

Dated: November 9, 1984.

Donald W. Lewis,

Director, Entry Procedures and Penalties
Division.

[FR Doc. 84-29935 Filed 11-14-84; 8:45 am]

BILLING CODE 4820-02-M

[T.D. 84-230]

Reimbursable Services—Excess Cost of Preclearance Operations

November 8, 1984.

Notice is hereby given that pursuant to section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning November 11, 1984.

Installation	Biweekly excess cost
Montreal, Canada.....	\$18,967
Toronto, Canada.....	21,308
Kindley Field, Bermuda.....	14,665
Nassau, Bahama Islands.....	23,523
Vancouver, Canada.....	15,274
Winnipeg, Canada.....	3,327
Freeport, Bahama Islands.....	14,272
Calgary, Canada.....	9,606
Edmonton, Canada.....	7,670

D. Lynn Gordon,

Acting Comptroller.

[FR Doc. 84-29936 Filed 11-14-84; 8:45 am]

BILLING CODE 4820-02-M

VETERANS ADMINISTRATION

Advisory Committee on Health- Related Effects of Herbicides; Meeting

The Veterans Administration gives

notice under the provisions of Pub. L. 92-463 that a meeting of the Advisory Committee on Health-Related Effects of Herbicides will be held in Room 119 of the Veterans Administration Central Office, 810 Vermont Avenue, NW, Washington, DC on December 11, 1984, at 8:30 a.m. The purpose of the meeting will be to assemble and analyze information concerning toxicological issues for which the Veterans Administration needs to formulate appropriate medical policy and procedures in the interest of veterans who may have encountered herbicidal chemicals used during the Vietnam Conflict.

The meeting will be open to the public up to the seating capacity of the room. Members of the public may direct questions, in writing only, to the Chairman, Barclay M. Shepard, M.D., and submit prepared statements for review by the Committee. Such members of the public may be asked to clarify submitted material prior to consideration by the Committee.

Transcripts of the proceedings and rosters of the Committee members may be obtained from Mr. Donald Rosenblum, Agent Orange Projects Office (10A7), Department of Medicine and Surgery, Veterans Administration Central Office, Washington, DC 20420. (Telephone: (202) 376-7528).

Dated: November 7, 1984.

By direction of the Administration.

Rosa Maria Fontanez,

Committee Management Officer.

[FR Doc. 84-29985 Filed 11-14-84; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register

Vol. 49, No. 222

Thursday, November 15, 1984

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

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: Commission Meeting, Thursday, November 15, 1984, 3:00 p.m.

LOCATION: Third Floor Hearing Room, 1111—18th Street, NW., Washington, DC.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED:

Regional Directors Meeting

The Commission and the Regional Directors will discuss various matters.

For a recorded message containing the latest agenda information, call: 301—492—5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, MD 20207 301—492—6800.

Sheldon D. Butts,
Deputy Secretary.

[FR Doc. 84-30016 Filed 11-9-84; 5:01 pm]

BILLING CODE 6355-01-M

2

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: Commission Meeting, Thursday, November 15, 1984, 9:30 a.m.

LOCATION: Room 456, Westwood Towers, 5401 Westbard Avenue, Bethesda, MD.

STATUS: Closed to the Public.

MATTERS TO BE CONSIDERED:

1. Compliance Status Report
The staff will brief the Commission on a Compliance Status Report.
2. Enforcement Matter OS #3896
The Commission will consider Enforcement Matter OS #3896.

3. Enforcement Matter OS #3109
The Commission will consider Enforcement Matter OS #3109.

For a recorded message containing the latest agenda information call: 301—492—5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, MD. 20207 301—492—6800.

Sheldon D. Butts,
Deputy Secretary.

[FR Doc. 84-30017 Filed 11-9-84; 5:01 pm]

BILLING CODE 6355-01-M

3

FEDERAL ELECTION COMMISSION

FEDERAL REGISTER No. 84-29656.

PREVIOUSLY ANNOUNCED DATE AND TIME:

Thursday, November 15, 1984, 10:00 a.m.

The following items have been added to the agenda:

1. Draft Advisory Opinion #1954-52, Marty Russo, Member of Congress
2. Petition for rulemaking filed by the National Council of Farmer Cooperatives—11 CFR 114.1(e)

The following item previously sunshined should be corrected to read:

Draft Advisory Opinion #1984-33, Thomas F. Kelley, III, on behalf of National Restaurant Association PAC

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Information Officer, Telephone: 202-523-4065

Marjorie W. Emmons,
Secretary of the Commission.

[FR Doc. 84-30146 Filed 11-13-84; 3:18 pm]

BILLING CODE 6715-01-M

4

RAILROAD RETIREMENT BOARD

Notice of Public Meeting.

Notice is hereby given the Railroad Retirement Board will hold a meeting on November, 21, 1984, 10:00 a.m., at the Board's meeting room on the 8th floor of its headquarters building, 844 North Rush Street, Chicago Illinois 60611. The agenda for this meeting follows:

- (1) Bureau of Unemployment and Sickness Insurance (BUSI) Action Plan
- (2) Proposed Disability Regulations (Part 220)
- (3) Amendment of §§ 260.9(c) and 320.39 of the Board's Regulations

(4) Proposed Regulation for Lump-Sum Payments

(5) Proposed Changes in the RUIA Regulations (U&SI Quality Assurance and Program Integrity—Proposal for 14-Day Registration)

(6) Emons Industries Appeal

(7) Relinquishment of Rights in Cases Where a Discharge is Claimed to Have Been Wrongful

The entire meeting will be open to the public. The person to contact for more information is Beatrice Ezerski, Secretary to the Board, COM No. 312-751-4920, FTS No. 387-4920.

Dated: November 9, 1984.

Beatrice Ezerski,
Secretary to the Board.

[FR Doc. 84-30121 Filed 11-13-84; 12:54 pm]

BILLING CODE 7905-01-M

5

SECURITIES AND EXCHANGE COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: (To be published).

STATUS: Closed meeting.

PLACE: 450 Fifth Street, NW., Washington, DC.

DATE PREVIOUSLY ANNOUNCED: Thursday, November 1, 1984.

CHANGE IN THE MEETING: Additional items.

The following items were considered at a closed meeting held on Tuesday, November 6, 1984, at 10:00 a.m.

Institution of injunctive action.
Settlement of injunctive actions.
Report of investigation.

Chairman Shad and Commissioners Treadway, Cox, Marinaccio and Peters determined that Commission business required the above changes and that no earlier notice thereof was possible.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: William Fowler at (202) 272-3077.

Shirley E. Hollis,
Acting Secretary.

November 8, 1984.

[FR Doc. 84-30126 Filed 11-13-84; 12:54 pm]

BILLING CODE 6010-01-M

Testis Great Testis

Thursday
November 15, 1984

Part II

Environmental Protection Agency

40 CFR Parts 124, 144, 146 and 147
Underground Injection Control Program:
Federally-Administered Programs; Final
Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 124, 144, 146 and 147**

[FRL-2687-2]

Underground Injection Control Program: Federally-Administered Programs**AGENCY:** The Environmental Protection Agency.**ACTION:** Final rule.

SUMMARY: The Safe Drinking Water Act (SDWA) establishes the Underground Injection Control (UIC) program, which is designed to prevent underground injection through wells that may endanger drinking water sources.

The SDWA provides for States to apply for and receive approval from EPA to administer their own UIC programs, if they meet EPA's minimum requirements. If a State has not submitted an application or if the State program has been either disapproved or no longer meets the requirements of the Act, the SDWA requires EPA to prescribe a Federally-administered UIC program for the State. SDWA Sections 1422, 1425. On May 11, 1984, 49 FR 20138, *et seq.*, EPA published a final rule establishing EPA-administered programs in 22 jurisdictions; on the same day, the Agency proposed regulations establishing EPA-administered UIC programs in 13 additional States (including most Indian lands in these States), 49 FR 20238. In addition, the Agency proposed four programs for Indian lands in other jurisdictions.

Since the proposal, the Agency has granted primary enforcement authority to the States of Oregon, Washington, Rhode Island, Vermont, South Carolina, North Dakota, and for oil and gas related injections in South Dakota. Accordingly, EPA is not promulgating the programs proposed for these States. In the programs promulgated today, EPA will implement a program covering all classes of wells for some States; in others where an approved State program covers some classes of wells, the Federal program will cover only the remaining classes. The program promulgated today covers all States for which there is neither an approved State-administered program nor a promulgated EPA-administered program (see Table 1).

DATE: These regulations shall be promulgated for purposes of judicial review at 1:00 p.m. eastern time on November 29, 1984. These regulations shall become effective on December 30, 1984. In order to assist the EPA to

correct typographical errors, comments of a non-substantive nature on the final regulations may be submitted until [December 17, 1984]. The effective date will not be delayed by consideration of such comments.

ADDRESS: Comments of a technical and non-substantive nature should be addressed to Judy A. Long, Comment Clerk, Ground Water Protection Branch, EPA, Office of Drinking Water (WH-550), 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: John B. Atcheson, Ground Water Protection Branch, EPA (202) 382-5530.

SUPPLEMENTARY INFORMATION:**Table 1—Jurisdictions for Which the Programs Are Promulgated**

(The promulgated program covers all classes of wells unless otherwise noted)

The UIC Program

Florida (Class II only)
Hawaii
Kansas (Indian lands only)
Minnesota (Indian lands only)
Mississippi (Class II only)
Ohio (Class I, III, IV and V only)
Puerto Rico
South Dakota (Classes I, III, IV and V wells, and Class II wells on Indian lands)
Virgin Islands
Wisconsin (Indian lands only)
Osage Mineral Reserve, Oklahoma (Class II only)

Since the May 11, 1984, proposal, the Agency has approved applications for primacy from several of the States for which EPA, at that time, was proposing UIC programs. These recently approved programs are: North Dakota (Classes I, III, IV and V) Oregon (all classes of wells), Rhode Island (all classes of wells), Vermont (all classes of wells) and Washington (all classes of wells).

These approvals eliminate the need to promulgate EPA-administered programs for these classes of well in these States. Accordingly, EPA is not including them in this rulemaking.

I. Background

These regulations are being promulgated under the authority of Part C of the Safe Drinking Water Act (SDWA) (42 U.S.C. 300f to 300j-9) and, to the extent that they deal with hazardous waste, the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901-6987.). The SDWA is designed to protect the quality of drinking water in the United States, and Part C of the SDWA specifically mandates regulation of underground injection of fluids through wells. A summary of the relevant sections of Part C was provided in earlier rulemakings (see 48 FR 40099,

September 2, 1983). A detailed discussion of the relevant statutory provisions and regulatory development appeared in the first proposal of Federally-administered programs.

To briefly summarize what was explained in that proposal, EPA has promulgated minimum requirements for State UIC programs, as directed by the SDWA, in 40 CFR Parts 124, 144, 145 and 146. The SDWA provides for States, territories, and possessions (referred to below as "States") to apply to EPA for primary enforcement authority to administer the UIC program in their States, and for EPA to approve such programs if they meet the minimum requirements (SDWA Section 1422) or, for Class II (oil-and-gas related) wells, if they meet certain more flexible minimum statutory requirements (SDWA Section 1425).

If a State fails to submit a program application, if its application is denied, or if an approved program is changed such that it no longer meets the requirements of the SDWA and the applicable minimum requirements, the SDWA requires EPA to promulgate an EPA-administered program for the State (Section 1422(c)). In cases where a State has an approved State-administered program for only some classes of wells, EPA must administer the program for the remaining classes. In addition, where a State with an approved State-administered program has chosen not to assert authority over Indian lands in the State, or has failed to make an adequate demonstration of such authority, EPA will promulgate an EPA-administered program for such Indian lands.

In July 1983, the National Wildlife Federation filed suit challenging EPA's failure to have promulgated State UIC programs for States without approved UIC programs. The agency and the plaintiffs agreed in a Consent Decree, which was court approved, to promulgate (i.e., have signed by the Administrator) these programs by October 29, 1984. *National Wildlife Federation v. Ruckelshaus*, C.A. No. 83-JM-1333 (D. Colo., Dec. 22, 1983). These rules (the second package of "Direct Implementation" rules for States without approved UIC programs), therefore, are promulgated in response to the Court's ordered deadline.

On May 11, 1984, 49 FR 20138 *et seq.*, EPA promulgated EPA-administered programs for 22 states. In today's rulemaking action EPA is promulgating programs for seven additional States, which consist of all States for which there is neither an approved State-administered program nor a promulgated EPA-administered program.

In some cases, the promulgated programs cover only some classes of wells, because an approved State-administered program covers one or more other classes. EPA is also promulgating three EPA-administered programs on Indian Lands that lie within States with approved State-administered programs and one other Indian Lands program within a State which has an EPA-administered UIC program.

II. Structure of Direct Implementation

A. Contents of the Federally-administered programs

For the reasons outlined in an earlier proposal (48 FR 40100, September 2, 1983) the Agency has adopted the following scheme for regulations pertaining to Federally-prescribed State programs:

(1) Requirements, necessary to supplement or clarify all the EPA-administered programs, were promulgated as amendments to Part 144 in 49 FR 20138 *et seq.* (May 11, 1984);

(2) A subpart for each State program is contained in Part 147. In the cases where EPA administers the program each subpart: (a) makes applicable in each program the UIC minimum requirements of 40 CFR Parts 124, 144 and 146; and (b) prescribes additional State-specific requirements.

For State-administered programs, each subpart of Part 147 describes the approved program and incorporates by reference the appropriate requirements from State statutes and regulations. Such requirements are made a part of the UIC program under the SDWA. State procedural requirements, which are incorporated by reference as part of the applicable underground injection control program (see also 49 FR 20197-20220, May 11, 1984) and which differ from EPA procedural requirements, are not binding upon EPA. For example, a State's procedural requirements for enforcement which go beyond the procedural minimum requirements under the SDWA for enforcement will not be imposed by EPA in Federal enforcement actions.

B. Jurisdictions Covered

1. States

EPA is promulgating programs for every State which is not currently subject to an approved UIC program or a promulgated EPA-administered program. Several of the States included in this rulemaking have submitted applications for primary enforcement responsibility which the Agency is in the process of evaluating. It is possible that some of these programs may be

approved, and therefore eventually administered by the States. Nevertheless, the Agency is promulgating programs in this rulemaking for all States.

The Agency is taking this action for two reasons. First, the SDWA mandates that EPA implement a program in States where no State-administered programs has been approved, and it specifies a deadline for this action. Second, the Agency was sued for failure to meet this deadline and has entered into a Consent Decree which dictates that EPA develop and implement programs in States which do not have programs by the Fall of 1984. To be assured of meeting the requirements of both the SDWA and the Consent Decree, EPA is promulgating programs for all States not covered by a program as of the date of this rulemaking. If a State-administered program is subsequently approved after promulgation, EPA will withdraw the corresponding EPA-administered program.

2. Indian Lands

Indian lands affected by this rulemaking are of two types: Indian lands within States that are administered by EPA, and Indian lands within States with approved State-administered programs.

Indian lands in EPA-administered States. Some of the States in which EPA is implementing Federally-administered UIC programs contain Indian lands within their boundaries. As stated in the proposal, EPA intends, unless stated otherwise in the rule that the program in a given State apply to Indian lands in that State as well as to non-Indian lands. EPA especially invited Indians on affected Indian lands to submit comments on the appropriateness of the proposed program for those lands. In addition, EPA made a special effort to contact all affected tribal and other Indian organizations to solicit their comments. There was no new comment provided on the specific proposals made for Indian lands within States having EPA-administered programs. The Department of Interior (DOI), however, did comment in general on the administration of UIC programs on Indian lands. Their concerns centered on how the Agency intended to administer the programs, relative to existing regulatory requirements that DOI has on such lands. The EPA is answering the DOI comment in a separate forum, as we believe that DOI and EPA should work together to coordinate the administration of our separate programs, while fulfilling our distinct statutory mandates. A letter summarizing our response is a part of

the Administrative record of this rulemaking.

The Agency is promulgating these programs as proposed, but will continue to work with the Indians and DOI as they are implemented.

Indian Lands within States with approved State-administered programs. In the September 2, 1983 proposal (48 FR 40100 *et seq.*) EPA presented four alternative approaches to promulgating UIC programs on Indian lands in States with approved State-administered programs: (1) Implement a program consisting of current UIC minimum requirements; (2) implement a program consisting of requirements patterned after State requirements from the approved program applicable in the rest of the State; (3) adopt a combination of the minimum UIC requirements regulations and the approved State program requirements; or (4) develop unique requirements in response to Indian concerns or other special circumstances. After reviewing comments, EPA published its intent to use any of the four proposed options appropriate to the individual case when implementing programs for Indian lands in primacy States (49 FR 20140, May 11, 1984, *et seq.*).

The great majority of commenters preferred Option 2 for Indian lands in the State in which they were located. Others wanted programs specifically adapted to tribal policies. In such cases, EPA will develop a program similar to the surrounding State's program or a program adapted to other tribal preferences. Because an EPA-administered program based on either approach necessitates a thorough analysis to assure that it is consistent with EPA's authorities under the SDWA, it was not possible to develop many of these Indian lands programs. Therefore, EPA will not be promulgating such programs at this time. The Agency intends to do so at the earliest possible time.

For Indian lands in three such States, however, EPA has been able to develop programs, and these are included in today's promulgation. These programs cover Class II wells on the Osage Mineral Reserve in Oklahoma and all classes of wells on all Indian lands in the States of Kansas and Wisconsin. The Osage program has been designed according to a combination of Options (3) and (4), and consists of requirements drawn from the UIC minimum requirements regulations, the Oklahoma Corporation Commission regulations, the Bureau of Indian Affairs regulations, and unique requirements developed in response to Indian concerns. The

Kansas Indian lands program follows Option (1) and thus consists of the EPA minimum requirements regulations. The Wisconsin program follows Option (4), and consists of more stringent requirements in response to Indian preferences. Each of these programs is discussed in more detail in Part IV of this preamble.

Definition of Indian lands. In developing programs for Indian lands, it is necessary to specify as precisely as possible the particular lands intended to be covered by each program. To be ensured of comprehensive coverage, EPA intends in most cases to use a generic definition to identify those lands to be covered by Indian lands programs. The definition EPA intends to employ is that of "Indian country," defined by Federal statute at 18 U.S.C. § 1151.

EPA believes this definition is most consistent with the concept of Indian lands as the Agency has used in regulations and UIC program approvals to date. The term accurately describes lands for which EPA will administer the UIC program in the absence of a specific demonstration of State authority based on a statute or treaty.

Therefore, EPA is adding this definition of "Indian lands" to § 144.3, which applies when that term is used in each Indian lands program in Part 147. The jurisdiction of each Indian lands program can be described simply by using the term Indian lands. This is done in each Indian lands program today with the exception of the program for the Osage Mineral Reserve, which is intended to apply only to that specifically identified reserve.

III. General Contents of EPA-administered Programs

Part 147, containing all specific State UIC programs, was established in EPA's first promulgation of EPA-administered programs, 49 FR 20197 (May 11, 1984). A separate subpart of Part 147 corresponds to each State. Today's action adds to Part 147 an EPA-administered program for each of the 7 States listed and for Indian lands in certain other States. For each of the State programs and one of the Indian lands programs, EPA is making directly applicable the minimum requirements in Parts 124, 144, and 146. In addition, where necessary, each program sets forth certain additional State-specific requirements. These include requirements which—due to geologic, historical or hydrologic conditions—differ from State to State and region to region. They also include regulations that state more specifically requirements that in the minimum standards are only general and afford a broad range of discretion to the Director.

For certain requirements the Agency is specifying numerical standards which are based on conditions present in a State or part of a State. To the extent that conditions vary from one State to another, these requirements will also vary. The SDWA provides for such variations in Section 1422(c) and 1421 (b)(3) which requires that Agency to consider the varying hydrologic, geologic, and historical conditions in a State and not to disrupt existing State programs unnecessarily. Indeed, it is for this reason that the Agency originally built flexibility into the UIC program. Thus, it is necessary to vary some of these more specific requirements from State to State.

For the most part it is such specific requirements, or mechanisms for establishing such standards, that EPA is applying in each EPA-administered program. Many of these standards pertain to wells authorized by rule, since the authorization by rule mechanism requires that specific requirements be imposed by regulations, rather than in permit conditions as can be done for wells authorized by permit. For programs in States with no existing wells, any new wells will be required to receive permits, and the state-specific requirements for wells authorized by rule are not necessary.

A discussion of permitting schedules, mechanical integrity testing schedules, and other administrative considerations can be found in the program description for each of the State programs promulgated today. Program descriptions are available at the appropriate Regional Office.

IV. Response to Comments: General Program Elements

A. Aquifer Exemptions

In the first proposal (48 FR 40107-08 September 2, 1983) the Agency described in detail the criteria for exempting aquifers and the administrative mechanisms to be used in granting various kinds of exemptions. In the May 11, 1984 proposal (49 FR 20241) the Agency also solicited requests from operators who believed they were injecting into a USDW which qualified for exemption. These State specific issues are discussed in the preamble to the individual State programs.

The Agency received two comments on aquifer exemptions. One commenter expressed strong support for the Agency's administrative approach to aquifer exemptions, particularly the discretion afforded to Directors in EPA-implemented programs. The other commenter requested that a specific

aquifer be exempted. That request is being evaluated and a determination will be made shortly.

B. Pressure Limitation

The current UIC minimum requirements obligate the Director to establish limits on injection pressure. For wells authorized by permit the Director may determine an appropriate pressure on a case-by-case basis. For wells authorized by rule, a general standard must be established.

In the proposal and in the promulgation of the Direct Implementation programs on May 11, 1984 (49 FR 20138 *et seq.*; 49 FR 20238 *et seq.*), the Agency outlined the approach it intended to use in specifying injection pressures for operators. In the case of Class I operators, Class II salt water disposal well operators, and Class III operators authorized by rule, the Agency proposed to set a conservative maximum statewide value. The owner/operator could inject at a pressure higher than the specified standard by applying for and receiving a permit and by demonstrating in the application that the higher pressure did not violate the existing performance standards in 40 CFR 146.13(a)(1); 146.23(a)(1); 146.33(a)(1), 144.28(f)(3) as applicable.

In the case of owners or operators of enhanced recovery or hydrocarbon storage wells, EPA proposed to require submission of formation-specific maximum injection pressure values on a field or project basis. The Agency would then establish appropriate limits for formations or units based on this and other data. The operator could receive authorization to inject at higher pressures merely by demonstrating to the satisfaction of the Director that such pressures would not fracture the confining zone. For more detailed discussion of the Agency's reasons for adopting this approach, see FR 20138 *et seq.* (May 11, 1984).

The Agency proposed (see § 147.2912(b) as proposed) a slightly different approach for Subpart GCG, the Osage reservation. The comments pertaining to this requirement and the Agency's response are discussed in detail in the preamble to the Osage program. The following discussion addresses comments on the proposed approaches for the remaining programs.

One commenter noted that injection pressures should be established on a case-by-case basis even where a general maximum value has been specified.

The Agency generally agrees, and would like to point out that operators of most classes of wells for which injection pressure limits are set will soon have to

be permitted. As noted in the preamble to the proposal, EPA will consider pressures higher than the general standard specified, when issuing permits. Thus, as these operators apply for and receive permits, injection pressure limits will be established on a permit-by-permit basis and should therefore reflect conditions present in a particular field or formation.

The Agency recognizes that applying the standards of 144.28(f)(3)(c) (A) and (B) to brine injection wells while they are authorized by rule is a conservative approach. This approach is merely an interim standard, and the Agency intends to apply the standards of § 144.28(f)(3)(ii) when setting pressure limits for brine disposal wells authorized by permit. The Agency believes it appropriate to be more conservative in specifying requirements for wells while they are authorized by rule since the statute and regulations are preventative. Thus, in order to fulfill this mandate EPA must assume the most protective values until data such as information submitted as part of a permit application, indicates otherwise.

The same commenter requested that EPA consider allowing Class I and III well operators to inject at pressures which might induce fracturing in the injection zone, so long as there are adequate safeguards against fracturing the confining zone, a standard the Agency applies to operators of Class II wells.

In response, the Agency would like to note several points. First, the existing rules already establish that operators of these classes of wells may inject at pressures which fracture the injection zone, but only during well stimulation. See, §§ 144.13(a), 144.33(a).

Second, the reasons for developing a different standard for Class II wells is clearly laid out in 49 FR 20152—20153, May 11, 1984. To summarize that discussion briefly, Class II wells inject fluids which usually are relatively less dangerous than those injected in Class I and III wells. In addition, the SDWA specifies that rules for Class II operations may not unnecessarily interfere with or impede the production of oil and gas, unless those requirements are necessary to assure that USDWs are not endangered. See, SDWA §§ 1421(b)(2); 1422(c), a restriction not present for rules applicable to Class I and III wells. The Agency believes that the nature of injected fluids and the language of the statute justify different treatment for Class II operators.

Finally, the standard which the commenter questioned (i.e., the prohibition against fracturing the injection zone) was established in the

June 24, 1980 promulgation of 40 CFR Part 146. See, 45 FR 42472. It is not a new requirement of this rulemaking and, while the Agency would be willing to consider any important technical data not available during the previous comment periods, EPA does not believe the comment raises new issues or includes new data that warrant a change in these longstanding rules at this time.

Another commenter suggested that particular sections specifying injection pressure limits for Class II wells be deleted from the regulations (e.g., §§ 147.504, 147.1254 and 147.2103). The same commenter, in supporting this request stated that he " * * does not agree that arbitrarily set pressure limitations should be established for enhanced recovery wells." He noted further that enhanced recovery operators have an economic incentive to retain fluids in the injection zone and that propagation of fractures in the injection zone is in some cases desirable. The commenter further maintained that the requirement would prevent operators from fracturing the injection zone.

EPA has considered the comments carefully and has elected to retain the requirements as stated for several reasons. First, EPA will not, as asserted by the commenter, set pressure limits arbitrarily. For enhanced recovery wells the Agency will specify pressure limits on a field—or formation—specific basis and will make such determinations only after carefully reviewing available data, much of which will be supplied by the owner or operator. This approach will result in limits, which, far from being arbitrary, are site-specific and based upon sound technical data. Moreover, in establishing these limits, the Agency will go through the same public notice and comment requirements as those specified for permits in Subpart A of 40 CFR Part 124, that is, §§ 124.10, 124.11, 124.12, 124.13, and 124.14. Therefore, if the Agency's preliminary pressure limit does appear inappropriate, the owner or operator will have an opportunity to challenge EPA's specific determination in comments or at the hearing.

The Agency explained in the May 11, 1984, preamble to the first set of federally-administered UIC programs (49 FR at 20153):

" * * even after EPA has established field-specific injection pressure limitations, the agency will consider allowing higher pressures case-by-case with the approval of the Regional Administrator. An owner or operator desiring such a variance, must request

and obtain the written approval of the Regional Administrator. If the owner or operator is dissatisfied with the Regional Administrator's response to his request to operate at higher pressure, he may then apply for a permit and challenge the permit if he fails to receive permit conditions that he believes are appropriate.

Again, these owner-or operator-specific variances will be subject to the public notice and comment provisions of Subpart A of Part 124, that is, §§ 124.10, 124.11, 124.12, 124.13 and 124.14. Finally, as discussed in the above excerpt from the May 11, 1984, preamble, if the owner or operator still is dissatisfied with the Regional Administrator's decision regarding his variance request, he may apply for a permit (under § 144.25(c)), and ultimately appeal the permit conditions, if he believes they are not appropriate, under § 124.19. (Of course, no "appeal" of a field-specific injection pressure limitation, or of an operator-specific injection pressure variance lies under 124.19, as these pressure limitations are not appealable "permits" under that section; an application for a permit, pursuant to § 144.25(c), and a final permit decision in response to that request, are prerequisites to a § 124.19 appeal.)

Second, the Agency does recognize that in certain cases enhanced recovery operators may operate at pressures which exceed the fracture pressure of the injection zone. The proposed rule contained provisions that would allow an owner or operator of an enhanced recovery well to inject at such higher pressures (see §§ 147.504(a)(1)(ii), 147.1254(a)(1)(ii) and 147.2103(a)(1)(ii)) and the final rules retain these provisions. Thus, contrary to the commenter's assertions, the rules would not automatically prevent an enhanced recovery operator from injecting at pressures which exceed the injection zone fracture pressure. The requirement that the owner/operator demonstrate that such higher injection pressures will not fracture the confining zone or cause fluid movement into a USDW is consistent with, indeed, mandated by, the SDWA.

Third, the Agency accepts the premise that, in many cases, owners or operators of enhanced recovery wells and hydrocarbon storage wells have a vested interest in not fracturing confining zones, thus decreasing the risk that such fractures will result. However, in some cases lost injected fluid, not significant in commercial terms, may give rise to USDW contamination that is significant. Consequently, while a permit is the appropriate vehicle for

identifying and authorizing *increased* injection pressures for most owners or operators, the Agency believes that for the reasons outlined enhanced recovery operations and hydrocarbon storage wells should be established by rule, with procedures to establish more tailored maximum pressures on a field or unit basis.

Finally, the UIC minimum requirement regulations have always contained provisions which limit injection pressures. In specifying a numerical standard for units and formations, the Agency will merely be applying these general minimum standards to specific situations. The only other way to meaningfully apply a limit on maximum injection pressures consonant with the SDWA's protective mandate would be through a permit. In order to minimize the burden on owners or operators of enhanced recovery operations, the Agency decided in its original promulgation to allow owners and operators of enhanced recovery wells to be authorized by rule rather than permit.

The Agency recognizes that the general standard to be used in setting appropriate field pressures (e.g. the fracture pressure of the injection zone) is a conservative one. It is for this reason that EPA proposed and is promulgating a simplified procedure for allowing owners or operators to inject at higher pressures. Moreover, the majority of comments from oil and gas operators made on the September 2, 1983, proposal indicated that, in most instances, operators of enhanced recovery operations often do not wish to fracture the injection zone.

The Agency believes that the promulgated approach is a balanced one that meets three important objectives. First and foremost, consistent with the statutory mandate of the SDWA, it maintains the protective standard of the existing UIC program and provides for the establishment of specific values as necessary to implement that standard. Second, it allows for full consideration of relevant physical and geologic conditions that may vary across a State. This approach, therefore, avoids any potential unnecessary rigidity that could be imposed by a more conservative and less specifically tailored standard. Third, the adopted approach accomplishes these objectives in the least burdensome manner possible, without requiring permits from enhanced recovery and hydrocarbon storage wells and without requiring the great majority of facilities to undergo a well-by-well examination.

Commenters expressed concern that the Agency, in listing what it deemed appropriate data for defining injection

pressures, intended that those examples listed in the proposal be the only data acceptable. The Agency, in the proposal, noted that the examples listed were among "... data in the category of reasonably establishing the injection zone fracture pressure." (49 FR 20240, May 11, 1984). The list was not intended to be all-inclusive and other appropriate data may serve to establish appropriate pressures.

C. Cementing and Casing Requirements

The Agency proposed casing and cementing requirements in Part 147 which the Regional Administrator could impose on operators of wells authorized by rule for life, when he determines the wells may not be in compliance with the existing minimum requirements in § 144.22(a)(8) (recodified at § 144.28(e)) and § 146.22. These sections essentially state a performance requirement that wells be cemented and cased to prevent the movement of fluids into or between strata.

Comments were received on this proposal, particularly regarding §§ 147.504 and 147.2103. Comments were also made on §§ 147.2104 and 147.1754, which proposed to apply these cementing requirements to all new wells. Finally, several commenters raised questions on the cementing requirements which the Agency proposed to apply to owners or operators of wells on the Osage Mineral Reserve. These latter comments are addressed in Subpart GGG, since the cementing requirements proposed for the Osage program were somewhat unique. This following section addresses the comments raised on the cementing and casing requirements specified in the other sections listed above.

One commenter strongly supported the Agency's proposed approach. The commenter noted existing rule-authorized wells would be allowed to continue to operate as constructed as long as they did not allow the movement of fluids into USDWs. The commenter went on to express support for the establishment of standards in the regulations which would be applied to owners or operators who did not comply with the performance standards in § 146.22 (See also § 144.28(e)).

Another commenter maintained that the economics of enhanced recovery and hydrocarbon storage dictate that owners or operators construct and maintain wells in a manner that assures that the injection zone is isolated. The commenter contended that because of this economic incentive the method of isolating injection zones could and should be left to the operator.

EPA does agree that the economics of enhanced recovery operations encourage operators to identify some leaks, and when they become sufficiently large, to fix them. However, such an incentive does not relieve the Agency from the need to assure proper construction of these wells in accordance with the requirements of the SDWA. Depending upon the characteristics of the reservoir and other specifics of the operation, there could be significant leaks that would not translate into significant economic losses. Moreover, improper cementing of the borehole through strata other than the injection zone could allow fluid to migrate from one formation to another, a situation that would have no effect on the enhanced recovery operation, but which could result in significant contamination of a USDW. Finally, the Agency does apply a performance standard to existing wells as the commenters urge. The more specific cementing requirements enumerated are applied only when the well may be causing fluid movement into or between USDWs. Even when this is the case, the Director may specify other requirements tailored to a specific well or wells. In view of the above, the Agency is retaining requirements as proposed. (See 49 FR 20153-20154, May 11, 1984, for a more detailed discussion of the Agency's reasons for adopting the above approach.)

Commenters objected to the level of specificity in §§ 147.1754 and 147.2104. These sections establish requirements for new wells and for existing wells which are being converted to injection wells. Commenters maintained that a single performance standard would be more appropriate. After consideration, the Agency is promulgating the requirements as proposed. The standards established in the sections are appropriate in most cases and are meant to apply to new injection wells. Thus, the burden to the operators for complying with the stated requirements would be minimal. The Agency does agree that, under some conditions, it may be desirable to establish other standards more suited to an individual well or set of wells. Again, the rules as proposed recognize this need and provide for it. The Regional Administrator may, under 147.2104, impose additional requirements or substitute alternative requirements when appropriate.

Accordingly, while the Agency does agree that these requirements are not universally applicable, we believe them to be generally appropriate and we have

provided for alternative requirements when necessary or desirable.

D. Plugging and Abandonment

One commenter suggested that requiring the operator to submit a plan within one year of a program's effective date specifying how the well was to be plugged was an unnecessary burden. The commenter went on to point out that Class II wells typically have lifetimes of 30 years and that plans submitted in advance of actual closure would not reflect state-of-the-art technology. Finally, the commenter suggested that EPA require a single plugging plan 45 to 60 days before abandonment.

In response, EPA notes that the amendment in § 144.28(c)(2)(i) is not a part of this rulemaking. That requirement was proposed on September 2, 1983, and promulgated on May 11, 1984, after extensive public comment. (For a detailed discussion of Agency's reasoning, see the preamble discussion for the May 11, 1984 rulemaking at 40 FR 20128 et. seq.) Nevertheless, the Agency will briefly address the concerns raised by the commenter. The Agency does not agree with the commenter for several reasons. First, as explained in the promulgation of this requirement, we do not agree that the requirement to submit the plan in § 144.28(c)(2)(i) represents a significantly increased burden on operators. The requirement that operators develop and maintain a plan which is acceptable to the Director for plugging and abandoning wells is an existing requirement of the UIC minimum requirements regulations. The only additional requirement proposed in § 144.28(c)(2)(i) was that the plan be submitted to the Regional Administrator. Even in cases where the owner or operator has hundreds of wells this is not a significant burden, since, to the extent that the wells are similar, are in the same field, and penetrate to the same formation they will be plugged in the same manner and an operator need only submit a single "key" plan covering such wells.

Second, the Agency does provide for updated plans to be submitted, thus providing for changes in plugging methods. In fact, the Agency requests such changes 45 days before actual plugging, just as the commenter suggests (see § 144.28(c)(2)(ii)).

Finally, the plugging plan specified in § 144.28(c) cannot be viewed in a vacuum. The requirement is meant to complement financial responsibility requirements in § 144.28(d). That section requires the operator to maintain

"financial resources * * * to close, plug, and abandon the underground injection operation in a manner prescribed by the Director." In order for the Director to make such a determination, he must have knowledge of how the operator contemplates plugging the well. Accordingly, the Agency believes that the minimal administrative burdens caused by this section are necessary and justified by the requirements of the Safe Drinking Water Act and previously promulgated regulations.

E. Area of Review

The Agency proposed, for several of the programs, to limit the options for establishing the area of review to the minimum fixed radius as described in § 146.6(b). In proposing this approach the EPA noted that the potentially large number of wells involved, together with the existence of many formulae, could slow implementation considerably.

One commenter agreed that reliable mathematical models might not be available for many areas, but suggested that the option to choose a model when one is available should be maintained since that would be the best method for determining "actual" area of review.

After considering the comment, EPA intends to promulgate the requirement as proposed. The area of review merely establishes the boundary of that area around a proposed injection facility within which the applicant for a permit must identify the location of wells which penetrate the injection zone, and (for certain Class II wells) the area within which he must identify any additional wells potentially affected by operating pressures. The Administrator will approve or disapprove each application based upon a review of information available for defining the proposed injection operation, the geology of the area, and other activities in the area.

The Agency noted when this requirement was initially proposed that the Director may solicit input from owners/operators on which methods might be appropriate, but the decision as to how to determine area of review has always rested with the Director. Accordingly, in selected jurisdictions the Agency is deciding to use only a fixed radius.

Comments Not Appropriate to This Rulemaking

Several commenters addressed issues which were not subjects of this rulemaking. For example, one such commenter suggested that any waste which is combustible be incinerated, rather than disposed of in injection wells. Another commenter suggested

that the Agency prohibit well injection, and that industry should bear the burden of pollution-free disposal. Additionally, one commenter noted that current land use inhibited recharge and contaminated surface and ground waters.

The Agency is mindful of its responsibility to protect the environment and we appreciate the concerns raised. The issues discussed are important; however, the Agency, in this rulemaking, is attempting only to develop sound, balanced regulations for directly implementing UIC programs in States without approved UIC programs. This is not the proper forum for a reassessment of already promulgated rules establishing the minimum requirements for State UIC programs. See 40 CFR Parts 144, 145 and 146. Neither is this the appropriate place to discuss more general topics concerning the Agency's missions and responsibilities.

Coordination With States

One commenter urged EPA to approve the State-administered programs in Florida and Mississippi, noting that the benefits of a single program administered by the State were significant, and that the burden to industry of complying with dual programs was significant.

In response, the Agency notes that it has always been our goal to have the States administer the UIC program. EPA has worked diligently for several years to encourage States to identify or obtain such authorities and requirements and apply for program approval. In the above States, negotiations are continuing on necessary changes to the State's application. However, the Agency is precluded by law and regulation from granting primary enforcement authority until a State has demonstrated authority and statutory and regulatory provisions which meet the Federal requirements. Progress is being made towards that end. However, the Act requires that either approved State programs or Federal programs be established, and further delay is unwarranted. Moreover, the Agency has entered into a Court-approved Consent Decree to promulgate these Federally-administered UIC programs. As soon as either of these States qualifies for primacy the Agency will act. In the interim, we hope to minimize the effect of dual programs by working with the States whenever possible to match the federal regulations, within the bounds imposed by the minimum requirements.

IV. State-Specific Subparts

Subpart K—Florida

Subpart K requires all owners and operators of Class II wells to comply with the UIC regulations at 40 CFR Parts 124, 144, and 146. In addition, this subpart contains regulations specific to Florida, where discretion is allowed, in order to make the Florida Class II UIC program appropriate and amenable to the combination of historic practices and geology unique to the State. EPA is also applying this program to Indian lands in the State.

Maximum Injection Pressure

As explained in Part IV.B. of this Preamble, EPA's approach to establishing pressure limits for existing operations is to set a conservative statewide value for Class II saltwater disposal wells, and to require submission of information that will enable the Agency to establish formation-specific values for Class II hydrocarbon storage and enhanced recovery wells. This is the approach being promulgated today for Florida.

Casing and Cementing

As explained in Part IV.C. of this preamble, EPA's approach for existing wells is to establish state-specific casing and cementing requirements that apply when the Regional Administrator determines that a well may not be in compliance with the standards in the minimum requirements that prohibits the movement of fluids. EPA is promulgating specific casing and cementing requirements for the Florida program according to this approach.

Area of Review

As discussed in Part IV.E. of this preamble, the Agency proposed to limit the options for establishing the area of review for Class II wells to the minimum fixed radius as described in § 146.6(b) for several programs. The Agency adopted this approach because of the potentially large number of wells involved, and the considerable delay in program implementation that could be caused by processing requests based on many formulae.

Subpart M—Hawaii

The State of Hawaii does not have an EPA-approved UIC program for any Class of wells within the State. EPA, therefore, must propose a program for all classes of wells. Because EPA was unaware of any existing Class I, II, III, or IV wells within the State, it did not promulgate any specific provisions for existing wells authorized by rule. Class V wells will be inventoried, but no

permitting or other regulatory action beyond the requirements of 40 CFR Parts 144 and 146 are proposed at this time. EPA has determined that the minimum program requirements set forth in 40 CFR Parts 124, 144, and 146 were appropriate for this jurisdiction and will require all owners/operators to comply with these UIC regulations.

Applicants who seek a Federal UIC permit in this jurisdiction should be aware that the State of Hawaii has developed regulations which may prohibit construction and operation of Class I, II, III, and IV injection wells. Such State rules are not prohibited by the SDWA, because section 1423(c) provides that "nothing in this [Act] shall diminish any authority of a State . . . to adopt or enforce any law or regulation respecting underground injection".

Subpart R—Kansas-Indian Lands

Subpart R contains the UIC program for Kansas, which, for non-Indian lands, is administered by the State. EPA is adding to Subpart R requirements comprising the UIC program for Indian lands in Kansas, to be administered by EPA. The Kansas Indian lands program consists of the UIC minimum requirements regulations at 40 CFR Parts 124, 144 and 146.

Because EPA is not aware of any Class I, II, III or IV wells on Indian lands in Kansas, it is not proposing any specific provisions for existing wells authorized by rule. Class V wells will be inventoried within one year of promulgation of the program, but no permitting or other regulatory action beyond those in 40 CFR 124, 144, and 146 is proposed at this time.

The Agency has taken this approach, rather than adopt a program tailored to the state-administered program in effect in the rest of the State, primarily because EPA is not aware of any Class I, III, or IV wells in existence in the State. The Agency also is unaware of any significant level of injection activity anticipated for the future. Thus, development of a Federally-administered Indian lands program tailored after the state-administered requirements is not necessary to relieve owners and operators of any burden which could result from different approaches being applied to similar operations in the same State. The application of the UIC minimum requirements regulations is, therefore, the most straightforward and simple means of putting into effect the requirements necessary to cover any injection activity that may become a possibility in the future. Discussions with appropriate tribal organizations and with the Bureau of Indian Affairs

indicated concurrence with the approach.

Subpart Y—Minnesota

Subpart Y contains the EPA-administered program for Minnesota. EPA is adding to Subpart Y provisions establishing a unique program for Indian lands within the State. The EPA-administered program in the rest of the State, promulgated May 11, 1984, contains provisions specifying requirements for receiving a Federal permit. State law and policy, however, prohibits most well injections, and as mentioned above, the Safe Drinking Water Act clearly provides that nothing in the SDWA "shall diminish any authority of a State . . . to adopt or enforce any law or regulation respecting underground injection". (see SDWA Section 1423(c)). In response to Indian wishes for a program at least as stringent as the State's, the Agency is banning injection into all classes of wells except Class V, and regulating Class V wells in accordance with the applicable provisions of 40 CFR Parts 124, 144, and 146. This action is being taken on the basis of comments received from representatives of the seven Chippewa Reservations in the State. These comments favored a ban on injection based on the geology and hydrology of the Reservations as well as on consistency with the State approach. Since these Reservations represent the majority of the tribal land in the State, their comments are viewed as being the preference of the majority of the Indians in the State.

Subpart Z—Mississippi

Subpart Z requires all owners or operators of Class II wells to comply with the UIC regulations at 40 CFR Parts 124, 144, and 146. In addition, this program contains regulations specific to Mississippi, where discretion is allowed, in order to make the Mississippi Class II UIC program appropriate and amenable to the combination of historic practices and geology unique to the State. EPA is applying this program to Indian lands in the State.

Maximum injection Pressure

As explained in Part IV.B. of this Preamble, EPA's approach to establishing pressure limits for existing operations is to set a conservative statewide value for Class II saltwater disposal wells and to require submission of information that will enable the Agency to establish formation-specific values for Class II hydrocarbon storage and enhanced recovery wells. This is

the approach promulgated today for Mississippi.

Casing and Cementing

As explained in Part IV.C. of this preamble, EPA's approach for existing wells is to establish state-specific casing and cementing requirements that apply when the Regional Administrator determines that a well may not be in compliance with the standards in the minimum requirements that prohibits the movement of fluids. EPA is implementing specific casing and cementing requirements for the Mississippi program according to this approach.

Area of Review

As discussed in Part IV.E of this preamble, the Agency is limiting the options for establishing the area of review for Class II wells to the minimum fixed radius as described in § 146.6(b). The Agency is adopting this approach due in part to the potentially large number of wells involved, and the considerable delay in program implementation caused by processing requests based on many formulae.

Subpart KK—Ohio

Subpart KK requires all owners/operators of Class I, III, IV, and V wells to comply with the UIC regulations at 40 CFR Parts 124, 144, and 146. In addition, this program contains regulations that supplement the UIC regulations, where discretion is allowed, in order to make the Ohio UIC program appropriate and amenable to the combination of historic practices and geology unique to Ohio. On September 22, 1983, EPA granted the State of Ohio primary enforcement authority to operate a UIC Class II well program. Ohio has not received primary enforcement authority for Class I, III, IV, and V wells. EPA will operate the program for injection wells other than Class II wells, until such time as Ohio is granted primary enforcement authority over the remaining classes of wells.

Maximum Injection Pressure

EPA is applying to all Federally-implemented programs the use of a simple formula that EPA will use in each State program to establish maximum injection pressures, measured at the wellhead, for wells authorized by rule. The regulatory approach adopted here is discussed in detail in Part IV.B. of this preamble. An appropriate fracture gradient for Ohio is 0.75, psi/ft, according to the Ohio Department of Natural Resources and Ohio Environmental Protection Agency. This number is also within the range suggested by Warner and Lehr and is,

therefore, being used in Ohio. EPA recognizes that this may be a conservative figure for some areas, but, as discussed above in this preamble and in the May 11, 1984 regulations (49 FR 20138 *et seq.*), operators may receive permission to operate at pressures greater than the pressure being proposed here by demonstrating that the injection does not cause the movement of fluids into or between USDWs. The Agency believes the figure is consistent with the SDWA, without being unduly restrictive to operators.

The State of Ohio has submitted an application for primary enforcement responsibility for Class I, III, IV and V wells. If this program is approved by EPA, the Federally-administered program will be rescinded.

Subpart QQ—South Dakota

Subpart QQ requires all owners or operators of Class I, III, IV and V wells to comply with the UIC regulations at 40 CFR Parts 124, 144, and 146. In addition, this subpart contains regulations that supplement the UIC regulations, where discretion is allowed, in order to make the South Dakota UIC program appropriate and amenable to the combination of historic practices and geology unique to South Dakota.

Since the May 11, 1984, proposal of an EPA-administered program for Class II wells in South Dakota, the State has submitted a final application for primary enforcement authority for a program to regulate the Class II wells. After careful review, EPA determined that the State's application was adequate and approved the State-administered program on October 10, 1984. This approval eliminates the need to promulgate an EPA-administered program for Class II wells except for those located in Indian Lands.

Maximum Injection Pressure

As explained in Part IV.B. of this preamble, EPA's approach to establishing pressure limits for existing operations is to set a conservative statewide value and to provide for injection at higher pressures under the circumstances discussed above in the preamble. This is the approach being promulgated today for South Dakota.

Casing and Cementing

As explained in Part IV.C. of this preamble, EPA's approach for existing wells is to establish state-specific casing and cementing requirements that apply when the Regional Administrator determines that a well may not be in compliance with the standards in the minimum requirements that prohibit the movement of fluids. EPA is applying

specific casing and cementing requirements for the South Dakota program according to this approach. In response to comments, the Agency is deleting requirements listed in § 147.2104, as explained in Part IV.C. of the preamble.

EPA-State Coordination

All Class I and Class III wells in South Dakota are required to apply for permits prior to initiation of construction. Such more stringent requirements are not prohibited by the SDWA, because § 1423(c) of the SDWA provides that nothing in the Act "shall diminish any authority of a State * * * to adopt or enforce any law or regulation respecting underground injection".

Subpart YY—Wisconsin

Subpart YY sets forth the UIC program for Wisconsin, which is administered by the State as approved by EPA. However, since Wisconsin did not assert jurisdiction over Indian lands in the State, EPA is promulgating a program applicable to those lands. EPA is therefore adding to subpart YY an EPA-administered Indian lands program.

This program consists of a prohibition of all underground injection. This approach is the one preferred by the majority of the tribal organizations in the State. The approach is taken because of the very high value the Indians place on ground water in their reservations. In addition, this approach is largely consistent with the approved state-administered program in effect in the rest of the State, which prohibits all injections other than certain Class V wells.

Subpart BBB—Puerto Rico

Subpart BBB requires all owners or operators in Puerto Rico to comply with the UIC regulations at 40 CFR Parts 124, 144, and 146.

Because EPA is not aware of any existing Class I, II, or III wells in Puerto Rico, it is not proposing any specific new provisions for existing wells authorized by rule. Class V wells will be inventoried but no permitting on other regulatory action beyond the existing federal UIC regulations is proposed at this time.

All new Classes I, II, and III wells in Puerto Rico are required to apply for permits prior to initiation of construction.

One commenter requested that EPA exempt the aquifer beneath the Union Carbide Caribe facility located in Penuclas, Puerto Rico. If Union Carbide formally requests an aquifer exemption,

EPA will review the application and take appropriate action.

Subpart CCC—Virgin Islands

Subpart CCC requires all owners or operators to comply with the UIC regulations at 40 CFR Parts 124, 144, and 146.

Because EPA is not aware of any existing Class I, II, III, or IV wells in the Virgin Islands, it is not specifying new provisions for existing wells authorized by rule. Class V wells will be inventoried but no permitting or other regulatory action beyond the current federal UIC regulations is being developed at this time.

All new Classes I, II, and III wells in the Virgin Islands are required to apply for permits prior to initiation of construction.

Subpart GGG—Osage Mineral Reserve

A. Background

The Osage Mineral Reserve in Oklahoma was established by an Act of Congress in 1906, which allows the Osage Indian Tribe, through the Bureau of Indian Affairs (BIA), to establish leasing policies and obtain royalties from oil and gas production. Because of the nature of this grant of authority, the State of Oklahoma does not regulate mineral extraction activities on the Reserve, and the Oklahoma UIC program for Class II wells (those related to the production of oil and gas) approved by EPA on December 2, 1981, does not apply to injection activities on the Reserve. Consequently, EPA is developing a Class II UIC program for the Osage Mineral Reserve. This subpart establishes such a program. A program to regulate Class I, III, IV, and V wells will be developed and promulgated separately.

B. Criteria for Establishing the Osage UIC Program

EPA's national UIC program requirements at 40 CFR 144.2 clarify the authority of the Agency with respect to prescribing UIC programs for Class II wells on Indian lands. Section 144.2 provides that the Administrator may depart from the Agency's general UIC regulations as long as he considers tribal interest and preferences, consistency with the program of the State in which the Indian lands are located, and other factors as are necessary and appropriate to carry out the statutory requirements of the SDWA. With respect to Indian lands programs generally, EPA proposed on September 2, 1983, (48 FR 40098) four options for the contents of Indian lands programs to be implemented by EPA.

These include: (1) A program consisting of current UIC minimum requirements; (2) a program consisting of the requirements of the State-administered program for the State in which Indian lands are located; (3) a program consisting of a combination of Federal and State requirements; and (4) a program different in some respects from both the Federal UIC program and the approved State program containing requirements that respond to concerns and wishes of the affected tribal government.

In consideration of the large number of wells in the Osage Mineral Reserve, and the fact that the Reserve already has a considerable history of regulation of Class II wells, EPA has decided that the most appropriate approach is to tailor a program specifically to the Reserve, combining the approaches of several of the proposed options. The program being promulgated today has been developed by drawing from existing BIA requirements, requirements from the approved Oklahoma UIC program in effect in the rest of the State, the EPA UIC minimum requirements, and the expressed preferences of the Osage Tribe. Following is a brief explanation of how three major sources (the existing BIA program regulating oil and gas production, the Oklahoma Corporation Commission Class II UIC program, and the EPA UIC minimum requirements at Parts 124, 144, and 146) were used in developing the Osage County requirements.

Bureau of Indian Affairs

The BIA is currently regulating all oil and gas production in Osage County and is responsible for the prevention of pollution by oil and gas producers under the authority of 25 CFR Part 226. As a part of this responsibility, BIA requires injection well operators to gain Osage Agency, BIA, approval before drilling, converting, or plugging an injection well. The Osage UIC program incorporates many requirements of the current BIA program but will expand upon these requirements. BIA and EPA will work together based upon the regulations administered by each Agency. A single permit, containing existing BIA conditions and the conditions applied by EPA as part of this rulemaking, will satisfy the requirements of both Agencies. Some of the specific aspects of the BIA program which EPA is adopting include the following: bonds required by 25 CFR Part 226; BIA forms; setting plugs in abandoned wells to protect currently used aquifers as well as at the base of the lowest USDW; and testing newly converted injection wells to at least 200 psi to insure that the

casing, tubing and packer operate correctly.

Oklahoma Corporation Commission

The Oklahoma Corporation Commission received primacy for the Class II injection well program for non-Indian lands in Oklahoma on December 2, 1981. Since Osage County is located in Oklahoma and many well operators have facilities both in Osage County and in the rest of the State, the proposed program included several requirements similar to the State requirements. Some of the proposed provisions similar to Oklahoma's included: plugging requirements, the one-fourth inch female fitting to the tubing/casing annulus, and corrective action requirements. Based on comments received during the public comment period, however, changes were made to these program areas; therefore, the second and third requirements now differ somewhat from the State's.

EPA's UIC Minimum Requirements (Parts 124, 144, and 146). This program contains several provisions similar or identical to the EPA regulations, although in some cases they were modified to be more flexible. Some of the sections used are: area permits, emergency permits, permit modifications and terminations, and the appeals procedure.

The approach described above was considered superior to the several other options considered. Adoption of a program identical to the State program approved in Oklahoma would have ensured consistency of the Osage program with the adjoining jurisdiction, but would disrupt the existing regulatory program of the BIA and ignore the preferences of the Osage Tribe for matching certain of the standards and procedures of that BIA program. Another option was to adopt a program consisting of the precise minimum requirements of the national UIC regulations. This option was rejected as being inconsistent with both the BIA and the Oklahoma State programs, ignoring the advantages of coordination and cooperation between programs, the desirability of relative uniformity across jurisdictional lines, and the preferences of the Osage Tribe. At the same time, under the adopted approach, the substantive standards of the EPA minimum requirements have been retained with only few and limited exceptions.

These rules are presented in four parts. Sections 147.2901 to 147.2908 contain general provisions applying to all Class II injection wells in Osage County. These provisions include explanations of the area of review

concept, the plugging and abandonment requirements, and instructions for obtaining an emergency permit. Sections 147.2909 to 147.2915 contain the rules for authorization of existing Class II injection wells (defined as those wells the construction of which was approved by the Bureau of Indian Affairs (BIA), pursuant to 25 CFR 183, prior to the effective date of this UIC program). Since these wells will be authorized by rule for the life of the well, the operators will not automatically have to apply for an EPA permit (a well authorized by rule may be called in for a permit by the Regional Administrator, under certain circumstances, pursuant to § 147.2915). However, these rules do contain construction, operation, monitoring and reporting requirements with which the operators must comply. Sections 147.2916 to 147.2928 contain the instructions for submitting a permit application, as well as construction, operation, monitoring, and reporting requirements for injection wells to be drilled or converted after the effective date of the program. Also included are requirements for corrective action, area permits, and permit transfers, modifications, and terminations. Standard permit conditions are outlined in these sections, as well as procedures for the appeal of permit decisions. Section 147.2929 contains the administrative permitting procedures such as preparing draft permits, giving public notice of important actions and responding to comments.

C. Organization and Content

The Osage UIC program promulgated today is codified as Subpart GGG of Part 147 of 40 CFR. EPA established Part 147 to contain all Federally-administered UIC programs as well as notices of approval for State-administered programs. To help inform the public of all requirements applicable in each State, EPA adds to Subpart LL, which describes the approved programs administered by Oklahoma, a reference explaining that the requirements for the Indian lands program for the Osage Mineral Reserve in the State are set forth at Subpart GGG.

The four groups of standards just described are the same basic program elements contained in the Federal UIC minimum requirements: general program requirements, program requirements and technical standards for wells authorized by rule, program requirements and technical standards for wells authorized by permit, and procedural requirements (including public participation) for the permitting process. Although the format or means of administration of these standards varies from the minimum

requirements, the substantive standards themselves are equivalent to the minimum requirements with only few and limited exceptions.

Some variations result from attempts to maintain consistency with the program of the Oklahoma Corporation Commission applicable in the rest of the State. Although that program has been approved by EPA, it does not in every case meet precisely the UIC minimum requirements regulations, because strict equivalence is not required of State Class II programs under Section 1425 of the SDWA. Other variations result from conforming the Osage program to the existing BIA program, or to tribal preferences. As mentioned above, § 144.2 of EPA's regulations provides the flexibility to promulgate programs on Indian lands that contain such variations. The major differences, and rationale for the differences, are outlined below.

§ 147.2902 Definitions (Minimum Requirements § 144.3)

One commenter questioned EPA's inclusion of "pulling of tubular goods" in the definition of a "well workover" noting that it was not included in BIA's requirement. Under BIA requirements, a permit is required for well workovers and the commenter apparently believed that EPA's inclusion pulling the tubular goods would require operators to get a BIA permit. However, BIA's definition of a workover does not include the pulling of tubular goods, and BIA permit requirements for workovers will continue to apply to only those activities that are described under the BIA definition. The Agency's action today will not change existing BIA requirements as to whether the Agency should concern itself with activities such as pulling of the tubular goods. The EPA under the SDWA has a different mandate than the BIA and, therefore, concerns itself with activities which the BIA does not. We believe it a legitimate activity, consistent with the goals of the Act and the minimum standards regulations, that EPA have knowledge of occasions when the tubular goods are pulled. On such occasions, EPA may desire to observe the condition of the pipe, or schedule tests in a manner less burdensome to the operator. We, therefore, left our proposed definition unchanged since it does not affect existing BIA permitting requirements.

In the proposal, Class II well definitions ("Class II wells, Existing Class II wells and New Class II wells") were incorrectly identified as Class III well definitions. Corrections to each definition to properly identify it as pertaining to Class II, have been made.

Prohibition of Unauthorized Injection (Minimum Requirements § 144.11); Osage § 147.2903

One commenter suggested that EPA add a provision to the Osage regulation similar to the Oklahoma Corporation Commission's (OCC's) provisions Rule 3-311 and 3-312. OCC's provision states that reserve pit fluids may be injected provided that OCC grants approval. OCC also has in place a provision for temporary emergency authorization of such injections.

Section 147.2903 requires that any underground injection must be authorized by permit or rule. In addition, § 147.2906 provides for the issuance of emergency permits. Therefore, we believe that the program requirements specified, if not identical to the OCC provisions, are at least substantially similar. The Agency can grant emergency authorizations when appropriate with minimal administrative procedures.

One commenter expressed concern that the proposed emergency authorization (§ 147.2906(a)(2)) was not adequate to protect correlative rights apparently because the standard in that section refers to loss of oil or gas, regardless of who the operator might be. In response, EPA would like to point out that a third provision at § 147.2906(a)(3) cites delay in production as justification for an emergency permit. For either of the above requirements, EPA intends that the owner or operator make the demonstration. Accordingly, it is obvious that the Agency is concerned about loss or delay of oil and gas production to an operator, and these correlative rights would be protected.

Area of Review (Minimum Requirements § 146.06); Osage § 147.2904

For the Osage program, EPA defines the area of review as "a fixed radius of one-fourth mile from the well, field or project." However, the zone of endangering influence is an area around the well or project calculated by EPA, that may be greater, equal to or less than one-fourth mile. One commenter suggested that EPA define the zone of endangering influence as less than or equivalent to the area of review.

After carefully considering the comment, EPA is promulgating the one-quarter mile fixed radius as proposed and as promulgated previously in § 146.6. The area of review merely establishes the boundary of that area around a proposed injection facility within which the applicant for a permit must identify the location of wells which

penetrate the injection zone and for certain Class II wells, operating at high pressures, identifying any additional wells affected by the operating pressure. The Regional Administrator will approve or disapprove each permit application based upon a review of information available for defining the proposed injection operation, the geology of the area, and other activities in the area. Permits will be granted only when it is demonstrated that underground sources of drinking water will not be endangered. We have decided to retain the zone of endangering influence concept as proposed in 147.2904, because we believe that it is consistent with the Agency's mandate to protect USDWs.

Plugging and Abandonment Plan (Minimum Requirements):
 §§ 144.21(c)(5), 144.22(a)(5), and 144.52(a)(6)); Osage § 147.2905

EPA minimum requirements require owners or operators to prepare and maintain a plugging and abandonment plan within the first year of the UIC program. The Osage regulations require such a plan to be developed at least five days before plugging, which must occur within one year of the termination of injection. This approach maintains the advantage of consistency with the adjoining jurisdiction, since the approved Oklahoma program does not require such plans to be prepared prior to actual plugging. In addition, the Agency believes that this difference is justified on the basis of the unique characteristics of the Osage program.

For several reasons, the details of plugging and abandoning wells on the Osage Reserve are likely to be uniform and, therefore, plans will be easier to process than for most other programs. First, the Osage program covers only Class II wells and the construction details of the wells are generally similar. Second, there are a limited number of producing formations within the Osage Reserve, the disposal operations are confined to a few discrete strata. The geology of these strata and overlying strata is well established. Since plugging and abandonment procedures are largely a function of the well construction and the geological and geohydrologic characteristics of the site, the task of developing and evaluating the plans should be relatively simple. Thus, equivalent protection for USDWs is provided in the Osage program without requiring early preparation of plugging and abandonment plans.

Notice of Plugging and Abandonment (Minimum Requirements): §§ 144.21(c)(4), 144.22(a)(4), 144.51(n), and § 144.28(j) and (c)(2)(iii) and 144.52(a)(6)); Osage § 147.2905

EPA's minimum requirement regulations currently require notice of plugging and abandonment but leave the minimum advance notice time to the discretion of the Director. For EPA-administered programs in general, EPA has established this time period at 45 days before plugging and abandonment, with the possibility of a shorter time if approved by the Regional Administrator. (See § 144.28(j)(2), 49 FR 20185, May 11, 1984). EPA is establishing this time period at five days before plugging and abandonment for Osage County.

The primary purpose of the 45 day notice was to allow EPA to review plans and make arrangements to observe the plugging operation if the Agency wished to do so. The same factors described above that demonstrate the lack of a need to require advance preparation of plugging and abandonment plans support the reasonableness of a short notice period. In view of these factors, i.e., that Osage county is relatively small, and the EPA is operating a field office in the county, the review of plans and observation of plugging can still be arranged within the five day time period.

One commenter objected to this five day notice requirement, noting that a minimum 24 hours prior notice was already required by the Osage Agency. The commenter suggested that EPA's requirement was redundant and should be reduced to 24 hours prior notice of plugging so that a single notice could be given. The EPA agrees that a single notice would be more practical and notes that the Osage Agency's 24 hour requirement is a minimum prior notice. Thus, the operator could notify the Osage Agency and EPA at the same time and still comply with both Agency requirements.

EPA's minimum requirements regulations require that wells be plugged when they are abandoned (§ 146.10), but provide that temporary and intermittent cessation shall not be considered abandonment (§§ 144.21(c)(5), 144.22(a)(5), and 144.52(a)(6)). For EPA-administered programs generally, EPA has provided that any cessation of injection that extends longer than two years will not be considered "temporary and intermittent," and that, therefore, the well must be plugged unless the owner or operator notifies the Regional Administrator and demonstrates maintenance procedures that will ensure

no endangerment of USDWs during the period of abandonment (see § 144.28(c)(2)(ii), 49 FR 20183, May 11, 1984.) In the proposed Osage regulations, EPA specified a six-month plugging and abandonment period in Osage County. Most commenters expressed strong objection to this requirement. One landowner expressed agreement with the six-month period. Most commenters, however, felt that six months is not an adequate time period. They indicated that economic fluctuations within the industry often dictate that wells be temporarily abandoned and brought back into service when conditions warrant it. They, therefore, felt that six months would not be adequate time for a realistic assessment. Finally, one commenter objected to the specific requirements applied to wells which were temporarily abandoned (See § 147.2905(a)). As was stated in the proposal, one of the main reasons for the six-month requirement was to achieve consistency with OCC requirements that apply elsewhere in Oklahoma.

After considering comments opposed to and in support of the proposed six-month plugging and abandonment requirement, EPA has decided to modify § 147.2905 to require that a well be properly plugged within one year of ceasing the injection unless the owner or operator demonstrates that the well will be reactivated. This modification will reflect more accurately the conditions which dictate a well's future usefulness and at the same time, EPA maintains control over timely plugging and abandonment. During the lapsed period between when these regulations were being drafted and when they were proposed in the *Federal Register* OCC modified its plugging and abandonment requirement to one year. Therefore, EPA's one-year provision in Osage County is consistent with the State's, and is responsive to both public comments and to tribal preferences.

EPA still intends, however, to retain the requirements of § 144.2905(a) which require operators to perform mechanical integrity tests annually. The commenter who raised this issue proposed monitoring of fluid levels in lieu of the MIT tests. EPA would like to point out that the Agency has the authority to approve alternative tests and that under certain circumstances the commenter's proposal could serve as a basis for proving mechanical integrity.

Authorization of Underground Injection by Rule (Minimum Requirements: § 144.21 Osage: §§ 147.2909 to 147.2915)

Under 40 CFR §§ 144.21, and 144.31, owners or operators of existing salt water disposal wells are required to obtain a permit. For the Osage Class II program, existing salt water disposal wells which do not endanger USDWs are authorized by rule for the life of the well unless specifically identified by EPA as needing a permit. It is the preference of the Osage Tribe that owners or operators of existing wells not be routinely subjected to the permit application process, since they have already provided much of this information to the BIA. Furthermore, under Oklahoma's approved Class II program, owners or operators of existing wells are not routinely required to obtain a new permit. Therefore, the Osage provision is consistent with tribal preferences and with the program in effect in the adjoining jurisdiction.

Wells authorized by rule will receive the same technical scrutiny as those being permitted. Wells authorized by rule must meet the same operating, monitoring, mechanical integrity testing, and reporting requirements as wells under permit. EPA will perform an in-depth review of well construction and operation at the time of mechanical integrity testing. This alternative approach will reduce EPA's administrative paperwork burden of issuing permits for existing wells and will allow EPA to accelerate the mechanical integrity testing schedule for salt water disposal wells. The reduced administrative workload will also allow EPA to witness more of these mechanical integrity tests, with the goal of witnessing all mechanical integrity tests in Osage County.

Construction Requirements (Minimum Requirement § 146.22; Osage: 147.2911 and 147.2919)

One operator commented that EPA's proposal to require that wells be equipped with a one-fourth-inch female fitting would impose an additional economic burden on operators. The commenter further stated that an operator usually has a standard fitting within his operation. After considering these comments, we have changed this requirement. Rather than specifying a one-fourth-inch female fitting, the regulation now requires that the operator provide a standard female fitting.

§ 147.2912(a) and 147.2920 Operating Requirements (Minimum Requirements: § 146.8; Osage: §§ 147.2912(a) and 147.292(b)).

Mechanical Integrity Tests

The Agency proposed to allow operators to demonstrate there is no significant leak in the casing, tubing or packer by:

1. A pressure test of the casing/tubing annulus to the maximum injection pressure, but not less than 200 psi; or,
2. Monitoring the pressure in the casing/tubing annulus, following an initial pressure test.

The Agency received more comments on the proposed pressure testing of the casing/tubing annulus than any other provision in the proposed Osage regulations. Most commenters believed that the proposed pressure test was overly restrictive. Some believed that the test itself would cause a casing, tubing, or packer leak. Others stated that many old wells could not pass any pressure test and still other commenters pointed out that in some of their wells, oil is produced through the casing/tubing annulus (dual completions). Most commenters suggested alternative mechanical integrity testing procedures. These included:

1. Monitoring fluid level in annulus to insure that it is constantly lower than the base of any USDW,
2. Using radioactive tracer survey to assure that fluid is going into authorized injection zone,
3. Limiting maximum test pressure,
4. Decreasing minimum test pressure to 100 psig,
5. Using "Mule Tail" test to identify where injection fluid is going, and
6. Waiving the pressure test requirement for wells injecting in a vacuum.

There were several comments on modifying the optional annulus monitoring. Some urged EPA to consider the well to have integrity if there were no pressure on the annulus; another suggested that the annulus be left open and the well would be considered to have mechanical integrity as long as fluid was not observed at the surface; and others suggested the fluid level in the annulus be monitored and as long as the fluid level remained below the base of USDW, the well did not need mechanical integrity testing.

One commenter wanted the option to monitor the injection pressure/flow rate relationship.

Both the EPA general technical requirements for UIC programs (40 CFR Part 146) and the Osage regulations (40 CFR Part 147, Subpart GGG) require as a fundamental minimum that each well

have mechanical integrity. The regulations state that all wells must demonstrate that there is no significant leak in the casing, tubing, and packer. Because of this fundamental regulatory requirement and because of the Agency's statutory mandate to protect USDW's, EPA decided to consider no options which would allow wells to operate if there are significant leaks in the casing. For the same reasons, EPA decided not to allow waivers of mechanical integrity testing.

After a thorough review of the comments and other technical data, however, EPA will consider the alternative proposed by the commenters, including:

1. Elimination of the requirement that pressures higher than 200 psi must be applied to the casing/tubing annulus—this should eliminate concern for the destructive nature of the higher pressures and still demonstrate the absence of significant leaks;
2. Elimination of the requirement of an initial pressure test when monitoring the casing/tubing annulus monthly—by requiring the annulus to be filled with a liquid and a positive gauge pressure maintained on the casing/tubing annulus, it can be effectively demonstrated that there are no significant leaks;
3. Addition of (for enhanced recovery wells only) records of monitoring showing the absence of significant changes in the relationship between injection pressure and injection flow rate at the wellhead, following an initial pressure test—this is an option provided for in 40 CFR Part 146.08; and
4. Addition of radioactive tracer surveys for detecting leaks—this can be an effective tool in detecting leaks in the tubing and packer, and it can also be used to detect casing leaks if the tubing is pulled.

It is recognized that none of the above tests may provide a suitable test for demonstrating the absence of significant leaks in those wells producing oil through the casing/tubing annulus. The regulation still provides for alternate tests when approved by the Administrator/Regional Administrator on a case-by-case basis. EPA, in consultation with affected operators and other regulatory agencies (States of Oklahoma and Kansas and the BIA), will consider the above alternatives and develop a suitable alternative method which will meet the requirements of the MIT before the dual completion wells are required to demonstrate mechanical integrity.

§ 147.2912(b) *Maximum Injection Pressure (Minimum Requirements: § 146.13(a); Osage: 147.2912(b)).*

For wells authorized by rule, the Agency proposed to adopt a simple formula that would prescribe injection pressure measured at the wellhead. The formula uses a value of 0.75 psi/ft for the fracture gradient.

The agency received a substantial number of comments on this issue. In general, nearly all commenters believed the general maximum values proposed by the Agency were too low. One noted the formula did not consider friction loss due to small diameter tubing or down-hole devices. Another was concerned that the pressure limits would prevent fracturing during well stimulation.

The Agency agrees with many of these comments. In particular EPA agrees that factors which determine appropriate injection pressures are specific to the particular injection formation, rather than being uniform across the county. It is also recognized that the fracture gradient of 0.75 psi used in the formula is a conservative figure. This approach for Class II salt water disposal wells remains a valid alternative in that those operating at relatively high pressures who wish to continue at those pressures will be required to submit a permit application, with factual fracture gradient data, within the first year. Operators have one year from the effective date of this regulation to comply with the calculated pressure limits, thus allowing operators time to obtain a permit or to make adjustments in their injection pressures. An exception to the calculated limits has been provided for well stimulation. EPA has decided to promulgate a revised approach for specifying limits on injection pressure for enhanced recovery wells. The approach is:

1. Eliminate the proposed county-wide psi/ft fracture gradient value;
2. Require Class II enhanced recovery injection well operators to provide definitive field or formation-specific fracture-pressure data within one year of the effective date of this program; and
3. Develop and specify a field or formation-specific pressure gradient based on these and other related data (See part IV.B. of this preamble for a description of the procedure to be used by the Regional Administrator to establish this field or formation-specific gradient under 147.2912(b)(2)(ii)).

§§ 147.2913 and 147.2922 *Monitoring and Reporting (Minimum Requirements: § 146.23(b) and 144.26; Osage: § 147.2913 and 147.2922).*

The minimum requirements require monitoring of the injection pressure and flow rate at least weekly for produced fluid disposal operations and at least monthly for enhanced recovery operations. EPA is adopting the monthly frequency for enhanced recovery operations; however, the frequency for produced fluid operations is being set at monthly as well. EPA believes that the difference between weekly and monthly monitoring is justified by the advantage of consistency with the approved Oklahoma requirements and the preferences of the Osage Tribe and the BIA.

One commenter objected to EPA's proposal approach to monitoring the "nature" of injected fluid. Essentially, EPA specified that an initial analysis be performed, and that subsequent analyses be done only when changes are made in the source or nature of fluid injected (See § 147.2913(d)). The commenter noted that the nature of produced water changes with time, and apparently believed that such changes would have to be reported.

EPA would like to note that it was for this reason that the word "change" was introduced into the requirement. As long as there are no substantive changes or additions to the nature of the produced fluids, the gradual change of concentrations that may occur in brines from a single given formation (source) need not be reported as a change in the nature of injected fluid.

The UIC minimum regulations at § 144.26 require that specific information be submitted to the Director. The Osage program in § 147.2913(a) requires inventory information to be submitted only upon request, because comprehensive well information is already on file with the BIA and the Osage UIC office. Submittal of information already available to EPA would be an unnecessary administrative burden upon the operator.

Application for a Permit (Minimum Requirements: § 144.31; Osage: 147.2918)

EPA has decided that some of the information ordinarily required to be submitted as part of a permit application need not be required for applications under the Osage program. This information includes the following items in § 144.31: paragraph (e)(1) (the activities conducted by the applicant that require him to obtain a permit); paragraph (e)(3) (SIC codes reflecting the products or services of the facility);

paragraph (e)(6) (lists of permits or approvals under other regulatory programs); paragraph (e)(7) (map of one mile radius around the facility; and paragraph (e)(8) (brief description of the nature of the business).

Most of these information items are unnecessary because they generally are known and uniform among all facilities regulated by the program, given that the program regulates only a single and well-defined class of wells and is contained within a relatively limited geographic area. With respect to notice of other permits received, the coordination that has already been incorporated into this program between EPA and BIA, the only other permitting authority for injection wells in this area, renders such notice unnecessary.

With respect to the mile radius map, the Osage program does require a map showing the area of review (established in § 147.2905 of the program as one-fourth mile), which will show the main elements of the facility and surrounding area that are of concern. This requirement is consistent with the approved Oklahoma program and the BIA program.

Two comments were received suggesting that both the area of review and the public notice area be one-fourth mile as opposed to one-half mile. Under the BIA program the notice requirement is limited to adjacent operators. Since that provision would ignore off-set lease operators, we are promulgating the half-mile public notice area. This is similar to OCC notice requirements and the Agency believes that the half mile area will more likely include all affected operators than the one-quarter mile.

The proposed regulations included requirements that plans for corrective action on wells within the area of review and the results of mechanical integrity testing, be submitted with the permit application. Commenters questioned the sequence of those requirements in the permitting process. They pointed out that since corrective actions will be prescribed by EPA and Mechanical Integrity tests will be witnessed by EPA, it is unreasonable to impose these requirements prior to EPA's review of the permit. After reevaluating our requirements based on these comments, we have decided to remove both corrective action plans and mechanical integrity testing from the list of permit application information at 147.2918b (9) and (11). These requirements must still be met prior to operation in accordance with § 147.2920(b) and § 147.2923. In making these adjustments, EPA is merely rescheduling the submission of

information required for permitting and well operation.

Monitoring and Reporting Requirements (Minimum Requirements: § 144.38; Osage: § 147.2922(e)).

An addition (item "e") has been made to this section to include transfer of ownership. This inclusion makes this section consistent with the requirement stated in § 147.2926(a)(1).

Signatories to Permit Applications and Reports (Minimum Requirements: § 144.32; Osage: § 147.2925(j)).

For owners or operators that are not individuals, the minimum requirements specify who may sign permit applications and reports according to their position in the corporation, partnership or municipality. The Osage program requires only that the "owner or operator" sign such documents, a standard somewhat less specific than the minimum standards. The Agency is adopting this approach since it is the standard now employed by the BIA. Since the Agency will be using the BIA permit form with some additions, accepting BIA's signatory requirements will enable EPA to implement the program without unduly disrupting the existing program, while still assuring protection of USDWs.

§§ 147.2926, 147.2929(a), 147.2929(d)(2)(i)) Shortening of Certain Notice Periods (Minimum Requirements: §§ 124.10, 144.31(d), and 144.38)

In several instances, the Osage program proposes to use time periods for public notice or notification of the Regional Administrator by the owner/operator which are less than those specified in the minimum requirements regulations. For example, § 147.2929, Public Notice, specifies a public comment period of 15 days, while 40 CFR § 124.10 specifies 30 days. Similarly, § 147.2926, Permit Transfers and § 147.2929(a), Completeness Review, require only 10 day time periods while the minimum requirements at § 144.38 require 30 days of notice for permit transfers, and at § 144.26(d) impose no deadline on EPA for completing reviews. The Agency believes that these lesser time periods are appropriate for the Osage program. The Mineral Reserve is small, the fields well established, and both the Agency and the affected community are well acquainted with the activities occurring there. This allows the necessary review, comment, and action to be accomplished by all involved parties within a shorter time. In addition, the times specified are consistent with those in the Oklahoma

Class II program and exceed current BIA requirements. Further, EPA's Osage UIC field office located in Osage County facilitates contact between the Agency and operators. Considering all these factors, EPA believes EPA the shorter time periods proposed in the Osage program to be justified.

The ten day period for completeness reviews of permit applications establishes a time limit where none exists in the minimum requirements. It should be made clear, however, that the Agency in no way intends that failure to perform the review in the specified time results in any type of automatic determination or approval. Failure would simply constitute a breach of the stated regulatory duty and impose the continued obligation to perform the duty as quickly as possible.

VI. Compliance with Regulatory Review Requirements

A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "major" and, therefore, subject to the requirement of the Regulatory Impact Analysis. This regulation is not major because it will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumer, individual industries, Federal, State or local government agencies, or geographic regions, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, the impact of the proposed rule is not considered to be major.

These amendments were submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any comments from OMB to EPA and any response by the Agency are available for public inspection at the EPA Office of Drinking Water, 401 M Street, S.W., Washington, D.C. 20460.

B. Regulatory Flexibility Act

Today's regulations apply these requirements to new jurisdictions. However, the Agency's analysis indicates that this will not have a significant economic impact on a substantial number of small entities. All of the programs promulgated today were contemplated in the original economic analysis of the UIC program, and there has been no major change in the estimates of the burden of the program.

C. Paperwork Burden

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 2040-0042.

List of Subjects

40 CFR Part 124

Administrative practice and procedure, Air pollution control, Hazardous materials, Waste treatment and disposal, Water pollution control, Water supply, Indian lands.

40 CFR Part 144

Administrative practice and procedure, Reporting and recordkeeping requirements, Confidential business information, Water supply.

40 CFR Part 146

Hazardous materials, Reporting and recordkeeping requirements, Waste treatment and disposal, Water supply.

40 CFR Part 147

Administrative practice and procedure, Reporting and recordkeeping requirements, Intergovernmental relations, Penalties, Confidential business information, Water supply.

Authority: Safe Drinking Water Act, 42 U.S.C. 300h.

William D. Ruckelshaus,
Administrator.

For the reasons set out in the preamble, Parts 144 and 147 of Chapter I, Title 40 of the Code of Federal Regulations are amended as set forth below.

PART 144—[AMENDED]

Section 144.3 is amended by adding a definition for "Indian Lands" to follow the definition of HWM facility:

§ 144.3 Definition.

Indian lands means "Indian country" as defined in 18 U.S.C. 1151. That section defines Indian country as:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

PART 147—STATE UNDERGROUND INJECTION CONTROL PROGRAM

Subpart K—Florida

Subpart K is amended by adding §§ 147.501, 147.502, 147.503, and 147.504 as follows:

§ 147.501 EPA-administered program—Class II wells.

(a) *Contents.* The UIC program for Class II wells in the State of Florida is administered by EPA. This program consists of the UIC program requirements of 40 CFR Parts 124, 144, and 146, and additional requirements set forth in the remainder of this subpart. Injection well owners and operators, and EPA, shall comply with these requirements.

(b) *Effective date.* The effective date of the UIC program for Florida is: December 30, 1984.

§ 147.502 Aquifer Exemptions. [Reserved]

§ 147.503 Existing Class II (except enhanced recovery and hydrocarbon storage) wells authorized by rule.

Maximum injection pressure. To meet the operating requirements of § 144.28(f)(3)(i) of this chapter, the owner or operator shall use an injection pressure at the well head no greater than the pressure calculated using the following formula:

$$P_m = (0.733 - 0.433 S_g) d$$

where

P_m = injection pressure at the well head in pounds per square inch

S_g = specific gravity of injected fluid (unitless)

d = injection depth in feet.

§ 147.504 Existing Class II enhanced recovery and hydrocarbon storage wells authorized by rule.

(a) *Maximum injection pressure.* (1) To meet the operating requirements of § 144.28(f)(3)(ii) (A) and (B) of this chapter, the owner or operator:

(i) Shall use an injection pressure no greater than the pressure established by the Regional Administrator for the field or formation in which the well is located. The Regional Administrator shall establish such a maximum pressure after notice, opportunity for comment and opportunity for a public hearing, according to the provisions of Part 124, Subpart A of this chapter, and will inform owners and operators in

writing of the applicable maximum pressure; or

(ii) May inject at pressure greater than those specified in paragraph (a)(1)(i) of this section for the field or formation in which he is operating provided he submits a request in writing to the Regional Administrator, and demonstrates to the satisfaction of the Regional Administrator that such injection pressure will not violate the requirement of § 144.28(f)(3)(ii) (A) and (B). The Regional Administrator may grant such a request after notice, opportunity for comment, and opportunity for a public hearing, according to the provisions of Part 124, Subpart A of this chapter.

(2) Prior to such time as the Regional Administrator establishes rules for maximum injection pressure based on data provided pursuant to paragraph (a)(2)(ii) of this section the owner or operator shall:

(i) Limit injection pressure to a value which will not exceed the operating requirements of § 144.28(f)(3)(ii); and

(ii) Submit data acceptable to the Regional Administrator which defines the fracture pressure of the formation in which injection is taking place. A single test may be submitted on behalf of two or more operators conducting operations in the same formation, if the Regional Administrator approves such submission. The data shall be submitted to the Regional Administrator within 1 year of the effective date of this program.

(b) *Casing and cementing.* Where the Regional Administrator determines that the owner or operator of an existing enhanced recovery or hydrocarbon storage well may not be in compliance with the requirements of §§ 144.28(e) and 146.22, the owner or operator shall, when required by the Regional Administrator:

(1) Protect USDWs by:

(i) Cementing surface casing by recirculating the cement to the surface from a point 50 feet below the lowermost USDW; or

(ii) Isolating all USDWs by placing cement between the outermost casing and the well bore; and

(2) Isolate any injection zones by placing sufficient cement to fill the calculated space between the casing and the well bore to a point 250 feet above the injection zone; and

(3) Use cement:

(i) Of sufficient quantity and quality to withstand the maximum operating pressure;

(ii) Which is resistant to deterioration from formation and injection fluids; and

(iii) In a quantity no less than 120% of the calculated volume necessary to cement off a zone.

(4) Comply with other requirements which the Regional Administrator may specify either in addition to or in lieu of the requirements set forth in paragraphs (b)(1)–(3) of this section as needed to protect USDWs.

(c) *Area of review.* Notwithstanding the alternatives presented in § 146.06 of this chapter, the area of review shall be a minimum fixed radius as described in § 146.06(b) of this chapter.

(The information collection requirements contained in paragraph (a)(2)(ii) were approved by the Office of Management and Budget under control number 2040-0042)

Subpart M—Hawaii

2. Subpart M is amended by adding §§ 147.600 and 147.601.

§ 147.600 State-administered program. [Reserved]

§ 147.601 EPA-administered program.

(a) *Contents.* The UIC program for the State of Hawaii is administered by EPA. This program consists of the UIC program requirements of 40 CFR Parts 124, 144, and 146, and additional requirements set forth in the remainder of this subpart. Injection well owners and operators, and EPA, shall comply with these requirements.

(b) *Effective date.* The effective date of the UIC program for the State of Hawaii is December 30, 1984.

Subpart R—Kansas

1. Subpart R is amended by revising § 147.850 to read as follows:

§ 147.850 State-administered program—Class I, III, IV and V wells.

The UIC program for Class I, III, IV and V wells in the State of Kansas, except those on Indian lands as described in § 147.860, is the program administered by the Kansas Department of Health and Environment, approved by EPA pursuant to Section 1422 of the SDWA. Notice of this approval was published in the *Federal Register* on December 2, 1983 (48 FR 54350); the effective date of this program is December 2, 1983. This program consists of the following elements, as submitted to EPA in the State's program application.

2. Subpart R is amended by revising § 147.851 to read as follows:

§ 147.851 State-administered program—Class II wells.

The UIC program for Class II wells in the State of Kansas, except those on Indian lands as described in § 147.860, is the program administered by the Kansas

Corporation Commission and the Kansas Department of Health and Environment, approved by EPA pursuant to Section 1425 of the SDWA. Notice of this approval was published in the Federal Register on February 8, 1984 (49 FR 4735); the effective date of this program is February 8, 1984. This program consists of the following elements, as submitted to EPA in the State's program application.

3. Subpart R is amended by adding § 147.860.

§ 147.860 EPA-administered program—Indian lands.

(a) *Contents.* The UIC program for all classes of wells on Indian lands in Kansas is administered by EPA. This program consists of the UIC program requirements of 40 CFR Parts 124, 144, and 146, and additional requirements set forth in the remainder of this subpart. Injection well owners and operators, and EPA, shall comply with these requirements.

(b) *Effective date.* The effective date of the UIC program for Indian lands in Kansas is December 30, 1984.

Subpart Y—Minnesota

1. Subpart Y is amended by adding § 147.1210 as follows:

§ 147.1210 Requirements for Indian Lands.

(a) *Purpose and Scope.* This section sets forth additional requirements that apply to injection activities on Indian lands in Minnesota.

(b) *Requirements.* Notwithstanding the other requirements of this subpart, for Indian lands described in paragraph (a), no owner or operator shall construct, operate, maintain, or convert any Class I, II, III, or IV well. The UIC program for Class V wells on such Indian Lands is administered by EPA, and consists of the applicable requirements of 40 CFR Parts 124, 144, and 146. In addition, no owner or operator shall abandon a well without the approval of the Regional Administrator.

(c) *Effective date.* The effective date of the UIC program requirements for Indian lands in Minnesota is December 30, 1984.

Subpart Z—Mississippi

1. Subpart Z, is amended by adding §§ 147.1251, 147.1252, 147.1253, and 147.1254 as follows:

§ 147.1251 EPA-administered program—Class II wells.

(a) *Contents.* The UIC program for Class II wells in the State of Mississippi is administered by EPA. This program consists of the UIC program

requirements of 40 CFR Parts 124, 144, and 146, and additional requirements set forth in the remainder of this subpart. Injection well owners and operators, and EPA, shall comply with these requirements.

(b) *Effective date.* The effective date of the UIC program for Class II wells in Mississippi is December 30, 1984.

§ 147.1252 Aquifer Exemptions. [Reserved]

§ 147.1253 Existing Class II (except enhanced recovery and hydrocarbon storage) wells authorized by rule.

Maximum injection pressure. To meet the operating requirements of § 144.28(f)(3)(i) of this chapter, the owner or operator shall use an injection pressure at the wellhead no greater than the pressure calculated using the following formula:

$$P_m = (0.733 - 0.433 S_g) d$$

where

P_m = injection pressure at the wellhead in pounds per square inch

S_g = specific gravity of injected fluid (unitless)

d = injection depth in feet.

§ 147.1254 Existing Class II wells authorized by rule.

(a) *Maximum injection pressure.* (1) To meet the operating requirements of § 144.28(f)(3)(ii) (A) and (B) of this chapter, the owner or operator:

(i) Shall use an injection pressure no greater than the pressure established by the Regional Administrator for the field or formation in which the well is located. The Regional Administrator shall establish such a maximum pressure after notice, opportunity for comments and opportunity for a public hearing, according to the provisions of Part 124, Subpart A of this chapter, and will inform owners and operators in writing of the applicable maximum pressure; or

(ii) May inject at pressures greater than those specified in paragraph (a)(1)(i) of this section for the field or formation in which he is operating provided he submits a request in writing to the Regional Administrator, and demonstrates to the satisfaction of the Regional Administrator that such injection pressure will not violate the requirement of § 144.28(f)(3)(ii) (A) and (B). The Regional Administrator may grant such a request after notice, opportunity for comment, and opportunity for a public hearing, according to the provisions of Part 124, Subpart A of this chapter.

(2) Prior to such time as the Regional Administrator establishes rules for maximum injection pressure based on data provided pursuant to paragraph

(a)(2)(ii) of this section the owner or operator shall:

(i) Limit injection pressure to a value which will not exceed the operating requirements of §§ 144.28(f)(3)(ii); and

(ii) Submit data acceptable to the Regional Administrator which defines the fracture pressure of the formation in which injection is taking place. A single test may be submitted on behalf of two or more operators conducting operations in the same formation, if the Regional Administrator approves such submission. The data shall be submitted to the Regional Administrator within 1 year of the effective date of this program.

(b) *Casing and cementing.* Where the Regional Administrator determines that the owner or operator of an existing enhanced recovery or hydrocarbon storage well may not be in compliance with the requirements of §§ 144.28(e) and 146.22, the owner or operator shall when required by the Regional Administrator:

(1) Protect USDWs by:

(i) Cementing surface casing by recirculating the cement to the surface from a point 50 feet below the lowermost USDW; or

(ii) Isolating all USDWs by placing cement between the outermost casing and the well bore; and

(2) Isolate any injection zones by placing sufficient cement to fill the calculated space between the casing and the well bore to a point 250 feet above the injection zone; and

(3) Use cement:

(i) Of sufficient quantity and quality to withstand the maximum operating pressure;

(ii) Which is resistant to deterioration from formation and injection fluids; and

(iii) In a quantity no less than 120% of the calculated volume necessary to cement off a zone.

(4) Comply with other requirements which the Regional Administrator may specify either in addition to or in lieu of the requirements set forth in paragraphs (b) (1)–(3) of this section as needed to protect USDWs.

(c) *Area of review.* Notwithstanding the alternatives presented in § 146.06 of this chapter, the area of review shall be a minimum fixed radius as described in § 146.06(b) of this chapter.

(The information collection requirements contained in paragraph (a)(2)(ii) were approved by the Office of Management and Budget under control number 2040-0042.)

Subpart KK—Ohio

1. Subpart KK is amended by adding §§ 147.1801, 147.1802 and 147.1803 as follows:

§ 147.1801 EPA-administered program—Class I, III, IV, and V wells.

(a) *Contents.* The UIC program for Class I, III, IV, and V wells in the State of Ohio is administered by EPA. This program consists of the UIC program requirements of 40 CFR Parts 124, 144, and 146, and additional requirements set forth in the remainder of this subpart. Injection well owners and operators, and EPA, shall comply with these requirements.

(b) *Effective date.* The effective date of the UIC program for Class I, III, IV and V wells in Ohio is December 30, 1984.

§ 147.1802 Aquifer Exemptions.

[Reserved]

§ 147.1803 Existing Class I and III wells authorized by rule. Maximum injection pressure.

The owner or operator shall limit injection pressure to the lesser of:

(a) A value which will not exceed the operating requirements of § 144.28(f)(3)(i); or

(b) A value for well head pressure calculated by using the following formula:

$$P_m = (0.8 - 0.433 S_g) d$$

where

P_m = injection pressure at the well head in pounds per square inch

S_g = specific gravity of injected fluid (unitless)

d = injection depth in feet.

Subpart QQ—South Dakota

1. Subpart QQ is amended by adding §§ 147.2100, 147.2101, 147.2102, 147.2103, and 147.2104 as follows:

§ 147.2100 State-administered program. Class II wells [Reserved]

§ 147.2101 EPA-administered program.

(a) *Contents.* The UIC program for Class I, III, IV and V wells and Class II wells on Indian lands in the State of South Dakota is administered by EPA. This program consists of the UIC program requirements of 40 CFR Parts 124, 144, and 146, and additional requirements set forth in the remainder of this subpart. Injection well owners and operators, and EPA, shall comply with these requirements.

(b) *Effective date.* The effective date of the UIC program for South Dakota is: December 30, 1984.

§ 147.2102 Aquifer exemptions.

(a) This section identifies any aquifers or their portions exempted in accordance with §§ 144.7(b) and 146.4 of this chapter at the time of program promulgation. EPA may in the future exempt other aquifers or their portions, according to applicable procedures, without codifying such exemptions in this section. An updated list of exemptions will be maintained in the Regional office.

(b) Those portions of all aquifers located on Indian Lands, which meet the definition of USDW and into which existing Class II wells are injecting, are exempted within a ¼ mile radius of the well for the purpose of Class II injection activities only.

§ 147.2103 Existing Class II enhanced recover and hydrocarbon storage wells authorized by rule.

(a) *Maximum injection pressure.* (1) To meet the operating requirements of § 144.28(f)(3)(ii) (A) and (B) of this chapter, the owner or operator:

(i) shall use an injection pressure no greater than the pressure established by the Regional Administrator for the field or formation in which the well is located. The Regional Administrator shall establish such a maximum pressure after notice, opportunity for comments, and opportunity for a public hearing, according to the provisions of Part 124, Subpart A of this chapter, and will inform owners and operators in writing of the applicable maximum pressure; or

(ii) may inject at a pressure greater than those specified in paragraph (a)(1)(i) of this section for the field or formation in which he is operating provided he submits a request in writing to the Regional Administrator, and demonstrates to the satisfaction of the Regional Administrator that such injection pressure will not violate the requirement of § 144.28(f)(3)(ii)(A) and (B). The Regional Administrator may grant such a request after notice, opportunity for comment, and opportunity for a public hearing, according to the provisions of Part 124, Subpart A of this chapter.

(2) Prior to such time as the Regional Administrator establishes field rules for maximum injection pressure based on data provided pursuant to paragraph (a)(2)(ii) of this section the owner or operator shall:

(i) Limit injection pressure to a value which will not exceed the operating requirements of § 144.28(f)(3)(ii); and

(ii) Submit to the Regional Administrator data acceptable to the Regional administrator which defines the fracture pressure of the formation in

which injection is taking place. A single test may be submitted on behalf of two or more operators conducting operations in the same formation, if the Regional Administrator approves such submission.

(b) *Casing and Cementing.* Where the Regional Administrator determines that the owner or operator of an existing enhanced recovery or hydrocarbon storage well may not be in compliance with the requirement of §§ 144.28(e) and 146.22, the owner or operator shall when required by the Regional Administrator:

(1) Protect USDWs by:

(i) Cementing surface casing by recirculating the cement to the surface from a point 50 feet below the lowermost USDW; or

(ii) Isolating all USDWs by placing cement between the outermost casing and the well bore; and

(2) Isolate any injection zones by placing sufficient cement to fill the calculated space between the casing and the well bore to a point 250 feet above the injection zone; and

(3) Use cement:

(i) Of sufficient quantity and quality to withstand the maximum operation pressure;

(ii) Which is resistant to deterioration from formation and injection fluids; and

(iii) In a quantity no less than 120% of the calculated volume necessary to cement off a zone; and/or

(4) Comply with other requirements which the Regional Administrator may specify in addition to or in lieu of the requirements set forth in paragraph (b) (1)-(3) of this section as needed to protect USDWs.

(The information collection requirements contained in paragraph (a)(2)(ii) were approved by the Office of Management and Budget under control number 2040-0042)

§ 147.2104 Requirements for all Wells.

(a) The owner or operator converting an existing well to an injection well shall check the condition of the casing with one of the following logging tools:

(1) A pipe analysis log; or

(2) A caliper log.

(b) The owner or operator of a new injection well cased with plastic (PVC, ABS, or others) casings shall:

(1) Not construct a well deeper than 500 feet;

(2) Use cement and additives compatible with such casing material; and

(3) Cement the annular space above the injection interval from the bottom of the blank casing to the surface.

(c) The owner or operator of a newly drilled well shall install centralizers as directed by the Regional Administrator.

(d) The owner or operator shall as required by the Regional Administrator:

(1) Protect USDWs by:

(i) Setting surface casing 50 feet below the lowermost USDW;

(ii) Cementing surface casing by recirculating the cement to the surface from a point 50 feet below the lowermost USDW; or

(iii) Isolating all USDWs by placing cement between the outermost casing and the well bore; and

(2) Isolate any injection zones by placing sufficient cement to fill the calculated space between the casing and the well bore to a point 250 feet above the injection zone; and

(3) Use cement:

(i) Of sufficient quantity and quality to withstand the maximum operating pressure; and

(ii) Which is resistant to deterioration from formation and injection fluids; and

(iii) In a quantity no less than 120% of the calculated volume necessary to cement off a zone.

(4) The Regional Administrator may approve alternate casing and cementing practices provided that the owner or operator demonstrates that such practices will adequately protect USDWs.

(e) *Area of review.* Notwithstanding the alternatives presented in § 146.6 of this chapter, the area of review shall be a fixed radius as described in § 146.6(b) of this chapter.

(f) The applicant must give separate notice of intent to apply for a permit to each owner of record of the land within one-quarter mile of the site. The addresses of those to whom notice is given and the description of how notice was given shall be submitted with the permit application. The notice shall include:

(1) The name and address of applicant;

(2) A brief description of the planned injection activities, including well location, name and depth of the injection zone, maximum injection pressure and volume, and fluid to be injected;

(3) The EPA contact person; and

(4) A statement that opportunity to comment will be announced after EPA prepares a draft permit. This requirement may be waived by the Regional Administrator if he determines that individual notice to all land owners of record would be impractical.

Subpart YY—Wisconsin

1. Subpart YY is amended by revising § 147.2500 to read as follows:

§ 147.2500 State-administered program.

The UIC program for Class I, II, III, IV, and V wells in the State of Wisconsin, other than those on Indian lands as described in § 147.2510, is the program administered by the Wisconsin Department of Natural Resources, approved by EPA pursuant to SDWA Section 1422. Notice of this approval was published in the Federal Register on September 30, 1983 (48 FR 44783); the effective date of this program is November 30, 1983. This program consists of a prohibition of all injection wells except heat pump return flow injection wells and may be found in the following elements, as submitted to EPA in the State's program application.

2. Subpart YY is amended by adding § 147.2510.

§ 147.2510 EPA-administered program—Indian lands

(a) *Contents.* The UIC program for Indian lands in the State of Wisconsin is administered by EPA. This program consists of 40 CFR Parts 144 and 146 and additional requirements set forth in this section. Injection well owners and operators, and EPA, shall comply with these requirements.

(b) *Requirements.* Notwithstanding the requirements of paragraph (a) of this section for Indian lands in Wisconsin no owner or operator shall construct, operate, maintain, or convert any Class I, II, III, IV or V injection well.

(c) *Effective date.* The effective date of the UIC program requirements for Indian lands in Wisconsin is December 30, 1984.

Subpart BBB—Puerto Rico

1. Subpart BBB is amended by adding §§ 147.2650 and 147.2651 as follows:

§ 147.2650 State-administered program. [Reserved]

§ 147.2651 EPA-administered program.

(a) *Contents.* The UIC program for Puerto Rico is administered by EPA. This program consists of the UIC program requirements of 40 CFR Parts 124, 144, and 146. Injection well owners and operators, and EPA, shall comply with these requirements.

(b) *Effective date.* The effective date of the UIC program for Puerto Rico is: December 30, 1984.

Subpart CCC—Virgin Islands

1. Subpart CCC is amended by adding §§ 147.2700 and 147.2701.

§ 147.2700 State-administered program. [Reserved]

§ 147.2701 EPA-administered program.

(a) *Contents.* The UIC program for the Virgin Islands is administered by EPA. This program consists of the UIC program requirements of 40 CFR Parts 124, 144, and 146. Injection well owners and operators, and EPA, shall comply with these requirements.

(b) *Effective date.* The effective date of the UIC program for the Virgin Islands is: December 30, 1984.

Subpart LL—Oklahoma

1. Subpart LL is amended by adding § 147.1852 as follows:

§ 147.1852 EPA-administered program—Osage Mineral Reserve—Class II wells.

The UIC program for Class II wells located within the Indian lands consisting of the Osage Mineral Reserve, Osage County, Oklahoma, is administered by EPA. This program consists of the requirements set forth at Subpart GGG of this Part.

2. 40 CFR Part 147 is amended by adding Subpart GGG.

Subpart GGG—Osage Mineral Reserve—Class II Wells

Sec.

147.2901 Applicability and scope.

147.2902 Definitions.

147.2903 Prohibition of unauthorized injection.

147.2904 Area of Review.

147.2905 Plugging and abandonment.

147.2906 Emergency permits.

147.2907 Confidentiality of information.

147.2908 Aquifer Exemptions.

147.2909 Authorization of existing wells by rule.

147.2910 Duration of authorization by rule.

147.2911 Construction requirements for wells authorized by rule.

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147.2913 Monitoring and reporting requirements for wells authorized by rule.

147.2914 Corrective action for wells authorized by rule.

147.2915 Requiring a permit for wells authorized by rule.

147.2916 Coverage of permitting requirements.

147.2917 Duration of permits.

147.2918 Permit application information.

147.2919 Construction requirements for wells authorized by permit.

147.2920 Operating requirements for wells authorized by permit.

147.2921 Schedule of compliance.

147.2922 Monitoring and reporting requirements for wells authorized by permit.

147.2923 Corrective action for wells authorized by permit.

147.2924 Area permits.

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- 147.2925 Standard permit conditions.
 147.2926 Permit transfers.
 147.2927 Permit modification.
 147.2928 Permit termination.
 147.2929 Administrative permitting procedures.

Authority: Safe Drinking Water Act, 42 U.S.C. 300h.

Subpart GGG—Osage Mineral Reserve—Class II Wells

§ 147.2901 Applicability and scope.

This subpart sets forth the rules and permitting requirements for the Osage Mineral Reserve, Osage County, Oklahoma, Underground Injection Control Program. The regulations apply to owners and operators of Class II injection wells located on the Reserve, and to EPA.

§ 147.2902 Definitions.

Most of the following terms are defined in § 144.3, and have simply been reproduced here for the convenience of the reader. This section also includes definitions of some terms unique to the Osage program. Terms used in this subpart are defined as follows:

Administrator—the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Aquifer—a geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

BIA—The "Bureau of Indian Affairs," United States Department of Interior.

Casing—a pipe or tubing of varying diameter and weight, lowered into a borehole during or after drilling in order to support the sides of the hole and, thus, prevent the walls from caving, to prevent loss of drilling mud into porous ground, or to prevent water, gas, or other fluid from entering the hole.

Cementing—the operation whereby a cement slurry is pumped into a drilled hole and/or forced behind the casing.

Class II Wells—wells which inject fluids:

(a) which are brought to the surface in connection with conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters would be classified as a hazardous waste at the time of injection;

(b) for enhanced recovery of oil or natural gas; and

(c) for storage of hydrocarbons which are liquid at standard temperature and pressure.

Existing Class II Wells—wells that were authorized by BIA and constructed and completed before the effective date of this program.

New Class II Wells—wells constructed or converted after the effective date of this program, or which are under construction on the effective date of this program.

Confining bed—a body of impermeable or distinctly less permeable material stratigraphically adjacent to one or more aquifers.

Confining zone—a geologic formation, group of formations, or part of a formation that is capable of limiting fluid movement above an injection zone.

Contaminant—any physical, chemical, biological, or radiological substance or matter in water.

Disposal well—a well used for the disposal of waste into a subsurface stratum.

EPA—The United States Environmental Protection Agency.

Fault—a surface or zone of rock fracture along which there has been displacement.

Fluid—material or substance which moves or flows whether in a semisolid, liquid, sludge, gas or any other form or state.

Formation—a body of rock characterized by a degree of lithologic homogeneity which is prevailing, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

Freshwater—"Underground source of drinking water."

Ground water—water below the land surface in a zone of saturation.

Injection well—a well into which fluids are being injected.

Injection zone—a geological formation, group of formations, or part of a formation receiving fluids through a well.

Lithology—the description of rocks on the basis of their physical and chemical characteristics.

Owner/operator—the owner or operator of any facility or activity subject to regulation under the Osage UIC program.

Packer—a device lowered into a well to produce a fluid-tight seal within the casing.

Permit—an authorization issued by EPA to implement UIC program requirements. Permit does not include the UIC authorization by rule or any permit which has not yet been the subject of final Agency action.

Plugging—the act or process of stopping the flow of water, oil or gas into or out of a formation through a borehole or well penetrating that formation.

Pressure—the total load or force per unit area acting on a surface.

Regional Administrator—the Regional Administrator of Region 6 of the United

States Environmental Protection Agency, or an authorized representative.

Subsidence—the lowering of the natural land surface in response to: earth movements; lowering of fluid pressure; removal of underlying supporting material by mining or solution solids, either artificially or from natural causes; compaction due to wetting (hydrocompaction); oxidation of organic matter in soils; or added load on the land surface.

Underground Source of Drinking Water—an aquifer or its portion:

(a) (1) which supplies any public water system; or

(2) which contains a sufficient quantity of ground water to supply a public water system; and

(i) currently supplies drinking water for human consumption; or

(ii) contains fewer than 10,000 mg/l total dissolved solids; and

(b) which is not an exempted aquifer.

USDW—Underground Source of Drinking Water.

Well—a bored, drilled, or driven shaft, or a dug hole whose depth is greater than the largest surface dimension.

Well Injection—the subsurface emplacement of fluids through a bored, drilled, or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension.

Well Workover—any reentry of an injection well; including, but not limited to, the pulling of tubular goods, cementing or casing repairs; and excluding any routine maintenance (e.g. re-seating the packer at the same depth, or repairs to surface equipment).

§ 147.2903 Prohibition of unauthorized injection.

(a) Any underground injection, except as authorized by permit or rule issued under the UIC program, is prohibited. The construction or operation of any well required to have a permit is prohibited until the permit has been issued.

(b) No owner or operator shall construct, operate, maintain, convert, plug, or abandon any injection well, or conduct any other injection activity, in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause the violation of any primary drinking water regulation under 40 CFR Part 142 or may otherwise adversely affect the health of persons. The applicant for a permit shall have the burden of showing that the requirements of this paragraph are met.

(c) Injection between the outermost casing protecting underground sources of drinking water and the well bore is prohibited.

§ 147.2904 Area of review.

(a) The area of review for an injection well or project will be a fixed radius of one-fourth of a mile from the well, field or project.

(b) The zone of endangering influence is the lateral area around the injection well or project in which the injection zone pressures may cause movement of fluid into an underground source of drinking water (USDW) if there are improperly sealed, completed or abandoned wells present. A zone of endangering influence may be determined by EPA through the use of an appropriate formula that addresses the relevant geologic, hydrologic, engineering and operational features of the well, field, or project.

§ 147.2905 Plugging and abandonment.

The owner/operator shall notify the Osage UIC office within 30 days of the date injection has terminated. The well must be plugged within 1 year after termination of injection. The Regional Administrator may extend the time to plug, but only if no fluid movement into a USDW will occur, and the operator has presented a viable plan for utilizing the well within a reasonable time.

(a) Until an injection well has been properly plugged and abandoned, annual reports to the Regional Administrator on well status, and mechanical integrity tests as outlined in §§ 147.2912 and 147.2920 will be required, whether or not injection has ceased.

(b) All wells shall be plugged to prevent movement of fluid into an USDW.

(c) The owner/operator shall notify the Osage UIC office by certified mail at least 5 days prior to the commencement of plugging operations. The Osage UIC office may waive or reduce the 5-day notice requirement when a qualified EPA representative is available to witness the plugging operation. The following information must be submitted as part of the notification:

- (1) Type and number of plugs to be used;
- (2) Elevation of top and bottom of each plug;
- (3) Method of plug placement; and
- (4) Type, grade and quantity of cement to be used.

(d) The well shall be kept full of mud as casing is removed. No surface casing shall be removed without written approval from the Regional Administrator.

(e)(1) If surface casing is adequately set and cemented through all freshwater zones (set to at least 50 feet below the base of freshwater), a plug shall be set at least 50 feet below the shoe of the casing and extending at least 50 feet above the shoe of the casing, or

(2) If the surface casing and cementing is inadequate, the well bore shall be filled with cement from a point 50 feet below the base of fresh water to a point 50 feet above the shoe of the surface casing, and any additional plugs as required by the Osage UIC office and/or the Osage Agency.

(3) In all cases, the top 20 feet of the well bore below 3 feet of ground surface shall be filled with cement. Surface casing shall be cut off 3 feet below ground surface and covered with a secure steel cap on top of the surface pipe. The remaining 3 feet shall be filled with dirt.

(f)(1) Except as provided in paragraph (f)(2) of this section, each producing or receiving formation shall be sealed off with a 50-foot cement plug placed at the base of the formation and a 50-foot cement plug placed at the top of the formation.

(2) The requirement in paragraph (f)(1) of this section does not apply if the producing/receiving formation is already sealed off from the well bore with adequate casing and cementing behind casing, and casing is not to be removed, or the only openings from the producing/receiving formation into the well bore are perforations in the casing, and the annulus between the casing and the outer walls of the well is filled with cement for a distance of 50 feet below the base of the formation and 50 feet above the top of the formation. When such conditions exist, a bridge plug capped with 10 feet of cement set at the top of the producing formation may be used.

(g) When specified by the Osage UIC office, any uncased hole below the shoe of any casing to be left in the well shall be filled with cement to a depth of at least 50 feet below the casing shoe, or the bottom of the hole, and the casing above the shoe shall be filled with cement to at least 50 feet above the shoe of the casing. If the well has a screen or liner which is not to be removed, the well bore shall be filled with cement from the base of the screen or liner to at least 50 feet above the top of the screen or liner.

(h) All intervals between cement plugs in the well bore shall be filled with mud.

(i) A report containing copies of the cementing tickets shall be submitted to BIA within 10 days of plugging completion.

(j) A surety bond must be on file with the Bureau of Indian Affairs (BIA), and shall not be released until the well has been properly plugged and the Regional Administrator has agreed to the release of the bond.

§ 147.2906 Emergency permits.

(a) An emergency permit may be issued if:

(1) There will be an imminent health hazard unless an emergency permit is issued; or

(2) There will be a substantial and irretrievable loss of oil and gas resources, timely application for a permit could not practicably have been made, and injection will not result in movement of fluid into an USDW; or

(3) There will be a substantial delay in oil or gas production, and injection will not result in movement of fluid into an USDW.

(b) *Requirements.*—(1) *Permit duration.* (i) Emergency permits issued to avoid an imminent health threat may last no longer than the time necessary to prevent the hazard.

(ii) Emergency permits issued to prevent a substantial and irretrievable loss of oil or gas resources shall be for no longer than 90 days, unless a complete permit application has been submitted during that time; in which case the emergency permit may be extended until a final decision on the permit application has been made.

(iii) Emergency permits to avoid a substantial delay in oil or gas production shall be issued only after a complete permit application has been submitted and shall be effective until a final decision on the permit application is made.

(2) Notice of the emergency permit will be given by the Regional Administrator according to the notice procedure for a draft permit within 10 days after issuance.

(3) An emergency permit may be oral or written. If oral, a written emergency permit must be issued within five calendar days.

§ 147.2907 Confidentiality of information.

(a) The following information cannot be claimed confidential by the submitter:

(1) Name and address of permit applicant or permittee.

(2) Information concerning the existence, absence or level of contaminants in drinking water.

(b) Other information claimed as confidential will be processed in accordance with 40 CFR Part 2.

§ 147.2908 Aquifer exemptions.

(a) After notice and opportunity for a public hearing, the Administrator may designate any aquifer or part of an aquifer as an exempted aquifer.

(b) An aquifer or its portion that meets the definition of a USDW may be exempted by EPA from USDW status if the following conditions are met:

(1) it does not currently serve as a source of drinking water, and
(2) it cannot now and will not in the future serve as a source of drinking water because:

(i) it is hydrocarbon producing, or can be demonstrated by a permit applicant as a part of a permit application for a Class II operation to contain hydrocarbons that are expected to be commercially producible (based on historical production or geologic information); or

(ii) it is situated at a depth or location which makes recovery of water for drinking water purposes economically or technologically impractical; or

(iii) it is so contaminated that it would be economically or technologically impractical to render that water fit for human consumption; or

(3) the Total Dissolved Solids content of the groundwater is more than 3,000 and less than 10,000 mg/l and it is not reasonably expected to supply a public water system.

§ 147.2909 Authorization of existing wells by rule.

All existing Class II injection wells (wells authorized by BIA and constructed or completed on or before the effective date of the Osage UIC program) are hereby authorized. Owners or operators of wells authorized by rule must comply with the provisions of §§ 147.2903, 147.2905, 147.2907, and 147.2910 through 147.2915.

§ 147.2910 Duration of authorization by rule.

Existing Class II injection wells are authorized for the life of the well, subject to the obligation to obtain a permit if specifically required by the Regional Administrator pursuant to § 147.2915.

§ 147.2911 Construction requirements for wells authorized by rule.

All Class II wells shall be cased and cemented to prevent movement of fluids into USDWs. The Regional Administrator shall review inventory information, data submitted in permit applications, and other records, to determine the adequacy of construction (completion) or existing injection wells. At the Regional Administrator's discretion, well casing and cementing

may be considered adequate if it meets the BIA requirements that were in effect at the time of construction (completion) and will not result in movement of fluid into an USDW. If the Regional Administrator determines that the construction of a well authorized by rule is inadequate, he shall require a permit, or he shall notify the owner/operator and the owner/operator shall correct the problem according to instructions from the Regional Administrator. All corrections must be completed within one year of owner/operator notification of inadequacies.

§ 147.2912 Operating requirements for wells authorized by rule.

(a) Each well authorized by rule must have mechanical integrity. Mechanical integrity must be demonstrated within five years of program adoption. The Regional Administrator will notify the well owner/operator three months before proof of mechanical integrity must be submitted to EPA. The owner/operator must contact the Osage UIC office at least five days prior to testing. The owner/operator may perform the mechanical integrity test prior to receiving notice from the Regional Administrator, provided the Osage UIC office is notified at least five days in advance. Conditions of both paragraphs (a)(1) and (a)(2) of this section must be met.

(1) There is no significant leak in the casing, tubing or packer. This may be shown by the following:

(i) Performance of a pressure test of the casing/tubing annulus to at least 200 psi, or the pressure specified by the Regional Administrator, to be repeated thereafter, at five year intervals, for the life of the well (pressure tests conducted during well operation shall maintain an injection/annulus pressure differential of at least 100 psi through the tubing length); or

(ii) Maintaining a positive gauge pressure on the casing/tubing annulus (filled with liquid) and monitoring the pressure monthly and reporting of the pressure information annually; or

(iii) Radioactive tracer survey; or
(iv) for enhanced recovery wells, records of monitoring showing the absence of significant changes in the relationship between injection pressure and injection flow rate at the well head, following an initial pressure test as described by Paragraph (a)(1)(i) or (v) of this section; or

(v) Testing or monitoring programs approved by the Regional Administrator on a case-by-case basis, and

(2) There is no significant fluid movement into a USDW through vertical

channels adjacent to the well bore. This may be shown by any of the following:

(i) Cementing records (need not be reviewed every five years);

(ii) Tracer survey (in appropriate hydrogeologic settings; must be used in conjunction with at least one of the other alternatives);

(iii) Temperature log;

(iv) Noise log; or

(v) Other tests deemed acceptable by the Regional Administrator.

(b) Injection pressure at the wellhead shall be limited so that it does not initiate new fractures or propagate existing fractures in the confining zone adjacent to any USDW.

(1) For existing Class II salt water disposal wells, The owner/operator shall, except during well stimulation, use an injection pressure at the wellhead no greater than the pressure calculated by using the following formula:

$$P_m = (0.75 - 0.433S_g)d$$

where:

P_m = injection pressure at the wellhead in pounds per square inch

S_g = specific gravity of injected fluid (unitless)

d = injection depth in feet

Owner/operator of wells shall comply with the above injection pressure limits no later than one year after the effective date of this regulation.

(2) For existing Class II enhanced recovery wells, the owner or operator:

(i) Shall use an injection pressure no greater than the pressure established by the Regional Administrator for the field or formation in which the well is located. The Regional Administrator shall establish such a maximum pressure after notice, opportunity for comment, and opportunity for a public hearing according to the provisions of Part 124, Subpart A of this chapter, and will inform owners and operators in writing of the applicable maximum pressure.

(ii) Prior to such time as the Regional Administrator establishes rules for maximum injection pressures based on data provided pursuant to paragraph (b)(2)(ii)(B) of this section the owner/operator shall:

(A) Limit injection pressure at the wellhead to a value which will not initiate new fractures or propagate existing fractures in the confining zone adjacent to any USDW; and

(B) Submit data acceptable to the Regional Administrator which defines the fracture pressure of the formation in which injection is taking place. A single test may be submitted on behalf of two or more operators conducting operations

in the same formation, if the Regional Administrator approves such submission. The data shall be submitted to the Regional Administrator within one year of the effective date of this program.

(c) Injection wells or projects which have exhibited failure to confine injected fluids to the authorized injection zone or zones may be subject to restriction of injection volume and pressure, or shut-down, until the failure has been identified and corrected.

(The information collection requirements contained in paragraphs (a)(i) (ii)-(v) and (a)(2) (i)-(v) were approved by the Office of Management and Budget under control number 2040-0042)

§ 147.2913 Monitoring and reporting requirements for wells authorized by rule.

(a) The owner/operator has the duty to submit inventory information to the Regional Administrator upon request. Such request may be a general request to all operators in the County (e.g., public notice, or mailout requesting verification of information).

(b) The operator shall monitor the injection pressure (psi) and rate (bb1/day) at least monthly, with the results reported annually. The annual report shall specify the types of methods used to generate the monitoring data.

(c) The owner/operator shall notify the Osage UIC office within 30 days of any mechanical failure or down-hole problems involving well integrity, well workovers, or any noncompliance. As required, operators must apply for and obtain a workover permit from the Bureau of Indian Affairs Osage Agency before reentering an injection well. If the condition may endanger an USDW, the owner/operator shall notify the Osage UIC office orally within 24 hours, with written notice including plans for testing and/or repair to be submitted within five days. If all the information is not available within five days, a followup report must be submitted with 30 days.

(d) The owner/operator shall determine the nature of injected fluids initially, when the nature of injected fluids is changed or when new constituents are added. The records should reflect the source of character of the new fluid and the date changes were made.

(e) The owner/operator shall retain all monitoring records for three years, unless an enforcement action is pending, and then until three years after the enforcement action has been resolved.

(Approved by the Office of Management and Budget under control number 2040-0042)

§ 147.2914 Corrective action for wells authorized by rule.

Based on the Regional Administrator's discretion, corrective action to prevent movement of fluid into a USDW may be required for improperly sealed, completed or abandoned wells (i.e., wells or well bores which may provide an avenue for fluid migration into a USDW) within the zone of endangering influence (as defined in 147.2904, Area of Review) of an injection well authorized by rule.

(a) EPA will notify the operator when corrective action is required. Corrective action may include:

- (1) Well modifications:
 - (i) Recementing;
 - (ii) Workover;
 - (iii) Reconditioning;
 - (iv) Plugging or replugging;
- (2) Limitations on injection pressure to prevent movement of fluid into an USDW;

(3) A more stringent monitoring program; and/or

(4) Periodic testing of other wells to determine if significant movement of fluid has occurred.

(b) If the monitoring discussed in paragraphs (a)(3) or (a)(4) of this section indicate the potential endangerment of an USDW, then action as described in paragraphs (a)(1) or (a)(2) of this section must be taken.

§ 147.2915 Requiring a permit of wells authorized by rule.

(a) The Regional Administrator may require the owner or operator of any well authorized by rule to apply for an individual or area permit. The Regional Administrator shall notify the owner/operator in writing that a permit application is required. The notice shall contain:

- (1) Explanation of need for application;
- (2) Application form and, if appropriate, a list of additional information to be submitted; and
- (3) Deadline for application submission.

(b) Cases in which the Regional Administrator may require a permit include:

- (1) The owner or operator is not in compliance with provisions of the rule;
- (2) Injection well is no longer within the category of wells authorized by rule;
- (3) Protection of USDW's requires that the injection operation be regulated by requirements which are not contained in the rule; or
- (4) Discretion of Regional Administrator.

(c) Injection is no longer authorized by rule upon the effective date of a permit or permit denial, or upon failure of the

owner/operator to submit an application in a timely manner as specified in the notice described in paragraph (a) of this section.

(d) Any owner/operator authorized by rule may request to be excluded from the coverage of the rules by applying for an individual or area UIC permit.

§ 147.2916 Coverage of permitting requirements.

The owner or operator of a new Class II injection well or any other Class II well required to have a permit in the Osage Mineral Reserve shall comply with the requirements of §§ 147.2903, 147.2907, 147.2918, through 147.2928.

§ 147.2917 Duration of permits.

Unless otherwise specified in the permit, the permits will be in effect until the well is plugged and abandoned or the permit terminated. The Regional Administrator will review each issued permit at least once every five years to determine whether it should be modified or terminated.

§ 147.2918 Permit application information.

(a) The owner/operator must submit the original and three copies of the permit application, with two complete sets of attachments, to the Osage UIC office. The application should be signed by the owner/operator or a duly authorized representative. The application should also include appropriate forms (i.e., BIA's Application for Operation or Report on Wells and EPA's permit application). The applicant has the burden of proof to show that the proposed injection activities will not endanger USDWs.

(b) The application shall include the information listed below. Information required by paragraphs (b) (5), (7), or (9) of this section that is contained in EPA or BIA files may be included in the application by reference.

(1) Map using township-range sections showing the area of review and identifying all wells of public record penetrating the injection interval.

(2) Tabulation of data on the wells identified in paragraph (b)(1) of this section, including location, depth, date drilled, and record of plugging and/or completion.

(3) Operating data:

- (i) maximum and average injection rate;
- (ii) maximum and average injection pressure;
- (iii) whether operation is on cyclic or continuous operation basis; and
- (iv) source and appropriate analysis of injected fluids, including total dissolved solids, chlorides, and additives.

(4) Geologic data on the injection and confining zones, including faults, geological name, thickness permeability, depth and lithologic description.

(5) Depth to base of fresh water.

(6) Schematic drawings of the surface and subsurface details of the well, showing:

(i) Total depth or plug-back depth;

(ii) Depth to top and bottom of injection interval;

(iii) Depths to tops and bottoms of casing and cemented intervals, and amount of cement to be used;

(iv) Size of casing and tubing, and depth of packer; and

(v) Hole diameter.

(7) Proof that surety bond has been filed with the BIA Superintendent in accordance with 25 CFR § 226.6. A surety bond must be maintained until the well has been properly plugged.

(8) Verification of public notice, consisting of a list showing the names, addresses, and date that notice of permit application was given or sent to:

(i) the surface land owner;

(ii) tenants on land where injection well is located or proposed to be located; and

(iii) Each operator of a producing lease within one-half mile of the well location.

(9) All available logging and testing data on the well (for existing wells, i.e., wells to be converted or wells previously authorized by rule).

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§ 147.2919 Construction requirements for wells authorized by permit.

(a) All Class II wells shall be sited so that they inject into a formation that is separated from any USDW by a confining zone free of known open faults or fractures within the area of review.

(b) All Class II wells shall be cased and cemented to prevent movement of fluids into or between USDWs. Requirements shall be based on the depth to base of fresh water, and the depth to the injection zone. Newly drilled Class II wells must have surface casing set and cemented to at least 50 feet below the base of fresh water, or the equivalent (e.g., long string cemented to surface). At the Regional Administrator's discretion, the casing and cementing of wells to be converted may be considered adequate if they meet the BIA requirements that were in effect at the time of construction (completion), and will not result in movement of fluid into a USDW.

(c) Owner/operators shall provide a standard female fitting with cut-off valves, connected to the tubing and the tubing/casing annulus so that the

injection pressure and annulus pressure may be measured by an EPA representative by attaching a gauge having a standard male fitting.

(d) No owner or operator may begin construction of a new well until a permit authorizing such construction has been issued, unless such construction is otherwise authorized by an area permit.

§ 147.2920 Operating requirements for wells authorized by permit.

(a) For new Class II wells, injection shall be through adequate tubing and packer. Packer shall be run on the tubing and set inside the casing within 75 feet of the top of the injection interval. For existing Class II, wells, injection shall be through adequate tubing and packer, or according to alternative operating requirements approved by the Regional Administrator, as necessary to prevent the movement of fluid into a USDW.

(b) Each well must have mechanical integrity. Mechanical integrity of the injection well must be shown prior to operation. The owner/operator must notify the Osage UIC office at least five days prior to mechanical integrity testing. Conditions of both Paragraphs (b)(1) and (b)(2) of this Section must be met.

(1) There is no significant leak in the casing, tubing or packer. This may be shown by the following:

(i) Performance of a pressure test of the casing/tubing annulus to at least 200 psi, or the pressure specified by the Regional Administrator, to be repeated thereafter, at five year intervals, for the life of the well (Pressure tests conducted during well operation shall maintain an injection/annulus pressure differential of at least 100 psi throughout the tubing length); or

(ii) Maintaining a positive gauge pressure on the casing/tubing annulus (filled with liquid) and monitoring the pressure monthly and reporting of the pressure information annually; or

(iii) Radioactive tracer survey; or

(iv) For enhanced recovery wells, record of monitoring showing the absence of significant changes in the relationship between injection pressure and injection flow rate at the wellhead, following an initial pressure test as described by Paragraph (b)(1) (i) or (v) of this section; or

(v) Testing or monitoring programs approved by the Administrator on a case-by-case basis, and

(2) There is no significant fluid movement into a USDW through vertical channels adjacent to the well bore. This may be shown by any of the following:

(i) Cementing records (need not be reviewed every five years);

(ii) Tracer survey (in appropriate hydrogeologic settings; must be used in conjunction with at least one of the other alternatives);

(iii) Temperature log;

(iv) Noise log; or

(v) Other tests deemed acceptable by the Administrator.

(c) Injection pressure at the wellhead shall be limited so that it does not initiate new fractures or propagate existing fractures in the confining zone adjacent to any UDSW.

(d) Injection wells or projects which have exhibited failure to confine injected fluids to the authorized injection zone or zones may be subject to restriction of injected volume and pressure or shut-in, until the failure has been identified and corrected.

(e) Operation shall not commence until proof has been submitted to the Regional Administrator, or an EPA representative has witnessed that any corrective action specified in the permit has been completed.

§ 147.2921 Schedule of compliance.

The permit may, when appropriate, specify a schedule of compliance leading to compliance with the Safe Drinking Water Act and the Osage UIC regulations.

(a) Any schedule of compliance shall require compliance as soon as possible, and in no case later than three years after the effective date of the permit.

(b) If a permit establishes a schedule of compliance which exceeds one year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.

(1) The time between interim dates shall not exceed one year.

(2) If the time necessary for completion of any interim requirement is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

(c) The permit shall be written to require that if a schedule of compliance is applicable, progress reports be submitted no later than 30 days following each interim date and the final date of compliance.

§ 147.2922 Monitoring and reporting requirements for wells authorized by permit.

(a) The owner/operator shall notify the Osage UIC office within 30 days of the date on which injection commenced.

(b) The operator shall monitor the injection pressure (psi) and rate (bbl/day) at least monthly, with the results reported annually. The annual reports shall specify the types or methods used to generate the monitoring data.

(c) The owner/operator shall notify the Osage UIC office within 30 days of any mechanical failure or down-hole problems involving well integrity, well workovers, or any noncompliance. (Operators should note the obligation to apply for and obtain a workover permit from the Bureau of Indian Affairs Osage Agency before reentering an injection well.) If the condition may endanger an USDW, the owner/operator shall notify the Osage UIC officer orally within 24 hours, with written notice including plans for testing and/or repair to be submitted within five days. If all the information is not available within five days, a followup report must be submitted within 30 days.

(d) The owner/operator shall retain all monitoring records for three years, unless an enforcement action is pending, and then until three years after the enforcement action has been resolved.

(e) The owner/operator shall notify the Osage UIC office in writing of a transfer of ownership at least 10 days prior to such transfer.

(Approved by the Office of Management and Budget under Control Number 2040-0042)

§ 147.2923 Corrective action for wells authorized by permit.

All improperly sealed, completed or abandoned wells (i.e., wells or well bores which may provide an avenue for movement of fluid into an USDW) within the zone of endangering influence (as defined in § 147.2904, Area of Review) that penetrate the injection zone of a Class II well, must have corrective action taken to prevent movement of fluid into a USDW.

(a) EPA will review completion and plugging records of wells within the zone of endangering influence that penetrate the injection zone and will notify the operator when corrective action is required. Corrective action may include:

- (1) Well modifications, including:
 - (i) Recementing;
 - (ii) Workover;
 - (iii) Reconditioning; and/or
 - (iv) Plugging or replugging;
- (2) Permit conditions to limit injection pressure so as to prevent movement of fluid into a USDW;
- (3) A more stringent monitoring program; and/or
- (4) Periodic testing of other wells within the area of review to determine if significant movement of fluid has occurred. If the monitoring discussed in

paragraph (a)(3) or (a)(4) of this section indicates the potential endangerment of a USDW, then action as described in paragraphs (a)(1) or (a)(2) of this section must be taken.

(b) If the Regional Administrator has demonstrable knowledge that wells within the zone of endangering influence will not serve as conduits for fluid movement into a USDW, the permit may be approved without requiring corrective action. However, additional monitoring shall be required to confirm that no significant migration will occur.

§ 147.2924 Area permits.

(a) Area permits may be issued for more than one injection well if the following conditions are met:

- (1) All existing wells are described and located in the permit application;
- (2) All wells are within the same well field, project, reservoir or similar unit;
- (3) All wells are of similar construction; and
- (4) All wells are operated by the same owner/operator.

(b) Area permits shall specify:

- (1) The area within which injection is authorized; and
- (2) The requirements for construction, monitoring, reporting, operation and abandonment for all wells authorized by the permit.

(c) Area permits can authorize the construction and operation of new wells within the permit area, if:

- (1) The permittee notifies the Regional Administrator in the annual report of when and where any new wells have or will be drilled;
- (2) The new wells meet the criteria outlined in (a) and (b) above; and
- (3) The effects of the new wells were addressed in the permit application and approved by the Regional Administrator.

(The information collection requirements contained in paragraphs (a)(1) and (c)(1) were approved by the Office of Management and Budget under control number 2040-0042)

§ 147.2925 Standard permit conditions.

(a) The permittee must comply with all permit conditions, except as authorized by an emergency permit (described in § 147.2906). Noncompliance is grounds for permit modification, permit termination or enforcement action.

(b) The permittee has a duty to halt or reduce activity in order to maintain compliance with permit conditions.

(c) The permittee shall take all reasonable steps to mitigate any adverse environmental impact resulting from noncompliance.

(d) The permittee shall properly operate and maintain all facilities

installed or used to meet permit conditions. Proper operation and maintenance also includes adequate operator staffing and training, adequate funding, and adequate engineering capability available.

(e) This permit may be modified or terminated for cause (see §§ 147.2927 and 147.2928). The filing of a request by the permittee for a permit modification or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

(f) This permit does not convey any property rights, or any exclusive privilege.

(g) The permittee shall furnish, within a reasonable time, information that the Regional Administrator requests, for determination of permit compliance, or if cause exists, for permit modification or termination.

(h) The permittee shall allow EPA representatives, upon presentation of appropriate credentials or other documentation, to:

(1) Enter permittee's premises where a regulated activity is conducted or located, or where records required by this permit are kept;

(2) Have access to and copy records required by this permit;

(3) Inspect any facilities, equipment, practices or operations regulated or required by this permit; and

(4) Sample or monitor any substances or parameters at any location for purpose of assuring compliance with this permit or the SDWA.

(i) Monitoring and records.

(1) Samples and monitoring data shall be representative of injection activity.

(2) Permittee shall retain monitoring records for three years.

(3) Monitoring records shall include:

(i) Date, exact place and time of sampling or measurement;

(ii) Individual(s) who performed the measurements;

(iii) Date(s) analyses were performed;

(iv) Individual(s) who performed the analyses;

(v) Analytical techniques or methods used, including quality assurance techniques employed to insure the generation of reliable data; and

(vi) Results of analyses.

(j) *Signatory requirements.* All applications, reports or information submitted to the Regional Administrator or the Osage UIC office must be signed by the injection facility owner/operator or his duly authorized representative. The person signing these documents must make the following certification:

"I certify under penalty of law that I have personally examined and am

familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

(k) *Reporting requirements.* (1) The permittee shall notify the Regional Administrator as soon as possible of any planned changes to the facility.

(2) The permittee shall give advance notice to the Regional Administrator of any planned changes which may result in noncompliance.

(3) This permit is not transferable to any person except after notice to the Regional Administrator in accordance with § 147.2926.

(l) A new injection well shall not commence injection until construction is complete and the Regional Administrator has been notified of completion of construction and has given his approval to commence injection.

(The information collection requirements contained in paragraphs (g) and (i) were approved by the Office of Management and Budget under control number 2040-0042)

§ 147.2926 Permit transfers.

(a) Permits may be transferred to another permittee:

(1) If the current permittee notifies the Regional Administrator at least 10 days before the proposed transfer date; and

(2) If the notice includes a written agreement between the existing and new permittees containing:

(i) A specific date for transfer of permit responsibility, coverage and liability; and

(ii) Assurance that the new permittee has a surety bond on file with BIA; and

(3) If the Regional Administrator does not respond with a notice to the existing permittee that the permit will be modified.

(b) If the conditions in paragraph (a) of this section are met, the transfer is effective on the date specified in paragraph (a)(2)(i).

(Approved by the Office of Management and Budget under control number 2040-0042)

§ 147.2927 Permit modification.

(a) Permits may be modified for the following causes only (with the exceptions listed in paragraph (b) of this section regarding minor modifications):

(1) There are substantial changes to the facility or activity which occurred after permit issuance that justify revised or additional permit conditions.

(2) The Regional Administrator has received information (e.g., from monitoring reports, inspections) which warrants a modified permit.

(3) The regulations or standards on which the permit was based have changed.

(4) The Regional Administrator has received notice of a proposed permit transfer.

(5) An interested person requests in writing that a permit be modified, and the Regional Administrator determines that cause for modification exists.

(6) Cause exists for termination under § 147.2928, but the Regional Administrator determines that permit modification is appropriate.

(b) *Minor modifications.*

(1) Minor modifications do not require that the procedures listed in paragraph (c) of this section be followed.

(2) Minor modifications consist of:

(i) correcting typographical errors;

(ii) requiring more frequent monitoring or reporting;

(iii) changing ownership or operational control (see § 147.2926, Permit Transfers); or

(iv) changing quantities or types of injected fluids, provided:

(A) The facility can operate within conditions of permit;

(B) The facility classification would not change.

(c) *Modification procedures.*

(1) A draft permit shall be prepared with proposed modifications.

(2) The draft permit shall follow the general permitting procedures (i.e., public comment period, etc.) before a final decision is made.

(3) Only the changed conditions shall be addressed in the draft permit or public review.

§ 147.2928 Permit termination.

(a) Permits may be terminated for the following causes only:

(1) Noncompliance with any permit condition.

(2) Misrepresentation or failure to fully disclose any relevant facts.

(3) Determination that the permitted activity endangers human health or the environment.

(4) Interested person requests in writing that a permit be terminated and the Regional Administrator determines that request is valid.

(b) *Termination procedures.* (1) The Regional Administrator shall issue notice of intent to terminate (which is a type of draft permit).

(2) Notice of intent to terminate shall follow the general permitting procedures (i.e., public comment period, etc.) before a final decision is made.

§ 147.2929 Administrative permitting procedures.

(a) *Completeness review.* (1) The Regional Administrator shall review each permit application for completeness with the application requirements in § 147.2918. The review will be completed in 10 days, and the Regional Administrator shall notify the applicant whether or not the application is complete.

(2) If the application is incomplete, the Regional Administrator shall:

(i) List the additional information needed;

(ii) Specify a date by which the information must be submitted; and

(iii) Notify the applicant when the application is complete.

(3) After an application is determined complete, the Regional Administrator may request additional information to clarify previously submitted information. The application will still be considered complete.

(4) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions taken.

(b) *Draft permits.* (1) After an application is deemed complete, the Regional Administrator shall either prepare a draft permit or notice of intent to deny the permit (which is a type of draft permit). If the Regional Administrator later decides the tentative decision to deny was wrong, he shall withdraw the notice of intent to deny and prepare a draft permit.

(2) A draft permit shall contain at least the following information:

(i) the standard permit conditions in § 147.2925;

(ii) any monitoring and reporting requirements;

(iii) the construction and operation requirements; and

(iv) plugging and abandonment requirements.

(c) *Statement of basis.* (1) The Regional Administrator shall prepare a statement of basis for every draft permit.

(2) The statement of basis shall briefly describe the draft permit conditions and the reasons for them. In the case of a notice of intent to deny or terminate, the statement of basis shall give reasons to support the tentative decision.

(3) The statement of basis shall be sent to the applicant, and to any other person who requests a copy.

(d) *Public notice.* (1)(i) The Regional Administrator shall give public notice when:

(A) a permit application has been tentatively denied;

(B) a draft permit has been prepared;

(C) a hearing has been scheduled; or
 (D) an appeal has been granted.
 (ii) The applicant shall give public notice that he is submitting a permit application.
 (iii) Public notice is not required when a request for permit modification or termination is denied. However, written notice will be given to the permittee and the requester.
 (iv) Public notices may include more than one permit or action.
 (2)(i) Public notice of a draft permit (including notice of intent to deny) shall allow at least 15 days for public comment.
 (ii) Public notice of a hearing shall be given at least 30 days before the hearing.
 (3)(i) Public notice given by the Regional Administrator for the reasons listed in paragraph (d)(1)(i) of this section shall be mailed to the applicant, and published in a daily or weekly paper of general circulation in the affected area.
 (ii) Notice of application submission required by paragraph (d)(1)(ii) of this section shall be given to the surface landowner, tenants on the land where an injection well is located or is proposed to be located, and to each operator of a producing lease within one-half mile of the well location prior to submitting the application to the Regional Administrator.
 (4) The notice of application submission in paragraphs (d)(1)(ii) and (d)(3)(ii) of this section shall contain:
 (i) the applicant's name and address;
 (ii) the legal location of the injection well;
 (iii) nature of activity;
 (iv) a statement that EPA will be preparing a draft permit and that there will be an opportunity for public comment; and
 (v) the name and phone number of EPA contact person.
 (5) All other notices shall contain:
 (i) the name, address, and phone number of the Osage UIC office and contact person for additional information and copies of the draft permit;
 (ii) name and address of permit applicant or permittee;
 (iii) brief description of nature of activity;
 (iv) brief description of comment period and comment procedures;
 (v) location of the information available for public review; and
 (vi) in the case of a notice for a hearing the notice shall also include:
 (A) date, time, and location of hearing;
 (B) reference to date of previous notices of the same permit; and

(C) brief description of the purpose of the hearing, including rules and procedures.

(e) *Public comments.* (1) During the public comment period, any person may submit written comments on the draft permit, and may request a public hearing. A request for hearing shall be in writing and state the issues proposed to be raised in the hearing.

(2) The Regional Administrator shall consider all comments when making the final decision, and shall respond to comments after the decision is made. The response shall:

(i) specify if any changes were made from the draft permit to the final permit decision, and why;

(ii) briefly describe and respond to all significant comments on the draft permit made during the comment period, or hearing, if held; and

(iii) be made available to the public.

(f) *Public hearings.* (1) The Regional Administrator shall hold a public hearing whenever he finds a significant amount of public interest in a draft permit, based on the requests submitted, or at his discretion.

(2) Any person may submit oral or written statements and data concerning the draft permit. The public comment period shall be automatically extended to the close of any public hearing held, or may be extended by the hearing officer at the hearing.

(3) A tape recording or written transcript of the hearing shall be made available to the public.

(g) *Reopening of the comment period.*

(1) If any of the information submitted during the public comment period raises substantial new questions about a permit, the Regional Administrator may:

(i) prepare a new draft permit;
 (ii) prepare a revised statement of basis; or

(iii) reopen the comment period.

(2) Comments submitted during a reopened comment period shall be limited to the substantial new questions that caused its reopening.

(3) Public notice about any of the above actions shall be given and shall define the scope of the new questions raised.

(h) *Issuance and effective date of a permit.* (1) After the close of the comment period on a draft permit, the Regional Administrator shall make a final permit decision. The Regional Administrator shall notify the applicant and each person who commented or requested to receive notice. The notice shall include reference to the procedures for appealing a permit decision.

(2) A final permit decision shall become effective 30 days after giving notice of the decision unless:

(i) a later date is specified in the notice;

(ii) review is requested under § 147.2929(j); or

(iii) no comments requested a change in the draft permit, in which case the permit is effective immediately upon issuance.

(i) *Stays of contested permit conditions.* If a request for review of a final UIC permit § 147.2929(j) is granted, the effect of the contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action. If the permit involves a new injection well or project, the applicant shall be without a permit for the proposed well pending final agency action. Uncontested provisions which are not severable from those contested provisions shall be stayed with the contested provisions.

(j) *Appeal of permits.* (1) Any person who filed comments on the draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. Any person who failed to file comments or participate in the hearing may petition for administrative review only to the extent of the changes from the preliminary permit to the final permit decision.

(2) A person may request review of a final permit decision within 30 days after a final permit decision has been issued. The 30-day period within which a person may request review begins with the service of notice of the Regional Administrator's final permit decision unless a later date is specified in that notice.

(3) The petition requesting review shall include:

(i) A demonstration that the petition is eligible under the requirements of paragraph (j)(1) of this section; and, when appropriate,

(ii) A showing that the condition in question is based on:

(A) a finding of fact or conclusion of law that is clearly erroneous; or

(B) an exercise of discretion or important policy consideration which the Administrator, in his discretion, should review.

(4) The Administrator may also decide, on his initiative, to review any condition of any UIC permit issued under these requirements. The Administrator must act under this paragraph within 30 days of the date notice was given of the Regional Administrator's action.

(5) Within a reasonable time following the filing of the petition for review, the Administrator shall issue an order either granting or denying the request. To the

extent that review is denied, the conditions of the final permit decision become final agency action.

(6) Public notice shall be given by the Regional Administrator of any grant of a review petition by the Administrator. Notice shall be sent to the applicant, the person requesting the review, appropriate persons on the Osage County mailing list and to newspapers of general circulation in the county. Included in the notice shall be a briefing schedule for the appeal and a statement that any interested person may file an amicus brief. Notice of denial of the review petition will be sent only to the person(s) requesting the review.

(7) A petition to the Administrator, under paragraph (j)(1) and (j)(2) of this section is a prerequisite to the seeking of judicial review of the final agency action. For purposes of judicial review, final agency action occurs when a final UIC permit is issued or denied by the Regional Administrator and agency review procedures are exhausted. A final permit decision shall be issued by the Regional Administrator:

(i) When the Administrator issues notice to the parties involved that review has been denied;

(ii) When the Administrator issues a decision on the merits of the appeal and

the decision does not include a remand of the proceedings; or

(iii) Upon the completion of the remand proceedings if the proceedings are remanded, unless the Administrator's remand order specifically provides that the appeal of the remand decision will be required to exhaust the administrative remedies.

(The information collection requirements contained in paragraph (a)(3) were approved by the Office of Management and Budget under control number 2040-0042)

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**Thursday
November 15, 1984**

Part III

Federal Maritime Commission

46 CFR Part 572

**Agreements by Ocean Common Carriers
and Other Persons Subject to the
Shipping Act of 1984; Final Rule**

46 CFR Parts 538 and 580

**Publishing and Filing Tariffs by Common
Carriers in the Foreign Commerce of the
United States (Including Service
Contracts, Time/Volume Rates and
Loyalty Contracts); Final Rule**

46 CFR Part 585

**Regulations To Adjust or Meet
Conditions Unfavorable to Shipping in
the Foreign Commerce of the United
States; Final Rule**

46 CFR Part 587

**Actions To Address Conditions Unduly
Impairing Access of U.S. Flag Vessels to
Ocean Trade Between Foreign Ports;
Final Rule**

FEDERAL MARITIME COMMISSION

46 CFR Part 572

[Docket Nos. 84-26 and 84-32]

Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: This Final Rule revises and supersedes the Interim Rule on agreements which implemented those provisions of the Shipping Act of 1984 governing agreements by or among ocean common carriers as well as certain marine terminal operator agreements. This Rule modified by addition, deletion, and revision the Interim Rule in the areas of definitions, exclusions and exemptions, agreement format, reporting and record keeping and the information requirements of the Information Form. In addition the transitional rules regarding mandatory provisions in agreements are deleted in their entirety. The Rule also makes various editorial, technical, and clarifying changes in the Interim Rule. As of this publication, all of the Commission's interim regulations to implement the 1984 Act are finalized.

DATE: This Rule is effective on December 15, 1984.

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SUPPLEMENTARY INFORMATION:

I. Background

The Shipping Act of 1984, Pub. L. 98-237, 98 Stat. 67, 46 U.S.C. app. 1701-1720 (the Act or the 1984 Act) was signed into law on March 20, 1984 with an effective date of June 18, 1984. The 1984 Act superseded the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. 801 *et seq.*) with respect to the regulation of agreements by or among ocean common carriers, and certain other subject persons, in the foreign oceanborn commerce of the United States. The Act makes significant

changes with regard to the kinds of agreements that are within its scope, the mandatory content of certain kinds of agreements, the procedures for filing, processing, and reviewing agreements, and the parameters of the antitrust immunity which it confers on agreements. Other areas of significant change include new statutory definitions, and a somewhat modified exemption authority. The Act authorizes the requiring of periodical or special reports as well as the filing of conference minutes and provides for penalties for infringement of its provisions.

The Act and its legislative history set forth certain policies to guide regulation under the new statutory scheme. One fundamental purpose of the Act is to establish a nondiscriminatory regulatory process with a minimum of government intervention and regulatory costs. Another is to provide an efficient and economic ocean transportation system in harmony with international shipping practices. To these ends, agreements are to be reviewed and processed within a fixed period of time and generally will become effective after a short waiting period. Only those pending agreements which raise concern under the general standard or the conduct prohibited by section 10 of the Act are to be subjected to injunctive challenge in federal court where the Commission has the burden of proof. The Act thereby places greater emphasis on the subsequent monitoring of an agreement after it has become effective in order to ensure that agreement operations are conducted consistent with the requirements of the Act.

On May 29, 1984, pursuant to section 17(b) of the Act (46 U.S.C. app. 1716(b)) which authorizes the Commission to prescribe interim rules without adhering to the usual notice and comment procedures under the Administrative Procedure Act (5 U.S.C. 553), the Commission published an Interim Rule implementing those provisions of the Act which govern agreements. *Rules Governing Agreements By Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984*, Docket No. 84-26 (49 FR 22296-22318). Interested persons were given 90 days to comment on the Interim Rule. In addition, interested persons were afforded an opportunity to submit emergency comments addressing any matters which might warrant modification prior to the June 18, 1984 effective date. A number of emergency comments were received and on June 14, 1984, the Commission published

amendments to the Interim Rule (49 FR 24697).¹

Subsequently, during the comment period, the Commission received petitions from a number of conferences to suspend certain record keeping and reporting requirements in Subpart G. On September 17, 1984 the Commission published a further amendment to the Interim Rule which deferred the implementation of certain of those requirements pending the issuance of a Final Rule (49 FR 36371).

Thirty-nine filings were received in Docket No. 84-26: 14 emergency comments filed prior to June 18, 1984; 23 final comments either timely filed or filed shortly after the deadline and granted an extension of time for filing;² and two petitions seeking relief from certain requirements of Subpart G. Because of the extensive number of parties that participated in this proceeding, comments are identified by number in the following discussion. A list of comments filed in Docket No. 84-26 is provided in the conclusion to the Supplementary Information.

On September 17, 1984, again pursuant to the section 17(b) rulemaking authority, the Commission published a third amendment to the Interim Rule. *Amendments to Rules Governing Agreements by Ocean Common Carriers and Other Persons*, Docket No. 84-32 (49 FR 36371). This amendment added a new § 572.103(g) to state Commission policy regarding the completeness and definiteness with which agreement authority must be described, and a new § 572.406 to establish guidelines regarding open-ended authority and interstitial authority. Interested persons were given 30 days to comment on this amendment. Ten timely comments were received in Docket No. 84-32. These comments are also listed in the conclusion to the Supplementary Information.

Many of the concerns raised in the emergency comments and in the Subpart G petitions filed in Docket No. 84-26 have been addressed through changes in the mandatory provisions of Subpart H and through the temporary suspension of certain requirements in Subpart G.

¹ The Office of Management and Budget (OMB) clearance number was also published in the *Federal Register* on June 14, 1984 (49 FR 24521).

² Several persons sought to file late comments in Docket No. 84-26 well after the close of the comment period and these requests were denied. For the most part these comments are either repetitions of points already raised in other comments or are rendered moot by the Commission's action regarding Subpart H. For a discussion of the reasons for rejecting these late filed comments see the Commission's Order of Denial in Docket No. 84-26 dated October 17, 1984.

Matters raised in the emergency comments and the petitions which were not addressed in the June amendments or the September Order have been considered in connection with the issuance of the Final Rule. Thus, all timely comments received in Docket Nos. 84-26 and 84-32 have been reviewed and considered. The Supplementary Information discusses significant matters raised in the comments. Any comments not expressly mentioned herein, have either been incorporated as a technical change without discussion or have been found to be without merit or irrelevant.

In the discussion which follows, the term Interim Rule (designated Part 572) refers to the rules issued in Docket No. 84-26, as subsequently amended and suspended, and the amendment to Part 572 issued in Docket No. 84-32. The rule which is now published is referred to as the Final Rule.

II. Discussion of Comments on Part 572 and Appendix A

A number of technical changes have been made throughout Part 572 and Appendix A. Some changes were prompted by comments and others are clarifying or technical changes made to improve this part. One change made throughout has been the substitution of the phrase "this part" for phrases such as "this rule" or "these rules".

Subpart A—General Provisions

Subpart A contains provisions which are of general applicability to Part 572. Specific sections state the authorities, purpose and policies of Part 572 and define certain terms.

Section 572.101 Authority.

Section 572.101 states the statutory authorities for Part 572. No comments were received on this section and no substantive changes have been made to it in the Final Rule.

Section 572.102 Purpose.

Section 572.102 states the purpose of Part 572, namely to implement those provisions of the Act which govern agreements among ocean common carriers and other subject entities. Comment 38 states that the words "other entities" should be changed to "marine terminal operators" because such operators are the only entities other than ocean common carriers which are required to file agreements under the Act. This point is well taken. Therefore, as a clarification, § 572.102 is amended to recite the language of section 4 of the Act which states that the Act applies to agreements by or among ocean common carriers and to

agreements among marine terminal operators and among one or more ocean common carriers. Marine terminal operator agreements subject to Part 572 must have a nexus with foreign commerce.

Section 572.103 Policies.

Section 572.103 sets forth the general policies to be followed in administering the regulatory regime established by Part 572.

Section 572.103(b)—Section 572.103(b) states that in reviewing agreements under the general standard only that information which is relevant and necessary to a section 6(g) review shall accompany particular types of agreements. Comment 22 takes issue with § 572.103(b) specifically and § 572.103 generally to the extent that they establish a basis for requiring the Information Form with certain agreement filings. The basis for the Information Form requirement is discussed below in connection with the comments to Subpart D, Subpart F and Appendix A. As indicated below, some adjustments have been made in the Information Form in response to comments. However, the basic requirement of a Form is being retained. Therefore, there is no need to modify the statement of policies with regard to informational needs.

Section 572.103(f)—Section 572.103(f) states Commission policy regarding the need for and means of achieving compliance with the Act's requirement that mandatory provisions be included in certain kinds of agreements. Comment 22 urges that conferences continue to be allowed to draft their own mandatory provisions. As indicated below in the discussion of Subpart H, the purpose of requiring adoption of the model mandatory provisions in Subpart H has been achieved, and Subpart H is deleted from the Final Rule. Appropriate changes have been made in the statement of policy in paragraph (f) to indicate that parties to conference agreements may develop their own mandatory provisions.

Section 572.103(g)—Section 572.103(g) together with § 572.406, were added in Docket No. 84-32 as new sections of Part 572. Section 572.103(g) states Commission policy that agreement must be clear and definite, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will operate.

Although Comment 102 expresses strong support for inclusion of § 572.103(g), a number of other comments suggest that it is vague,

unnecessary, or inappropriate and should be deleted or modified. The necessity of such a policy statement was not apparent at the time the Interim Rule was issued. The principles set forth in the policy statement were well settled under the administration of the 1916 Act and nothing in the 1984 Act or its legislative history indicated any departure from those established principles. However, the early experience in the administration of the 1984 Act provided a number of significant instances in which filed agreements contained unacceptably vague, incomplete or indefinite statements of authority. It was this experience that prompted the addition of § 572.103(g) and § 572.406 to Part 572.

This statement of policy merely represents a codification of existing policy. As a point of clarification, it should be noted that it is not the intent of this section to provide a basis for imposing detailed limits on every agreement. Its purpose is to ensure that a complete agreement is filed in sufficient detail to conduct a meaningful review. However, no change in the language of § 572.103(g) is necessary and it is retained in the Final Rule. The other issues raised by the comments are addressed below in the discussion of § 572.406.

Section 572.104 Definitions.

Section 572.104 lists definitions used in Part 572. Changes have been made in response to comments to state more precisely particular definitions.

Section 572.104(a)—Agreement.

Section 572.104(a) recites the definition of agreement. This definition is amended to include "cancellation", thereby conforming the definition to the statute.

Section 572.104(b)—Antitrust Laws.

Section 572.104(b) recites the definition of "antitrust laws" found in section 3(2) of the Act. Comment 38 states that this definition is used only once in the Interim Rule and should be eliminated, or, in the alternative, rephrased to provide the United States Code citations of the referenced statutes. This definition was included to improve the efficiency of Part 572 as a complete document and for that reason it shall be retained. The definition, however, has been modified to use the United States Code citations in order to make the definitions more functional.

Section 572.104(c)—Appendix. Section 572.104(c) defines the additional material which is appended to, and constitutes a part of, an agreement as an "appendix". Comment 22 suggests that the definition is so narrow as to preclude the use of an appendix to

publish provisions, such as self-policing rules, which have routinely been published in an appendix. Comment 39 suggests that the definition, in conjunction with other sections of Part 572, would impose the full 45-day waiting period on "appendices" contents.

The use of an appendix is explained at § 572.402(f), which governs the contents of such an appendix. Section 572.402(f) is amended to permit an expansion of the use of an appendix. The "appendix" publication is not mandatory, nor is there any prohibition against the "appendix" publication of other agreement provisions whose physical location is an agreement is not otherwise specified in this part. The period of review conducted for such filings depends upon the substantive content of the "appendix" and not its form. Parties are not precluded from routine use of appendices, unless the particular provision is one whose placement is required elsewhere in the agreement pursuant to §§ 572.402, 572.501, and 572.502. The Interim Rule definition fulfills these objectives and is retained.

Section 572.104(e)—Common Carrier. Section 572.104(e) recites the definition of the term "common carrier" which is set forth in section 3(6) of the Act. The statutory definition is stated conjunctively rather than disjunctively and requires both the assumption of responsibility for transportation and the utilization of a vessel. Comment 2 suggests that the word "and" be deleted from paragraph (e)(1) and replaced with the word "or". Because this suggested change would substantively alter the statutory definition of a common carrier, the change is not appropriate. The Final Rule therefore continues to recite the statutory definition.

Section 572.104(f)—Conference Agreement. Section 572.104(f) defines a "conference agreement" as one which provides for the collective fixing of rates, an administrative structure, and the filing of a common tariff, unless other features of the arrangement bring it within the definition of a consortium, joint service, pooling, sailing or transshipment agreement. Comment 22 suggests that the "central organization" element of this definition does not clearly encompass simple administrative structures. Comment 28 also suggests that the minimal administrative structure of agreements previously designated "rate agreements" is not clearly embraced by the definition. This definition is intended to include rate agreements. The Interim Rule definition shall therefore be revised

to remove any implication that only a large, complex administrative structure would bring a ratemaking agreement within the scope of this definition.

Section 572.104(g)—Consultation. Section 572.104(g) defines "consultation" as the process of conferring between carriers and shippers for the purposes of resolving commercial disputes or reducing malpractices. Comment 39 suggests that the definition's "resolving commercial disputes" language potentially oversteps the "promote . . . commercial resolution" language of the Act and could be interpreted to impose a requirement of binding arbitration.

In response to this suggestion, the definition in the Final Rule shall be clarified to state that "consultation" means a process whereby a conference and a shipper confer for the purpose of promoting the commercial resolution of disputes and/or the prevention and elimination of the occurrence of malpractices.

Section 572.104(i)—Effective Agreement. Section 572.104(i) defines an "effective agreement" as one approved pursuant to section 15 of the 1916 Act or one permitted to become effective pursuant to sections 5 and 6 of the 1984 Act. Comment 38 states that the term is not used in Part 572 and should be deleted. Comment 24 contends that the definition does not encompass agreements which are exempted under either the 1984 Act or the 1916 Act.

The term "effective agreement" is used in the definition of "modification" in section 572.104(r), which in turn supports sections 572.402 and 572.403. Definition of the term is retained, but its scope is expanded to include an agreement previously approved pursuant to section 15 of the 1916 Act or effective pursuant to an exemption under the 1916 Act, or filed and effective pursuant to sections 5 and 6 of the 1984 Act or exempt pursuant to section 16 of the 1984 Act.

Section 572.104(m)—Interconference Agreement. Section 572.104(m) defines an "interconference agreement" as one between conferences serving different trades. Comments 22 and 28 contend that the definition is unnecessarily restricted by the "different trades" condition. These Comments have merit. Because there is no prohibition against an agreement between two conferences in the same trade, such an agreement should be included in the definition of "interconference agreements" and made subject to the requirements placed on such agreements by the Act and Part 572. The Final Rule therefore simply defines "interconference agreement" to

mean an agreement between conferences.

Section 572.104(n)—Joint Service/Consortium Agreement. Section 572.104(n) defines a "joint service" or "consortium" agreement as a price fixing arrangement between ocean common carriers wherein the parties operate generally as a single carrier, under a single operating name and a common operating management.

Comment 27 suggests that the definition is too narrow and fails to contemplate a situation where a joint service holds out service only through its participation in a conference and does not independently fix its own rates or publish its own tariff. Comment 22 also contends that a joint service does not always include all of the attributes prescribed by the Interim Rule definition.

The 1984 Act refers to joint service/consortia but does not define these terms. In the interest of providing the industry some guidance in this area, we have developed a definition as consistent as possible with prior convention. We believe that agreements which engage in, or have the authority or potential to engage in, the activities described in this definition are properly treated as a single type of agreement and denominated a "joint service" or "consortium" agreement for the purposes of the Act and Part 572. We agree, however, that the joint service definition should be amended to include those agreements in which the parties choose to exercise their rate fixing and tariff authorities through participation, as a single entity, in a conference or other duly authorized agreement. Accordingly, § 572.104(n) (2) and (3) are revised to read: "(2) independently fixes its own rates, charges, practices and conditions of service or chooses to participate in its operating name in another agreement which is duly authorized to determine and implement such activities; (3) independently publishes its own tariff or chooses to participate in its operating name in an otherwise established tariff."

Section 572.104(o)—Marine Terminal Facilities. Section 572.104(o) defines the term "marine terminal facilities" to include off-dock container freight stations at inland locations. Comment 38 urges the deletion of this definition because the term does not otherwise appear in Part 572.

This term supports the definition of a marine terminal operator in § 572.104(p). It is appropriate, therefore, to define the facilities utilized by marine terminal operators in order to resolve uncertainties as to the Commission's

jurisdiction over agreements governing the use or operation of such facilities. As indicated in some of the other comments, there appears to be some confusion concerning the facilities that are provided by the "marine terminal operator" defined in section 3 of the 1984 Act.

Comments 20 and 34 state that Commission jurisdiction is improperly expanded by defining the term "marine terminal facility" to include off-dock container freight stations at inland locations or other similar facilities from which cargo is tendered to a consignee or received from shippers for vessel or container loading. These Comments suggest that Congress intended the reach of the 1984 Act to be no greater than that of the 1916 Act with respect to marine terminals. Comment 22 argues that the definition would subject importers and exporters to Commission regulation as marine terminal operators and enable them to obtain antitrust immunity under the 1984 Act.

Off-dock container freight stations are properly included within the term "marine terminal facilities." Both the 1984 Act and the 1916 Act refer to terminal operators as persons "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." As Comment 20 acknowledges, this phrase has been construed under the provisions of the 1916 Act in *Richmond Transfer and Storage Company*, 20 S.R.R. 599, 20 S.R.R. 177 (1980), to include marine terminal facilities not located on the dock at the water's edge. There is nothing in the 1984 Act or its legislative history to indicate that Congress intended the Commission to now construe marine terminal facilities so as to exclude off-dock container freight stations. Accordingly, the Commission will not, as urged by some comments, delete off-dock container freight stations from the marine terminal facility definition in § 572.104(o).

Comment 28 is concerned that agreements for "pure labor services," such as stevedoring contracts, may be made subject to the filing requirements of the 1984 Act because the phrase "and services connected therewith" is used in defining "marine terminal facilities" in § 572.104(o). Comment 28 misconstrues this definition. The "Supplementary Information" to the Interim Rule indicated that neither the term "marine terminal facility", nor the term "marine terminal operator", would operate to extend Commission jurisdiction over stevedoring or "pure labor services". The phrase "and services connected therewith" is intended to refer to those

labor services that are incidental to terminal operators, such as free time, checking, or handling. Accordingly, the suggestion that the above-referenced phrase be deleted has not been adopted.

Section 572.104(p)—Marine Terminal Operator. Section 572.104(p), which tracks the language of the 1984 Act, defines a "marine terminal operator" as a person:

... engaged ... in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. (Emphasis added).³

This definition shall be modified to make clear that shippers, or consignees, as well as their facilities, are not made subject to Part 572 and the Commission's jurisdiction merely because the shippers' or consignees' facilities are used to tender or received proprietary cargo. Shippers or consignees, who for their own or the carrier's convenience, tender or receive proprietary cargo at their owned or leased facilities are not engaged in the business of furnishing terminal facilities in connection with a common carrier by water. Such shippers or consignees provide facilities to common carriers only as an incidental element of their primary business concern. Such consignees and shippers do not meet the statutory definition of a marine terminal operator and are not subject to Part 572 and the agreement provisions of the 1984 Act. Accordingly, § 572.104(p) is amended by adding a statement that the term "marine terminal operator" does not include shippers or consignees who exclusively furnish marine terminal facilities or services in connection with the tendering or receiving of proprietary cargo from a common carrier by water.

Section 572.104(r)—Modification. Section 572.104(r) defines those changes which are interpreted to be "modifications" to agreements and therefore subject to sections of Part 572 dealing with "modifications". Comment 22 contends that "cancellations" are not properly includable in the definition.

³ There is a subtle but possible significant difference between the 1984 Act's definition of marine terminal operator and the 1916 Act's definition of a terminal operator as an "other person". Section 1 of the 1916 Act defines the term "other person" as "any person . . . carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with the common carrier". The term "carrying on the business of forwarding" is defined separately in the 1916 Act. Although the Commission has previously referred to terminal operators as persons carrying on the business of furnishing wharfage dockage etc., the phrase "carry on the business of" does not clearly modify the language "furnishing wharfage, dockage, etc." The 1984 Act, on the other hand, unequivocally requires marine terminal operators to be "engaged in the business of furnishing wharfage, dockage, etc."

The Act at section 3(1) suggests a distinction between "modification" and "cancellation." Section 572.104(r) is therefore amended to delete the reference to "cancellations".

Section 572.104(s)—Non-Vessel-Operating Common Carrier. Section 572.104(s) defines a common carrier which does not operate the vessels by which the ocean transportation is provided as a "non-vessel-operating common carrier" (NVOCC) and establishes its relationship to the underlying "ocean common carrier" as that of a "shipper". Comment 39 suggests that this definition be modified to expressly state that an NVOCC is a "common carrier" in its relationship with the underlying shipper. The Interim Rule definition, however, recites the statutory definition and shall be retained in the Final Rule.

Section 572.104(x)—Port. Section 572.104(x) defines the term "port" as the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation movement. Comment 23 suggests certain revisions to the definition of "port" as well as to the instructions to Part V(A) of the Information Form. Comment 23 objects that the way in which the term "port call" is used in the Form is overly broad and imposes an enormous data collection burden. Certain revisions have been made to the Information Form which should resolve this concern. Therefore, there is no need to change the definition of "port" in § 572.104(x).

Section 572.104(z)—Service Contract. Section 572.104(z) defines the term "service contract" as used in Part 572. This definition recites the definition set forth in the Act and makes no express reference to service contracts with shippers' associations. Comment 39 states that this definition would be improved by expressly recognizing the authority of conferences to enter into service contracts with shippers' associations. Comment 39 states that this change would better reflect the intent of the Act and its legislative history. This suggestion has merit and the definition shall be amended as suggested.

Section 572.104(aa)—Shipper. Section 572.104(aa) tracks section 3(23) of the Act and defines the term shipper as an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is made. Comment 28 suggests clarification of the definition by the inclusion of the word "other" after the words "owner or". Comment 33 suggests

the addition of a statement that the term "shipper" also includes "shippers associations". The first suggestion is adopted. This revision should also accommodate the other suggestion that the term "shipper" be expanded to include shippers' association.

Section 572.104(bb)—Shippers' Association. Section 572.104(bb) recites the statutory definition of a shippers' association. Comment 33 states that this definition should make clear that shippers' associations are included within the meaning of the term "shipper" wherever that term is used in Part 572. In view of the change made in the term "shipper", no change in this definition is deemed necessary. The question of whether a shippers' association should be composed only of persons who are the beneficial owners of cargo, as noted in Comment 22, is the subject of a pending petition and is not addressed here.

Section 572.104(cc)—Shippers' Requests and Complaints. Section 572.104(cc) describes the shipper/conference communications which constitute "shippers' requests and complaints" and which are subject to Part 572. Comment 39 suggests that the definition be limited to written communications and exclude misrating claims.

Limiting shippers' requests and complaints in written communications and excluding complaints pertaining to misratings is unduly restrictive and unwarranted. The matter of written versus oral communications is a procedural matter better dealt with in the context of the conference's rules regarding shippers' requests and complaints. Moreover, there appears to be no reason for excluding misratings as a subject matter for shippers' requests and complaints. The handling of misratings is a matter commonly dealt with in tariff publications and as such should not be excluded. Given the nature of misratings, and as long as the conference tariff provides an efficient and fair mechanism for their resolution, it is doubtful that such matters would come to the conference as a shippers' request or complaint. However, if the tariff fails to provide an appropriate remedy, then the tariff itself is open to criticism and is a valid subject for a request or complaint.

It is also suggested that § 572.104(cc) be expanded to include communications involving service contracts. This suggestion has merit and § 572.104(cc) has, therefore, been revised to provide that "shippers' requests and complaints" includes a communication from a shipper to a conference "requesting to enter into a service contract."

Section 572.104(dd)—Space Charter Agreement. Section 572.104(dd) defines that combination of inter-carrier activities which constitutes a "space charter agreement." Comment 28 suggests that there is a possible overlap between the "space charter" and "transshipment" agreement definitions and suggests that the definition of a space charter agreement expressly exclude transshipment agreements.

There is indeed some overlap between the two definitions. This occurs because a transshipment agreement is a type of space charter. To specifically exclude them from the definition of space charter would confuse this relationship. The suggestion therefore is not adopted.

Section 572.104(ff)—Transshipment Agreement. Section 572.104(ff) defines that combination of inter-carrier activities and authorities which are classified as "transshipment agreements." Apart from the previously discussed comment relative to the overlap between "space charter" and "transshipment agreements", Comment 38 contends that the "transshipment agreement" definition is unused in Part 572 and should be deleted. The term "transshipment agreement" is used as an exclusion in defining conference agreements in § 572.104(f) (an exclusion cited in section 3(7) of the Act). The term is also used and components of its definition are repeated in the exemption for "non-exclusive transshipment agreements". The definition therefore will be retained.

Subpart B—Scope

The purpose of Subpart B is to set forth those agreements which are subject to Part 572 and to specifically list certain kinds of agreements to which the rules of Part 572 do not apply. In response to certain comments and in order to state the distinction between subject and non-subject agreements more clearly, Subpart B is being reorganized as two sections. Section 572.201 of the Final Rule encompasses the agreements which were set forth in §§ 572.201 and 572.202 of the Interim Rule and is retitled "Subject Agreements." Section 572.202 of the Final Rule includes those agreements which were set forth in §§ 572.203 through 572.208 of the Interim Rule and is retitled "Non-subject agreements".

Comment 38 proposes that Subpart B be expanded to include "agreements related to transportation to be performed within or between foreign countries." Comment 22, on the other hand, urges that this same category of agreements be added as an exclusion in Subpart C.

Section 5(a) of the Act expressly provides that foreign transportation agreements are not required to be filed with the Commission. Because these agreements are not subject to filing, Subpart B is being modified to include them as agreements which are not subject to Part 572. Because of this addition of the broad class of foreign transportation agreements in Subpart B, the inclusion of foreign inland agreements or foreign marine terminal agreements in Subpart C has been eliminated from the Final Rule. Foreign transportation agreements are not subject to Part 572.

Comment 22 argues that transshipment agreements fall within the class of foreign transportation agreements specified in section 5(a) of the Act and should be excluded from filing. The Comment objects to continued regulation of transshipment agreements whether exclusive or non-exclusive. To the extent that these agreements are not subject to this part under section 572.202(c) or fall within the exemption of section 572.306, they need not be filed. Other types of transshipment agreements, however, are subject to filing requirements.

Section 572.201 (redesignated § 572.201(a)) Agreements by or Among Ocean Common Carriers.

Section 572.201 recites the listing of agreements in section 4(a) of the Act. No substantive changes have been made to this section in the Final Rule.

Section 572.202 (redesignated § 572.201(b)) Marine Terminal Operator Agreements Involving Foreign Commerce.

This section is based on section 4(b) of the Act. In conjunction with § 572.202(e) it clarifies and implements the distinction under the Act between marine terminal operator agreements which involve foreign commerce and those which are exclusively in interstate commerce. The suggestion in Comment 20 that further clarification of the status and treatment of marine terminal operator agreements is necessary has been addressed above in discussing the definitions of "marine terminal facility" and "marine terminal operator".

Section 572.203 (redesignated § 572.202(e)) Marine Terminal Operator Agreements Exclusively in Interstate Commerce.

This section states that a marine terminal operator agreement exclusively in interstate commerce is not subject to Part 572. Comment 38 suggests that this section is superfluous and recommends

that it be deleted. Inasmuch as this section, together with § 572.201(b), distinguishes those exclusively domestic marine terminal operator agreements which are outside the scope of Part 572 from those terminal agreements involving foreign commerce, this section serves a useful purpose and shall be retained. Certain technical changes suggested by Comment 38, however, have been adopted.

Comment 21 expresses concern about inadvertent antitrust exposure and would prefer a procedure whereby parties could obtain antitrust immunity under both the 1984 and 1916 Shipping Acts. Parties that have such concern may file an agreement under both the 1984 and 1916 Shipping Acts and seek to obtain antitrust immunity under both Acts.

Section 572.204 (redesignated § 572.202(d)) Common Carrier Marine Terminal Agreements.

This section provides that Part 572 does not apply to common carrier terminal agreements. Comment 38 suggests that the word "marine" should be added before the word "terminal". This change would bring the language of this section into conformity with section 7(b)(3) of the Act and therefore it is adopted.

Section 572.205 (redesignated § 572.202(f)) Non-Vessel-Operating Common Carrier Agreements.

This section states that agreements solely and exclusively between non-vessel-operating common carriers are not subject to Part 572. Comment 38 states that this section is superfluous and should be deleted. The purpose of this section is to provide guidance with regard to agreements between or among NVOCC's. Such agreements were subject to the 1916 Act but are not within the Commission's jurisdiction under sections 4 and 5 of the 1984 Act. An express statement that these agreements are not subject to Part 572 is therefore appropriate and will be retained in the Final Rule.

Two technical changes shall be made in this section. Comment 38 believes that the use of the word "by" in this section might be read to exclude a three-party space-charter and sailing agreement between one NVOCC and two ocean common carriers. To avoid this unintended interpretation, the word "by" has been deleted from the Final Rule. In addition, the phrase "solely and exclusively" is added in order to further clarify the status of agreements among NVOCC's under the Act.

Section 572.206 (redesignated § 572.202(g)) Ocean Freight Forwarder Agreements.

This section states that ocean freight forwarder agreements are not subject to Part 572. Comment 38 argues that this section is superfluous and should be deleted. Again there would appear to be a useful purpose served by retaining this section in order to provide guidance on those maritime industry agreements which were subject to the 1916 Act but not subject to sections 4 and 5 of the 1984 Act. The technical change suggested in Comment 38 would improve this section and the words "by or" are deleted. In addition, the phrase "solely and exclusively" is added to further clarify this section.

Section 572.207 (redesignated § 572.202(b)) Maritime Labor Agreements.

This section is a restatement of section 5(e) of the Act. No comments were received on this section and no substantive changes have been made to it in the Final Rule.

Section 572.208 (redesignated § 572.202(a)) Acquisitions.

This section is a restatement of section 4(c) of the Act. No comments were received on this section and no substantive changes have been made to it in the Final Rule.

Subpart C—Exemptions

Subpart C treats those agreements which have been exempted from filing or other requirements by the Commission pursuant to section 16 of the Act. In response to certain comments, Subpart C has been reorganized to deal solely with Commission ordered exemptions. The statutory exclusions formerly listed in this subpart have been relocated in Subpart B, as discussed above. Section 572.301 sets forth the procedures applicable to exemptions. Thereafter, each separate exemption is listed in a separate section. This arrangement will facilitate the orderly addition of any new exemptions to this subpart.

Section 572.301 Exemption Procedures.

Section 572.301 sets forth procedures for exempting agreements subject to the Act from any requirement of the Act.

Section 572.301(a)—Authority. Section 572.301(a) concludes with the statement that: "The antitrust laws do not apply to any agreement exempted from any requirement of the Act, including filing and Information Form requirements." Comment 38 states that this sentence should be deleted because the

Commission does not have jurisdiction over the antitrust laws. This language was suggested by section 7 of the Act which states that the antitrust laws do not apply to certain agreements. Its purpose was merely to indicate, as provided in the Act, that agreements exempt pursuant to section 16 enjoy antitrust immunity. It was not the intention of this statement to assert or imply Commission jurisdiction over the antitrust laws. In order to eliminate any confusion, this sentence shall be deleted. Deletion, of course, does not in any way affect whatever antitrust immunity attaches to exempt agreements.

Section 572.301(c)—Application for Exemption. Comment 38 suggests that in the first sentence of § 572.301(c) the words "or revocation" should be changed to read "or revocation of an exemption." This suggested change clarifies this section and is adopted.

Section 572.301(f)—Retention of Agreement by Parties. Section 572.301(f) requires that any agreement which has been exempted pursuant to section 16 of the Act shall be retained by the parties and be made available upon request for inspection during the term of the agreement and for a period of three years its termination.

Comments 22 and 38 object to the requirement that copies of exempt agreements be retained for a three-year period. These Comments do not question the Commission's authority to require retention of agreements but argue that the Commission should not, as a matter of policy, impose an across-the-board requirement for agreements with a *de minimis* impact.

This record keeping requirement is necessary to ensure that the Commission is able to carry out its trade monitoring responsibilities under the Act. Should a question of violation of the Act arise, the exempt agreement must be available for review. Moreover, a three-year period does not appear to be unreasonable. Finally, it does not appear to be a significant burden for parties to retain a copy of an agreement for a period of three years after its expiration. The record retention requirement, therefore, shall be retained as to exempt agreements.

Section 572.302 Foreign Inland Transportation Agreements—Exclusion.

This section in the Interim Rule stated an exclusion from filing for foreign inland transportation agreements. Comment 38 states that such agreements are not statutorily excluded from filing but should nevertheless be exempt from filing pursuant to section 16 of the Act.

Section 5(a) of the Act excludes from filing "agreements related to transportation to be performed within or between foreign countries." The Commission interprets this broad class of agreement to include foreign inland transportation agreements. Because of the inclusion of foreign transportation agreements in Subpart B there is no longer any need to retain this section and it is deleted from the Final Rule.

Section 572.303 Foreign Marine Terminal Agreements—Exclusion.

Section 572.303 in the Interim Rule states statutory exclusion from filing for foreign marine terminal agreements. Comment 38 states that these agreements should be treated as exemptions rather than as exclusions. Foreign marine terminal agreements, however, are also a specific type of the foreign transportation agreement referred to in section 5(a) of the Act. They are, therefore, included within the scope of section 572.202(c) in the Final Rule and are deleted from Subpart C.

Section 572.304 (redesignated § 572.302) Non-Substantive Modifications to Existing Agreements—Exemption.

This section is based on the exemption which formerly appeared at 46 CFR 524.3(d). The former exemption covered three specific kinds of agreements or modifications:

- (1) Technical changes to the text of the agreement itself;
 - (2) Changes in titles of persons or committees; and
 - (3) Agreements and changes affecting office facilities, furnishings, supplies and other housekeeping matters. The exemption in the Interim Rule narrowed the former exemption by eliminating the first two types of changes.
- Comments 22, 24, 26, 38 and 39 urge that the full scope of the former exemption be restored in the Final Rule. The reason for restricting the former exemption was to ensure that certain changes to the text of the agreement or in the personnel of the agreement administration would be filed so that the agreement on file with the Commission would accurately reflect the actual agreement currently in effect among the parties.

These Comments have merit and the full scope of the former exemption is restored. The purposes to be achieved by limiting the exemption can still be achieved if all such non-substantive agreements or modifications are filed with the Commission for informational purposes. Finally, this section is amended, as suggested by Comment 26, to allow parties to seek a determination from the Director, Bureau of Agreements

and Trade Monitoring as to whether a particular agreement or modification in non-substantive.

Section 572.303 (redesignated § 572.304) Husbanding Agreements—Exemption.

This section in the Interim Rule clarified and continued the exemption of husbanding agreements. No comments were received on this section, and no substantive changes have been made to this section in the Final Rule.

Section 572.304 (redesignated § 572.305) Agency Agreements—Exemptions.

This section in the Interim Rule clarified and continued the exemption for agency agreements pursuant to section 16 of the 1984 Act. Comment 19 states that a blanket exemption for agency agreements is not appropriate. This comment, filed by the Port of Los Angeles, notes that in Docket No. 83-48, *Alaska Maritime Agencies, Inc., et al. v. Port of Anacortes, et al.*, agents took the position that they should not be responsible for certain charges where they act for disclosed principals. The Port, however, states that it is not always clear for whom an agent is working or whether the agent is authorized to make certain representations. The Port, therefore, seeks some modification of the exemption to address the alleged need of marine terminal operators to know the scope of the authority of the parties with whom they are dealing.

Subsequent to the filing of Comment 19, a settlement was reached and approved by the Presiding Officer in Docket No. 83-48 which may address the Port's concern. See *Alaska Maritime Agencies Inc., et al. v. Port of Anacortes, et al.*, Initial Decision and Order Approving Settlement, administratively final October 15, 1984. In addition, § 572.301(f) requires that exempt agreements be retained for a period of three years. Should any problems develop, an affected party could bring them to the Commission's attention. Finally, ports or other parties may seek modification or revocation of this exemption at any time in a separate proceeding under the procedures of this subpart. Such modification, if warranted, would then be based upon a proper factual record. Neither substantive modification nor revocation, however, would appear to be warranted at this time.

Section 572.306(a) (redesignated § 572.304(a)).

Comment 22 believes that the comma following "an agent" where it first appears in this section might imply that the agent is subject to the Act rather

than merely state the type of agent whose agreement is subject to the Act. In order to remove any implication that all agents are subject to the Act, the recommended change shall be made and the comma shall be deleted.

Section 572.306(b) (redesignated § 572.304(b)).

Comment 22 also believes that a change is necessary in paragraph (b)(2). This Comment suggests that the words "do not" may have been omitted from paragraph (b)(2) and therefore suggests that the paragraph be revised to read "except those . . . (2) which do not permit an agent to enter into similar agreements with more than one carrier in the trade. . . ." There was no omission in the Interim Rule. The language in the Interim Rule carried over the exemption as it was formerly stated in 46 CFR 520.12(b). The former exemption did not apply to agency agreements which permit an agent to enter into similar agreements with more than one carrier in the trade. Because of the potential competitive significance of such agreements an exemption from filing would not be appropriate. This suggestion therefore has not been adopted.

Section 572.307 (redesignated § 572.305) Equipment Interchange Agreements—Exemption.

Section 572.307 in the Interim Rule clarified and continued the exemption for equipment interchange agreements. No comments were received on this section, and no substantive changes have been made to it in the Final Rule.

Section 572.308 Joint Policing Agreements—Exemption.

Section 572.308 continued the 1916 Act exemption for joint policing agreements only for the period of the Interim Rule. This exemption terminates thirty days after the issuance of the Final Rule, and thereafter, joint policing agreements must be filed pursuant to the requirements of the Act and Part 572. Comment 33 supported the termination of this exemption. Comments 22 and 38 are opposed to termination. Comment 22 questions whether joint policing arrangements are even subject to filing.

Joint policing agreements, at a minimum, come within section 4(a)(5) of the Act which applies to agreements among ocean common carriers to engage in an exclusive, preferential, or cooperative working arrangement. In addition, sections 4(a)(1) and (2) of the Act might also apply under certain circumstances. Joint policing

arrangements are therefore clearly within the scope of the Act.

Comment 22 argues further that even if such arrangements are subject to sections 4 and 5 of the Act, they should nevertheless be exempt from filing. Comment 22, as does Comment 38, maintains that this exemption may not be terminated at this time without further notice and opportunity for hearing.

This rulemaking proceeding was instituted, among other authorities, pursuant to section 16 of the 1984 Act. See 46 CFR 572.101. The Interim Rule published in the *Federal Register* on May 29, 1984, 49 FR 22300, notified all interested parties pursuant to the Administrative Procedure Act (APA) (5 U.S.C. 552(b)) of the proposed elimination of this exemption. All interested parties have had an opportunity to be heard through the filing of written comment in accordance with section 16 of the Act and the APA (5 U.S.C. 552(c)). Having provided the parties notice and opportunity for hearing, the Commission may properly terminate the exemption of joint policing agreements. Finally, no adequate reason not to terminate this exemption has been provided.

Comment 38 questions the rationale provided for terminating the exemption on joint policing agreements. As noted in the discussion of the Interim Rule, there are potential adverse effects on shippers resulting from a joint policing agreement. Joint policing arrangements may involve significant numbers of carriers and consequently may have a widespread effect on shippers utilizing these carriers. The Commission believes that these arrangements are significant enough to require that they be filed and reviewed.

Comment 38 argues that joint policing arrangements are beneficial in that they promote cost savings. Elimination of the exemption, however, will not destroy this benefit. The only result of terminating the exemption is to subject such arrangements to the Act's filing requirements. Given the fact that such arrangements need not be accompanied by elaborate information, and the relatively short waiting period before effectiveness, the burden of requiring that they be filed is minimal. This exemption therefore is terminated in the Final Rule. In light of the fact that this exemption is being terminated, it is unnecessary to address changes to section 572.308 suggested in the comments.

Section 572.309 Credit Information Agreements—Exemption.

Section 572.309 continued the 1916 Act exemption for credit information agreements only for the period of the Interim Rule. This exemption terminates thirty days after the issuance of the Final Rule, and thereafter, these agreements will be subject to the filing requirements of sections 4 and 5 of the Act and Part 572. Comment 33 supported the termination of the exemption for credit information agreements. Other comments (Comments 22, 24, 38, 39) urged that it be retained.

One misconception seems to be common to the comments opposed to termination of the exemption. The result of eliminating the exemption will not be to bar the formation of credit information agreements, but merely to require the parties to comply with the filing requirements. The filing requirements should not present a significant barrier to the formation of these agreements and the parties will be free to share credit information as they did under the 1916 Act.

Comments 24 and 38 take issue with the Commission's statement in the Supplemental Information that "credit is an important factor in price competition." Comment 24 maintains that this exemption does not authorize the collective pricing of credit. Comment 38 asserts that the limitation contained in § 572.309(c) barring the discussion of any matter which is required to be published in a tariff, ensures that these agreements will not result in antitrust abuses.

Credit information agreements must be filed because the distinction between the sharing of credit information and the collective formation of credit policy and pricing can easily become blurred. Accordingly, these agreements should be filed and reviewed in order to ensure that the directives of the Act are satisfied.

Similar to its position taken with respect to joint policing agreements, Comment 22 asserts that there is no requirement that credit information agreements be filed and that if the Commission wishes to terminate the exemption it must provide for additional notice and comment.

The Commission's position on this issue is the same as it is with respect to joint policing agreements. A credit information agreement is a "cooperative working arrangement", within the meaning of section 4(a)(5) of the Act, and therefore is an agreement within the scope of the Act. Consequently, the filing requirements of section 5 and Part 572 must be met. In addition, adequate

notice and comment has been provided. The termination of the exemption was duly noticed in the *Federal Register* with the publication of the Interim Rule (49 FR 22301 (1984)). Parties were given an opportunity to comment and the Commission has considered these submissions in accordance with the provisions of the APA.

Comment 24 asserts that the authority to set credit terms is interstitial to collective ratemaking authority. Therefore, according to this Comment, the exemption for credit information agreements should be continued where the parties already have collective ratemaking authority.

Although the establishment of credit rules is interstitial to collective ratemaking authority, establishment of credit rules is not within the scope of activity permitted by a credit information agreement. The two activities are distinct. As mentioned earlier, the purpose of a credit information agreement is the sharing of credit information, not the formation of credit rules. The Commission recognizes, however, that the sharing of certain credit information is inherent in the process of forming collective credit rules. Therefore, where the parties already have collective ratemaking authority and wish to form a credit information agreement, depending on the contents of that agreement, they may already have all the authority they require and may not need an additional agreement.

Finally, Comment 24 maintains that the expiration of this exemption is contrary to the provisions of section 2(1) of the Act to achieve a regulatory system involving a "minimum of government intervention and regulatory costs."

The Commission disagrees. This is not an example of the agency arbitrarily increasing the regulatory burden upon parties subject to the Act. Credit information agreements are properly within the scope of the Act and their significance to price competition requires that they not be exempted from the filing requirements. Because this exemption is being terminated, it is unnecessary to discuss the various suggested modifications to this section.

Section 572.310 (redesignated § 572.306) Nonexclusive Transshipment Agreements—Exemption

Section 572.310 continues the exemption under the 1916 Act for nonexclusive transshipment agreements pursuant to section 16 of the 1984 Act. The exemption in the Interim Rule made a number of changes to the previous

exemption in 46 CFR Part 524. The requirements appearing at § 572.310(a) (2) and (3) were added to the definition of the agreements which fall within the exemption. The specific items which must appear in a tariff were generally retained in § 572.310(c). Section 572.310(d) replaced the former mandatory agreement language with a description of the required and permissive contents of such agreements.

Section 572.310(a) (redesignated § 572.306(a)). Comment 28 objects to the requirement in § 572.310(a)(2) which limits the class of exempt agreements to those which, among other things, do not "guarantee any particular volume of traffic or available capacity." Comment 28 explains that often when a publishing carrier solicits the participation of a connecting or feeder carrier in meeting the needs of a developing trade or carrying cargoes of opportunity, the connecting carrier does not have sufficient unused vessel capacity in place and is obliged to charter additional vessel capacity. The connecting carrier, however, may be reluctant to charter additional capacity unless the publishing carrier agrees to guarantee a minimum volume of cargo. In order to facilitate such arrangements, Comment 28 urges the deletion of the second disqualifying element in paragraph (a)(2).

This exemption indeed is intended to be limited to arrangements that do not guarantee any particular volume of traffic or available capacity. Agreements that contain such guarantees may have more anticompetitive consequences and are more akin to space charter arrangements and therefore are subject to all requirements applying to those arrangements. Accordingly, this suggested change is not made in the Final Rule.

Sections 572.310 (c), (d) and (e) (redesignated sections 572.306 (c), (d) and (e)). Comment 24 suggests that paragraphs (c)(2) and (d)(4) which refer to origin, transshipment and destination "ports" should be modified to make clear that such agreements can apply to intermodal cargo. Transshipment arrangements, by their nature, are limited to the all-water movement of cargo. The suggested change, therefore, is not appropriate. This does not in any way, however, preclude the filing of through intermodal rates by participants in such arrangements.

Comment 38 urges certain substantive modifications to § 572.310 (c), (d) and (e) and a conforming technical change in § 572.310(b). Comment 38 would delete the reference to the required tariff provisions cited in § 572.310(b) and

enumerated in § 572.310(c). This Comment believes that the tariff regulations are sufficient in this regard. Comment 38 states that making the filing of a tariff a condition to the existence of an exemption is logically inconsistent because there can be no tariff provision until the agreement is effective and no such agreement can be effective unless it is exempt. The provision of § 572.310(c) will be retained in the Final Rule. There would appear to be no harm in having these tariff items enumerated in this exemption section as well as in the tariff rules. Moreover, this is a condition which will only be complied with subsequent to the effectiveness of a nonexclusive transshipment agreement. The apparent dilemma posed by Comment 38 is artificial.

Finally, Comment 38 suggests that § 572.310 (d) and (e) be deleted as unnecessary restrictions on the commercial arrangements of agreement parties. Section 572.310(d) requires that nonexclusive transshipment agreements contain a declaration of the nonexclusive character of the arrangement and lists 13 permissible terms or specifications in such agreements. Section 572.310(e) states that no other subject other than those listed in § 572.310(d) shall be included in an exempted nonexclusive transshipment agreement.

The requirements of § 572.310 (d) and (e) shall be retained. Those provisions are necessary in order to ensure with some degree of specificity the exact parameters of the exemption. Only agreements which meet these requirements need not be subject to the usual filing and review. Parties that wish to have terms other than those permitted under the exemption may draft their agreements accordingly. Such agreements, however, will be subject to filing and review.

Subpart D—Filing and Form Agreements

Subpart D implements the filing requirements of section 5 of the Act. It establishes filing and form requirements, defines and establishes procedures for filing modifications of agreements and specifies those agreements which must be accompanied by an Information Form. Subpart D also provides for a waiver of certain form requirements upon a showing of good cause.

Section 572.401 Filing of Agreement.

Section 572.401 specifies the time and place for submitting an agreement, describes the contents of the transmittal letter, and provides that any agreement and accompanying Information Form which does not meet the requirements of

filing shall be rejected in accordance with § 572.601.

Section 572.401(a) Several comments (Comments 1, 22, 24, 28, 34, 38) suggested changes in the filing specifications of § 572.401(a). Comment 38 states that this section should fully carry out the terms of the Act and should therefore provide for the filing of a complete memorandum which specifies the substance of any oral agreement subject to the Act. This suggestion has merit and is adopted. Section 572.401(a) now makes it clear that all agreements, including oral agreements reduced to writing in accordance with the Act, are subject to Part 572 and must be filed.

Comments 24, 28, and 38 contend that the requirement regarding authority to file is cumbersome or unnecessary. Comments 1 and 34 suggest that, consistent with 46 CFR 502.24, an attorney should be allowed to file without further statement of authority. The purpose of the authority to file requirement as set forth in the Interim Rule was to ensure that persons purporting to represent a group of principals did in fact have the authority to do so. There have been some instances in the past where the submissions tendered by parties allegedly on behalf of a group of principals were questionable representations of the intentions of the principals. In addition, there have been occasional failures under the Interim Rule and under predecessor agreement rules to provide verification of the authority to file. Upon inquiry, however, these deficiencies have been found to be an oversight or a technical failing and have been quickly remedied. In the case of a possible misrepresentation there appear to be sufficient safeguards (e.g., public notice of filing and penalties for misrepresentation) in the Final Rule to protect against or remedy any serious filing abuse. Therefore, the requirement for specification of authority to file has been deleted in the Final Rule.

Comment 22 notes that § 572.401(a) does not distinguish between a "subscribing" and "filing" party. Comments 22 and 38 take exception to the reference in this section to the Information Form. Inasmuch as this section is not intended to address the requirements governing the execution (i.e., "subscription") of agreements or the required supporting documents (those matters being addressed at § 572.402(d) and Appendix A, Part IX(c)) no change has been made in response to these comments.

Finally, § 572.401(a) has been changed to require only an original and two

copies of the Information Form rather than 15 as in the Interim Rule, thereby alleviating the paperwork requirements for parties to agreements.

Section 572.401(b). Section 572.401(b) describes the contents of the transmittal letter which accompanies an agreement filing. Its purpose is to describe the minimum information that is necessary to assure the timely and proper receipt, acknowledgement, public notice and initiation of the review process associated with a filed agreement.

Comment 24 suggests that this section unnecessarily requires the repetition of the submitting party's address and telephone number beneath the letter signature when that information is already provided in the letterhead. An appropriate change has been made to eliminate repetition.

Comment 34 contends that this section should not require that the person executing the agreement and the person signing the transmittal letter be the same. In order to clarify § 572.401(b) in this respect, an appropriate change has been made.

Comment 38 suggests that this section be amended to make clear that the transmittal letter is "submitted" rather than "filed". An appropriate change has been made.

In addition to these changes, this section has been reorganized to more clearly set forth the contents of the transmittal letter.

Section 572.401(c). Section 572.401(c) provides that any agreement and accompanying Information Form which does not meet the requirements of filing shall be rejected in accordance with § 572.601. Comment 38 contends that the reference to the Information Form, and any filing deficiencies therein, as a basis for rejection of a filing exceeds the authority granted in section 6(b) of the Act. Comment 34 criticizes § 572.401(c) as an imprecise paraphrase of the statutory language and redundant of § 572.601 and urges its deletion.

The purpose of § 572.401(c) is to emphasize the consequences of failure to meet the submission requirements of the Act and Part 572, to include both those requirements applicable to the filed agreement itself and those applicable to any submissions required in support of that filing. The authority to include deficiencies in the Information Form as a basis for rejection is clearly provided in section 5(a) of the Act which empowers the Commission by regulation to prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement. Section 6(b) of the Act directs the rejection of any agreement

that does not meet the requirements of section 5. The Information Form is, by the regulations of Part 572, part of the "requirements" referenced in section 5 of the Act and any substantive failure in its submission is a failure to meet the requirements of section 5 and, therefore, an appropriate basis for rejection. While § 572.401(c) does, to some extent, repeat the requirements expressed in § 572.601, early experience in the administration of the 1984 Act has shown a need for the additional cautionary emphasis. Section 572.401(c) is therefore retained without change.

Section 572.402 Form of Agreements.

Section 572.402 prescribes the form of agreements, with the exception of marine terminal and assessment agreements, filed with the Commission pursuant to section 5 of the Act. The provisions of this section were applicable to new and initial or replacement agreements filed on or after June 18, 1984. They were also made voluntarily applicable to modifications or restatements of agreements in effect before June 18, 1984 until such time as the Commission specifies a schedule for all governed agreements to be in conformity. The Commission's Interim Rule specifically solicited comments as to the compliance schedule to be established.

Comment 28 contends that the form requirements may be impractical and requests their voluntary application rather than their requirement. Comment 34 takes issue with the manner of page numbering specified at § 572.402(b) and the manner of page titling specified at § 572.402(c), stating that it would be preferable to begin the numbering of agreement pages with the first page after the required Title Page and Table of Contents. This Comment further submits that there is no basis for requiring an agreement to have both a "full" name and a "doing business as" name.

The purpose of § 572.402 is to establish a uniform format for agreements in order to facilitate: (1) Timely, accurate execution of the preliminary review imposed by section 6(b) of the Act and the substantive review and disposition directed generally by section 6 of the Act; (2) orderly maintenance and use of Commission records in support of the performance of its statutory obligations; and (3) eventual conversion of these records to a digitalized and/or micrographic form to enhance their cost effective use through computer assisted retrieval techniques. The brief experience under the Interim Rule has already served to demonstrate the utility of the new format in pursuing the first

two of these objectives. Significant portions of the gains in processing efficiency can be directly attributed to this standardization.

With the eventual extension of these format requirements to all agreements, even greater economies may reasonably be expected. With respect to the numbering of the pages of an agreement, the division of an agreement into discretely numbered sections should enhance the efficiency with which an agreement can be compiled and maintained, and will improve the efficiency with which an agreement is utilized. As regards the matter of page titling, the purpose of this section is to avoid the identification problem that arises should the pages of a loose-leaf document become separated.

The Interim Rule requirement to use the agreement's "doing business as" name was primarily intended to minimize the space required to title the page because "dba" names are generally shorter than the full name. However, upon further consideration, we believe that it is preferable to require each page of an agreement to be titled with the name that appears on the Title Page and the Rule is modified accordingly.

The Supplementary Information to Interim Rule § 572.402 invited comment as to the time frames for making the format requirements of § 572.402 applicable to agreements existing prior to June 18, 1984. Comment 24 contends that the format requirements should not be made applicable to existing agreements prior to June 18, 1986. Comment 29 suggests a period of ninety days, presumably ninety days after publication of the Final Rule.

As indicated above, the Commission has already experienced significant benefit from the standardized format in terms of administrative efficiency in processing and reviewing agreements. The standardized format should also facilitate the implementation of the other record management initiatives discussed above. A fixed deadline for achieving compliance, however, might produce a crush of filings which would overtax the Commission's resources. Conformance to the format requirements therefore shall be achieved according to the following schedule: (1) All new agreements shall be submitted in the required format when initially filed; (2) any restatement of a previously effective agreement filed subsequent to December 15, 1984 shall be submitted in the required format; (3) any effective agreement which is modified to any degree and for whatever purpose subsequent to December 15, 1984 shall be restated in its entirety and filed in the

required format, including the modification; and (4) all other governed agreements not otherwise brought into compliance shall be conformed to the required format and filed with the Commission by not later than October 1, 1985. This schedule is set forth in § 572.402(h). Finally, we have amended § 572.402 to state that the form requirements do not apply to cancellations of agreements.

Section 572.403 Modification of Agreements.

Section 572.403 establishes requirements with respect to modifications to agreements. Section 572.403(a) indicates which modifications are so significant as to require an accompanying Information Form. Section 572.403(d) provides a procedure for indicating textual changes in agreements and § 572.403(g) prescribes a two-year republication requirement. The comments addressing each of these sections are discussed below.

Section 572.403(a). Section 572.403(a) defines significant modifications as those changes in an agreement that may result in a significant reduction in competition. Where the competitive consequences of an agreement modification are likely to be minor, the Information Form usually would not be required. For example, the addition of a single port to the geographic scope of an agreement would not be a significant modification, but the addition of an entire port range may have such a competitive impact as to be a significant modification. The June 12, 1984 amendment to the Interim Rule dropped the specification that the addition of members to a conference constitutes a significant modification. This amendment also added the word "significant" to changes in geographic scope, to reductions in service levels, and to changes in pool penalty provisions of carrying charges, where such changes would require the filing of the Information Form.

Nine comments address § 572.403. Comment 18 argues that for joint service agreements, the Information Form should only be required where the modification entailed the addition of new parties to the agreement, but not for the addition of ports or vessels.

A joint service agreement may result in a substantial reduction in competition when two or more existing carriers in a trade consolidate their otherwise competing service. Modifications to a joint service agreement that add vessels or extend the port coverage of the agreement are not likely to lead to a substantial reduction in competition, except where the expansion of port

coverage includes ports currently served outside the joint service by two or more of the parties. Modification to a joint service agreement that increases the number of parties and, therefore, increases the potential market power of the joint service may have a substantial competitive impact on the trade and raise questions under the general standard. Consequently, the Commission is persuaded that significant modifications to a joint service agreement also include those that add parties to the agreement. An appropriate change is made in the Final Rule.

Comment 22 argues that the Commission is not authorized to require an Information Form either for the initial filing of any agreement or for a modification of an agreement. The Commission addresses the question of its authority to require an Information Form in the discussion of Appendix A.

Comment 26 argues that for conference agreements the only modifications that should require the submission of an Information Form would involve a substantial expansion of geographic scope. The requirement that an Information Form be filed with any modification that results in a "significant reduction in competition" is argued to be too broad and vague.

The Commission generally concurs that, as a practical matter, modifications of conference agreements, which do not add new authorities, will ordinarily only require the Information Form where they substantially increase the geographic scope of the agreement. This requirement is outlined in the Commission's June 12, 1984 amendment to the Interim Rule. However, if a conference agreement is amended to add or expand authority authorizing reductions in service, then such a modification would likely be viewed by the Commission as a significant modification requiring the submission of an Information Form.

The concerns raised by Comment 28 regarding § 572.403 are discussed under Appendix A.

Comment 30, in addition to arguing for the requirement that equal access agreements and modifications thereto be accompanied by an Information Form (an argument that has been addressed along with the concerns of Comment 28 under the Commission's discussion of Appendix A), also urges express reference to specific types of modifications that might result in a significant reduction in competition. These would include: changes in cargo categories and descriptions that result in significant increases in cargo that is subject to a pooling, equal access, joint

service, or consortium agreement; significant increases in the cargo or revenue share of a national-flag line in a pooling or equal access agreement; or a significant decrease in the cargo or revenue shares of a third-flag line in a pooling or equal access agreement.

The purpose of requiring an Information Form with significant modifications is to obtain needed information in order to properly and adequately review such modifications under the general standard. The Commission has specified certain modifications that may result in a significant reduction in competition, thereby requiring an Information Form. The Commission has not attempted to provide a *comprehensive* list of all such modifications. Because a pooling agreement is viewed as potentially substantially anticompetitive, any modification to such an agreement that reduced competition would likely be a significant modification requiring the Information Form.

The modifications to a pooling agreement referred to by Comment 30 would also likely result in a significant reduction in competition. Accordingly, as a clarification, § 572.403(a) is amended to state that significant modifications also include "changes in cargo categories or descriptions that result in a significant increase in the amount of cargo subject to the pool, or changes in the allocation of cargo or revenue that significantly change the cargo or revenue shares of national or non-national flag lines."

Comment 30 also argues that the change effected by the June 12, 1984 amendment to the Interim Rule requiring the Information Form only for those modifications that result in "significant" changes in geographic scope, "significant" reductions in service levels and "significant" changes in penalty provisions allows the parties excessive discretion to determine what modifications are in fact "significant".

We do not agree. While parties to agreements are allowed some discretion, in the first instance, to determine which modifications to their agreements are significant, the Commission retains the option to request additional information from the parties under section 6(d) where the "modification" appears significant and the Information Form has not been filed. The Commission does not wish to impose burdensome filing requirements for each and every change regardless of its competitive significance. Parties should contact the Director, Bureau of Agreements and Trade Monitoring for advice as to whether or not a particular modification

requires the filing of an Information Form.

Comment 34 urges that amendments to conference agreements which add authority to establish through intermodal rates should not be considered significant modifications.

One of the objectives of the 1984 Act is to clarify regulatory authority concerning conference intermodal authority. The Conference Report explicitly states that "no special stigma should attach" to conference agreement amendments that establish intermodal authority. H.R. Report 98-600, 98th Cong., 2d Sess. 34 (1984). This does not mean, however, that conference intermodal amendments which extend the scope of price fixing agreements and raise concerns under the general standard should not be scrutinized. An Information Form, therefore, is required. This should not place an excessive burden on the parties because the market share information required in the Form applies only to the relevant trade(s) as determined by the parties. Market share data need not be provided for interior points to be served.

Comment 37 argues that the Commission has no authority to request an Information Form for any conference agreement or modification, and that, in any event, it should not require the Form where the modification solely provides for the addition of members.

The Commission rejects the argument that it has no authority to require an Information Form for reasons stated in its discussion of Appendix A. In regard to the second point, the Commission has, in its June 12, 1984 amendment, already deleted the requirement that a modification adding members to conferences be accompanied by an Information Form.

Comment 38 makes two technical suggestions. First, it is suggested that the second paragraph of the Instructions in Appendix A be conformed with § 572.403(a) (repeating the requirement that the Information Form is to be filed with significant modifications). Second, the Commission is urged to list in one place all agreements that require the Information Form. The first change is adopted. The second recommendation is not practicable, at least for significant modifications under § 572.403(a), because not all the modifications encompassing various combinations of authorities that will be filed can be anticipated. A filing party may contact the Director, Bureau of Agreements and Trade Monitoring for advice in this regard. For the purposes of an initial agreement filing, the Instructions specify that parties to all agreements, with the exception of marine terminal

agreements, assessment agreements and agreements exempted from filing under Subpart C of Part 572, are required to file an Information Form in conjunction with the agreement.

Section 572.403(d). Section 572.403(d) establishes a mechanism for indicating textual changes in the language of an agreement. Comment 38 believes that the method of indicating changes is unnecessary and cumbersome. This comment suggests that parties should have the option of submitting separately, for information purposes, a copy of any agreement modification showing the deletions and new provisions.

Section 572.403(d) is intended to avoid any ambiguity as to what is being changed, deleted or added in an agreement and thereby facilitate the review of modifications to that agreement. This purpose may be equally achieved by the alternative method suggested by Comment 38. Section 572.403(d) therefore shall be amended to provide, as an alternative, for the informational filing of a page or pages indicating the proposed modification in the manner prescribed in sections § 572.403 (d)(1) and (d)(2).

Section 572.403(g). Section 572.403(g) requires the republication of an agreement under certain circumstances but exempts such republication from certain requirements of Part 572 when no substantive changes are involved. Comments 24 and 26 contend that the republication requirement is unnecessary and wasteful.

The purpose of § 572.403(g) is to provide for the periodic republication of the entire text of an agreement and to remove those portions of the agreement which have been deleted through prior modifications. Removal of obsolete language enhances the readability of the agreement. This section, however, has been amended so that the republication requirement applies only to those agreements which retain deleted language within the text of the agreement. Agreements which make changes by indicating the change on a separate page filed for information purposes, as provided for in § 572.403(d)(3), need not republish the entire agreement.

Section 572.404 Application for Waiver.

Section 572.404 provides for a waiver, upon a showing of good cause, of the form requirements of §§ 572.401, 572.402 and 572.403 and establishes the procedure and content for waiver requests. No comments were received on this section.

Upon further consideration, the Commission believes that the scope of § 572.404 should be enlarged to provide for a waiver, under appropriate circumstances, from the agreement organization and content requirements of §§ 572.501 and 572.502. There is a direct connection between § 572.402, on the one hand, and §§ 572.501 and 572.502, on the other. Any waiver associated, in particular, with § 572.402(e)(2) would almost certainly require relief from all or portions of §§ 572.501 and 572.502. This broadening of the waiver provision should not be interpreted as a lessening of the importance of these form and manner requirements. The purpose of expanding the waiver provision is to provide for the exceptional situation where some relief may be justified. Accordingly, § 572.404(a) is amended to include §§ 572.501 and 572.502 within the matters for which a waiver may be sought.

Section 572.405 Information Form.

Section 572.405 requires that a completed Information Form accompany certain agreements at the time of their filing. Complete responses are required for each item on the Information Form. Section 572.405(b) and the instructions to the Information Form require that, where the party is unable to provide a complete response, the party should provide either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain such information.

Because certain parts of the Information Form have been made voluntary or are only required to be completed for certain types of agreements, § 572.405(b) is amended to indicate that a complete response to the Information Form shall be supplied in accordance with the instructions. In addition, in order to relieve any paperwork burden on the parties and to enhance the ability of the Commission to protect the confidentiality of the Information Form, only an original and two copies of the Information Form are required to be filed.

Several comments object to the required explanation for noncompliance, including the use of estimates, as a basis for rejection of the agreement under § 572.601. Comment 37 questioned whether the Commission would use the explanation to reject the agreement on the basis of, for example, the accuracy of estimates or the adequacy of sources. Comment 39 suggests that, where explanations are "meritorious", they should be accepted.

In order to effectively and efficiently utilize the data provided on the Information Form, it is necessary for the Commission to assess the accuracy of such data. The identification of the sources of estimates allows the Commission to determine the extent to which such data should be incorporated in the analysis of the agreement. An explanation of why precise data are not available is required for certain parts of the Information Form in order to ensure that the parties make a reasonable attempt to provide data that is available to them. Available data, as addressed later in the discussions of Parts III and IV of the Information Form, are derived from data that the parties already have available, or would ordinarily acquire in the course of making the commercial decisions underlying the proposed agreement. The Commission has, however, deleted the requirement that an explanation of why precise data are not available accompany estimates in Parts III and IV, and the change is indicated in the relevant sections of the Final Rule. Reasonable explanations for the lack of availability of precise data will continue to be required for the remaining parts of the Information Form which require data and which are not voluntary. Where estimates are not provided, a statement of reasons for not providing estimates and the efforts made to obtain such information is required.

Six comments on § 572.405 address the issue of the Commission's authority to require the Information Form. Four comments took the position that the Commission does not have such authority under the Act. These comments are addressed in the discussion of §§ 572.401(c) and 572.601 and in the discussion of Appendix A—Information Form and Instructions.

Section 572.406 Complete and Definite Agreements.

Section 572.406 provides that any agreement filed under the Act and Part 572 shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties. This section provides that open-ended provisions will be permitted only if the enabling agreement indicates that any further agreement cannot go into effect unless filed and effective under the Act. Finally, this section describes matters which are interstitial to the basic agreement authority. Ten comments were filed in Docket No. 84-32 addressing this section.

The Supplementary Information to Docket No. 84-32 stated:

The rule does not state how the Commission will treat an agreement that is not sufficiently specific, complete and definite. In most cases, such deficiencies could probably be corrected through informal discussions between the Commission's staff and the parties. An agreement which is severely deficient, however, may be rejected, investigated or subject to a formal request for additional information or to challenge in the court under section 11(h) of the Act.

A number of comments (Comments 101, 105, 106, 107, 108) objected to the discussion insofar as it suggested that an agreement which was severely deficient under the criteria of § 572.406 could be rejected. These Comments argue that the Commission does not have the authority to reject an agreement because it is unclear or indefinite. Such agreements allegedly may only be investigated, subjected to a request for additional information or challenged in court under section 11(h) of the Act. Comments 107 and 110 propose the addition of a new paragraph which would expressly limit the Commission's action on deficient agreements to such an investigation, an information request or an injunction.

As the Supplementary Information in the Interim Rule indicated, the Commission would in most cases seek to resolve deficiencies through informal negotiations and discussions between its staff and the parties. Rejection of an agreement would only occur in a rare case where an agreement is so severely deficient that, on its face, it could not be construed as complete and where even the most basic analysis under the general standard would not be possible. Moreover, in such a case, it would not be possible to determine whether sections 10(a)(2) and 10(a)(3) were complied with. Finally, agreements should be sufficiently precise and definite to determine whether a particular activity is within the scope of the antitrust immunity conferred upon them by section 7 of the Act. The fact that there are other avenues available for dealing with deficient agreements, as suggested, does preclude the use of rejection. Clearly, an informal resolution of such deficiencies is preferred. In other cases, requests for additional information, investigation, or court challenge under section 11(h) of the Act may be appropriate. However, where even the most minimal requirements with regard to definiteness and completeness are not met, rejection may be appropriate. The Commission does not believe that it is necessary to formally state the actions which might be available within the text of § 572.406.

Section 572.406(a). Section 572.406(a) states that a filed agreement shall be the

complete agreement among the parties and shall specify in detail the substances of their understanding. Comments 102 supported this section as it appeared in the Interim Rule. Comment 105 urges that this section be eliminated or alternatively amended.

The Commission believes that § 572.406(a) adequately states the general rule that agreements must be complete and definite and this section remains unchanged in the Final Rule.

Section 572.406(b). Section 572.406(b) establishes guidelines concerning open-ended authority in agreements. Comment 102 supports this section in the Interim Rule. Comment 104 favors the elimination of this section but alternatively proposes certain modifications assuming that § 572.406(c) is not eliminated. Comment 105 considers § 572.406 (b) and (c) to be intertwined and proposes modifications to both sections.

Section 572.406(b) provides that agreement clauses which contain enabling authority expressly state that such authority may not be implemented unless the more specific implementing understanding or agreement is filed and effective under the Act. To that extent, this section merely states what the Act otherwise requires. Accordingly, § 572.406(b) is retained in the Final Rule. However, the phrase "open-ended or vague" is deleted.

Section 572.406(c). Section 572.406(c) is intended to provide a guideline regarding interstitial agreement authority. The comments were unanimous in expressing concern with this provision. A majority of comments favor the elimination of paragraph (c) from the Final Rule. Others, as an alternative, propose modification to eliminate phrases such as "routine and ordinary", "anticompetitive effect" and "routine operational". Some comments suggest that this paragraph would revive certain antitrust issues which were intended to be put to rest by the 1984 Act. Other comments suggest that it would erode the "reasonable basis to conclude" defense under section 7(a)(2) of the Act.

Section 572.406(c) is retained in the Final Rule but is amended along the lines suggested in several of the comments. The standard of this section is one that will be applied on an *ad hoc* basis and is not intended to preclude parties from taking interstitial action.

Subpart E—Content and Organization of Agreements

Subpart E provides for the standardization of the organization of an agreement, specifying the name, number,

and order of particular agreement articles.

Comment 38 argues that the requirements of Subpart E exceed the Commission's authority and should be deleted. Comment 34 urges that a period of at least six months subsequent to the adoption of the Final Rule be permitted to conform agreements to the requirements of Subpart E. Comment 28 suggests that the requirements of Subpart E may not be suitable for all agreements and that alternative formats should be permitted. Comment 39 urges that the Commission continue its policy of not specifying the language of agreement provisions. It also urges the Commission to reconsider making the requirements of Subpart E applicable to agreements which were approved prior to June 18, 1984. However, two conferences subscribing to Comment 39 did not object to Subpart E requirements provided that republication is not required prior to June 17, 1985.

The objectives of Subpart E are to: (1) Ensure that the text of an agreement contains the essential articles which are likely to appear in all agreements in a prescribed order; and (2) further support the standardization of agreement format and its associated goals and objectives as discussed above in connection with section 572.402. Nothing in the Act or its legislative history prohibits the Commission from establishing an orderly, minimum structure or organization for agreements filed with the Commission.

Upon consideration of the various proposed compliance schedules and available resources and obligations, the Commission has determined that a phased implementation schedule, both for §§ 572.402 and 572.403 and §§ 572.501 and 572.502, would minimize any burden by allowing up to ten months to achieve compliance. The elements required by § 572.501 are generally found in most agreements and provide the minimum information necessary for a general understanding of an agreement. These requirements, as revised below, shall continue for all agreements except cancellations, marine terminal agreements and assessment agreements. In the event that a waiver from these requirements is deemed necessary, § 572.404 has been expanded to permit application to be made for a waiver from the requirements of §§ 572.501 and 572.502.

Section 572.501 Agreement Provisions—Organization.

Section 572.501 provides a uniform organization for all agreements, except marine terminal agreements and assessment agreements.

Section 572.501(a). Section 572.501(a) imposes a minimum organization and subject matter outline on filed agreements (except for those which are exempted) and reserves the use of certain article numbers. Comment 29 contends that § 572.501(a) should be modified to provide that the content of a specified article is not required to be published unless that content has been commercially agreed to, contending that some of the articles do not otherwise ordinarily exist in some forms of agreements.

Section 572.501 (a) states that article numbers are reserved for the particular provision or authority as indicated in this section. Experience with agreements filed pursuant to the Interim Rule indicates that this statement has not clearly communicated its intended meaning. Some filing parties who perceive that they have no need for a particular article have simply omitted the subject matter of the article and assigned its number to another subject. Each of the articles enumerated in § 572.501 is generally found in nearly all types of agreements. The enumerated Articles 1 through 13 are reserved for the specified subject matter shown in §§ 572.501 and 572.502 and may not be used for any other subject or purpose, regardless of the type of agreement. Where an article is legitimately not applicable, as for example, a charter agreement which is not likely to have a neutral body policing provision, the article number and name is to either be omitted altogether or, to preserve the sense of the article numbering in the agreement, to be included in the text of the agreement followed by the word "None". Accordingly, appropriate revisions have been made in § 572.501(a) to clarify the use of the reserved article numbering system.

Section 572.501(b). Section 572.501(b) sets forth the specific order and describes generally the subject matter of the articles of an agreement.

Certain inquiries received by the Commission's staff suggest that some parties interpret the enumeration of Articles 1 through 13 in §§ 572.501 and 572.502 to mean that these articles are the only articles or subject matter which may be included in an agreement. Section 572.402(e)(2) clearly states that "any additional material provisions shall be set forth as consecutively number articles." Moreover, an agreement that contained only Articles 1 through 13 would in most instances not contain the full understanding between the agreement parties expressed in the filed agreement. In order to eliminate any further confusion, § 572.501(b) has been amended to state that additional

articles required to express the complete understanding between the parties to the agreement and not otherwise incorporated in appendices to the agreement shall immediately follow the enumerated articles. Such articles shall be numbered consecutively commencing with Article 14.

Section 572.501(b)(1). Section 572.501(b)(1) requires the publication of the "full name of the agreement" in Article 1 of the agreement. Comment 34 suggests that the parties to an agreement be permitted to use an abbreviation, acronym, or "doing business as" name. We are not adopting this suggestion. Article 1 is the appropriate place in an agreement to identify that agreement by its complete legal name. We find this requirement to be administratively necessary and not to impose any particular burden on the agreement parties. It therefore shall be retained.

Section 572.501(b)(2). Section 572.501(b)(2) requires a statement of the "Purpose of the Agreement" in Article 2. Comment 34 contends that the elaboration on the meaning of the term "purpose" is unnecessary. While paragraph (b)(2) will be retained, because section 5(b)(1) of the Act requires an agreement to state its "purpose", the elaboration objected to is deleted.

Section 572.501(b)(3). Section 572.501(b)(3) requires the statement of the name, address and corporate/domicile nationality of each party to the agreement in Article 3.

Five comments (Comments 22, 24, 26, 34, 38) question the need for this requirement. Comments 26 and 38 contend that the requirement is burdensome and contrary to the Act and should be deleted. Comment 24 states that this section should be amended to avoid delays in the admission or resignation of agreement members. Comment 22 questions the relevance of stating the parties' nationality.

The purpose of § 572.501(b)(3) is to ensure that the Commission has accurate and current information with respect to the agreement's membership. The lack of such information has been a long-standing problem. It is not the purpose of this section, however, to unreasonably delay the effectiveness of changes in membership, to unnecessarily burden the agreement document itself, or to collect unneeded information. Therefore, appropriate changes have been made to § 572.501(b)(3) and to § 572.605 to provide for expedited review of modifications effecting change in conference membership.

Section 572.501(b)(4). Section 572.501(b)(4) requires a statement of the geographic scope in Article 4. Comment 34 states that agreement members do not necessarily serve their respective trades pursuant to the authority of an agreement and that the implication that they do so serve should be eliminated. It is not the purpose of § 572.501(b)(4) to capture any more than the geographic breadth of the basic agreement. Certain changes have therefore been made in this section.

Comment 28 states that § 572.501(b)(4), as well as § 572.501(b)(5), should expressly require consortium agreements to specify the level and scope of service; otherwise, such agreements may contain "open-ended" or "blank check" authority. The fundamental concern of this Comment, i.e. "open-ended authority", has been addressed in § 572.103(g) and § 572.406. As this concern would appear to be met by these sections of the Final Rule, the suggested modifications to § 572.501(b)(4) or (b)(5) do not appear necessary.

Section 572.501(b)(5). Section 572.501(b)(5) requires in Article 5 a statement of the authorities permitted by the Act and intended to be exercised by the parties to the agreement. Comment 24 states that this requirement creates a risk that persons opposing an action taken pursuant to an agreement may argue that the only authority of the agreement is that stated in Article 5. This Comment suggests the addition of a statement that the parties' authority is to be derived from the entire agreement.

The purpose of Article 5 is to provide a general statement of the activities which the parties are authorized to engage in. Section 572.501(b)(5) has been revised to make this clear and that, except for the specification of fundamental matters, it will require that additional articles be provided which are more specific as to the authority to be exercised and the mechanics of that exercise. Finally, this section is revised to state that the parties may rely on the contents of the entire agreement as authority for their activities.

Section 572.501(b)(6). Section 572.501(b)(6) requires the titles and respective authorities of any agreement officials designated by the agreement parties be provided in Article 6.

Comment 38 contends that the requirements of § 572.501(b)(6) improperly prescribe substantive agreement content, exceed the authority of the Act and should be deleted. Comment 34 requests the clarification of the language and intent of the section with respect to the specification of agreement officials and their duties.

The purpose of § 572.501(b)(6) is to ensure that the Commission, the agreement parties and any other interested parties be informed as to who, by organizational title, is empowered to act on behalf of the agreement parties and in what capacity. This information is necessary to the effective and efficient administration of the Commission's agreement program, both with respect to the pre-effectiveness review of an agreement and the post-effectiveness monitoring of the activities of an agreement. It is not the purpose of this section, however, to unnecessarily delay the effectiveness of changes in such provisions or complicate the agreement document. Therefore, § 572.605 has been amended to provide for expedited review of modifications to Article 6.

Section 572.501(b)(7). Section 572.501(b)(7) requires that the terms and conditions of membership to the agreement be provided in Article 7. Comment 26 contends that this requirement is overly detailed and, in some cases, too trivial to be included in the basic agreement.

Section 572.501(b)(7) is an extension of the requirements of section 5(b)(2) of the Act which mandates that conference agreements provide reasonable and equal terms and conditions for conference membership. Of the nine required articles in § 572.501, it is the least likely to apply to all agreements. The requirements of § 572.501 would only apply to certain rate agreements and would not have application to transshipment, equipment interchange or charter agreements. Section 572.501(b)(7), therefore, has been revised to indicate that its provisions do not apply to certain agreements.

Section 572.502 Organization of Conference and Interconference Agreements.

Section 572.502 implements section 5(b) of the Act by requiring the inclusions of neutral body policing, prohibited acts, consultation, shippers' requests and complaints, and independent action provisions in conference and interconference agreements.

Section 572.502(a). Section 572.502(a) specifies the scope and application of the section with respect to conference agreements. Certain clarifying editorial changes have been made to the section. In addition the section has been revised to provide for the inclusion in agreements of provisions in addition to those prescribed in §§ 572.501 and 572.502.

Section 572.502(a)(1). Section 572.502(a)(1) requires a statement that at

the request of an agreement member the conference shall engage the services of an independent neutral body. The section further requires the inclusion of any neutral body procedures established.

Seven comments (Comments 22, 25, 26, 27, 34, 35, 39) were received on this section. None of the Comments take exception to the requirement for an agreement to provide an affirmative statement that a single agreement member may request neutral body policing. However, some contend that there is no statutory authority for requiring that, once implemented, the neutral body policing procedures have to be incorporated into the text of the agreement. Of those, three propose that, if the procedures are required, they should be included in an appendix. It is also suggested this section use the term "self policing" rather than the term "independent neutral body" policing.

Section 572.502(a)(1) implements section 5(b)(4) of the Act which provides for "an independent neutral body" to police the obligations of a conference and its members, if requested by a member line. The section will therefore continue to refer to an "independent neutral body." The requirement that any neutral body policing procedures be included in the agreement derives from the general requirement that an agreement contain the full understanding of the parties. To the extent that these procedures reflect concerted action by the parties, they are part of the agreement and must be filed.

Section 572.605 is amended, however, to provide for expedited review of neutral body policing procedures, excluding any modification of the triggering provision stemming directly from section 5(b)(4) of the Act. Section 572.502(a)(1) is also modified to allow neutral body procedures to be included in a designated appendix to the agreement, which is cross-referenced in Article 10.

Section 572.502(a)(2). Section 572.502(a)(2) requires an affirmative statement that a conference will not engage in conduct prohibited by section 10(c)(1) or 10(c)(3) of the Act. Comment 33 requests that § 572.502(a)(2) be expanded to incorporate the prohibition on refusals to negotiate with shippers' associations contained in section 10(b)(13) of the Act.

Section 572.502(a)(2) implements section 5(b)(5) of the Act which, insofar as section 10 prohibited acts are concerned, requires conference agreements to expressly reference only those prohibitions specified in sections 10(c)(1) and 10(c)(3) of the Act. We note,

however, that section 10(c)(1) of the Act prohibits a conference from boycotting or taking any other concerted action resulting in an unreasonable refusal to deal. While not addressing itself directly to shippers' associations, the prohibition against boycotting and other concerted actions may encompass the concern of Comment 33. No change has been made to § 572.502(a)(2).

Section 572.502(a)(3). Section 572.502(a)(3) requires that conference agreements provide procedures for consultation with shippers and for handling of shippers' requests and complaints. Comment 33 suggests that § 572.502(a)(3) should prescribe minimum time frames and other procedures for the consideration of shippers' complaints and requests in a manner similar to that of the mandatory provisions of Subpart H.

Section 572.502(a)(3) implements section 5(b) (6) and (7) of the Act which require conference agreements to contain consultation and request/complaint handling procedures. The mandatory provisions of Subpart H, including § 572.801 (c) and (d), served the purpose of bringing agreements into compliance with section 5(b) of the Act during the transition period. As discussed more fully below in connection with the disposition of Subpart H, that purpose has been served and the Commission is removing the mandatory provisions of Subpart H from the Final Rule. At this time there does not appear to be a need to require parties to agreements to adopt Commission prescribed provisions. Provisions drafted by parties to agreements are carefully reviewed to ensure that they contain sufficient specificity and detail. Accordingly, the changes to this section suggested in Comment 33 are not adopted.

Section 572.502(a)(4). Section 572.502(a)(4) requires that conference agreements specify its independent action procedures. Comment 34 proposes that this section be revised to permit: (1) Independent action procedures which allow for the exercise of such action on less than 10 calendar days' notice; and (2) a conference member to independently elect to provide more than 10 calendar days' notice of its intention to exercise independent action.

Section 572.502(a)(4) tracks the language of section 5(b)(8) of the Act which, in relevant part, provides that conference agreement independent action provisions may not impose a notice period of " * * * more than 10 calendar days * * *" for the exercise of independent action. The revisions suggested by Comment 34 are

unnecessary because their intended purpose is presently being served by § 572.502(a)(4). Therefore, no change to this section has been made.

Section 572.502(b). Section 572.502(b) requires every interconference agreement to contain independent action procedures (in addition to the enumerated Articles 1 through 12). Comment 24 contends that interconference agreements should not be required to contain the provisions of Articles 10, 11 and 12 specified in § 572.502(a).

Interconference agreements are generally types of conference agreements and, as such, should be subject to the same requirements. Therefore, the argument that the requirements of § 572.502(a) should not apply to interconference agreements is not persuasive and is rejected. However, a waiver of this requirement may be applied for pursuant to the new provisions of § 572.404. Such a waiver would be available where any or all of Articles 1 through 12 would not be applicable or appropriate given the particular interconference agreement. Finally, it should be noted that provisions which appeared in § 572.802 have been relocated in this section.

Subpart F—Action on Agreements

Subpart F implements section 6 of the Act which establishes procedures under which agreements are reviewed and acted upon by the Commission. The statutory model for review of agreements is the premerger clearance procedures set forth in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Pub. L. 94-435, 90 Stat. 1390). The procedures of Subpart F are intended to facilitate the expeditious review of agreements based on necessary and relevant information within the time allowed by the Act.

Section 572.601 Preliminary Review—Rejection of Agreements.

Section 572.601(b) provides for the rejection of any agreement that fails to comply with the filing and information requirements of the Act and Part 572. Comments 13, 17, 38, and 39 question the Commission's authority to reject an agreement for failure to meet filing and format requirements. Comments 29, 34, and 38 specifically challenge the authority to reject an agreement after preliminary review, pursuant to § 572.601(a), on the ground that the Information Form is not submitted, or is incomplete and an adequate explanation is not provided. They argue that only a deficiency in the agreement itself provides the basis for rejection. According to these Comments, an incomplete Information Form lacking an

adequate explanation should be remedied by a request for additional information.

Section 5(a) of the Act authorizes the Commission to prescribe the additional information that should accompany an agreement. These requirements are contained in § 572.405 pertaining to the Information Form. Section 6(b) of the Act provides for rejection of a submission which does not meet the requirements of section 5(a) of the Act. Section 572.601 implements this rejection authority. An agreement which is submitted with an incomplete Information Form, lacking an adequate explanation where required by § 572.405, fails to comply with § 572.405 and may be rejected. Moreover, the purpose of a request for additional information is not to obtain information which all parties are required to submit with an agreement in the first instance, but to acquire, in special circumstances, further information.

Comment 39 suggests that, before an agreement is rejected, the filing party should have an opportunity to correct any deficiencies within a specified time without suspending the 45-day waiting period. It is further proposed that this section be clarified to explain that agreements may only be rejected for nonconformance with technical filing requirements rather than for substantive deficiencies. Comment 39 also suggests that § 572.601(b) be amended to provide that rejection must occur within 20 days of filing and that, prior to rejection, the filing parties should be notified and given an opportunity to correct any deficiency. Finally, Comment 39 proposes that this section be amended to expressly provide for appeal to the Commission itself when an agreement is rejected.

Most of these concerns expressed in these comments are, as a practical matter, met under the existing Bureau of Agreements and Trade Monitoring procedures for processing agreements. Filing parties presently are given the opportunity to make minor corrections without suspending the 45-day waiting period. These corrections are usually speedily made because of their technical nature.

Every effort is made to review an agreement and accompanying Information Form for deficiencies as expeditiously as possible. In most situations this preliminary review is completed within a few days after the agreement's receipt at the Commission. In the case of particularly complex agreements, slightly more review time may be needed. A specific time period for rejection therefore does not appear

to be necessary or appropriate and could under certain circumstances, deny the Commission and the filing parties necessary flexibility.

As to Comment 39's concern about rejection for other than filing deficiencies, the nature of the preliminary review provided for in section 6(b) of the Act and § 572.601(a) makes clear that this rejection is not based on a substantive review of the agreement.

Decisions on rejection agreements are presently made by the Commission and not the staff. There is, therefore, no need to provide for an appeal procedure to the Commission because they have already considered the matter. If, in the future, this procedure is changed, then, at that time, it would be appropriate to consider an appeal mechanism to provide for Commission review.

Section 572.602 Federal Register Notice.

Section 572.602 implements section 6(a) of the Act which requires the Commission to transmit notice of the filing of an agreement to the Federal Register within seven days of receipt.

Section 572.602(a). Comment 38 suggests that the words "A notice of" be added at the beginning of § 572.602(a). This clarifying change is made in the Final Rule.

Section 572.602(b). Section 572.602(b) describes the contents of the notice to appear in the Federal Register. Comment 19 suggests the use of a standardized form of notice which would be completed and filed by the parties with the agreement. Present procedures appear to be adequate and little or no savings in time would appear to result from the suggested change. Accordingly, a standardized form for notice is not adopted.

Comments 24 and 28 suggest that the notice of the Federal Register identify the filing party. This suggestion has merit. This information is submitted with the agreement and its publication in the Federal Register would facilitate the effort of interested persons to communicate with the filing party. This section is amended accordingly.

Section 572.603 Comments.

Section 572.603 provides for comment by any interested person to an agreement and addresses the status and confidentiality of such comments.

Section 572.603(a). Section 572.603(a) allows third parties to submit comments to filed agreements. No limitations, except the response period indicated in the Federal Register notice, attach to the filing of such comments. Confidential treatment will be afforded comments

where the commenter so requests and there exists a proper legal basis for nondisclosure.

This provision attracted a number of comments (Comments 19, 20, 24, 25, 26, 30, 34, 39) both supporting and opposing confidential treatment of third party comments. The majority of these (Comments 19, 20, 24, 25, 26, 34, 39) believe that confidentiality, where appropriate, for third party comments is contrary to the provisions of the Act. It is asserted that the disclosure exemptions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, are the exclusive avenue for withholding third party comments. Some comments (Comments 19, 20, 24, 34, 39) suggest that the filing parties be provided with copies of third party comments. This would allegedly ensure administrative efficiencies, avoid the filing and processing of FOIA requests, and allow the filing party the opportunity to confront adverse information. On the other hand, comment 30 submits that all information filed with an agreement, either by a filing party or third parties, is protected under section 6(j) of the Act. It is asserted that confidentiality for third party comments will encourage submission of more complete comments.

Comment 28 suggests that persons commenting on agreements be allowed to waive confidentiality and Comment 20 proposes that claims of confidentiality be supported by precise statutory grounds. Comment 20 further suggests that the parties be provided with all non-confidential comments. It is suggested that if complete confidentiality is claimed for all parts of a comment, notice of the filing and claimed exemptions be provided to the parties. Comment 20 requests that non-confidential oral communications with Commission staff by persons in opposition to an agreement be made publicly available.

Many of these comments misconstrue both this section and the Act. First, third party comments are not protected by the confidentiality provisions of section 6(j) of the Act. Only "information and documentary material filed with the Commission under section 5 or 6 is exempt from disclosure." 48 U.S.C. App. 1705(j). This information is solely provided by the filing parties. No mention is made in sections 5 and 6 of the Act of "information" to be submitted by third parties. Comments on agreements, however, may in appropriate circumstances be protected under the disclosure exemptions of FOIA (5 U.S.C. 552(b)(3)(1-7)), the Trade Secrets Act (18 U.S.C. 1905), or other similar statutes. Although third party comments are not protected under

section 6(j) of the Act, it would be inappropriate and improper, particularly where a request for confidentiality has been received, to routinely make them available to the agreement parties, without prior Commission review.

Requiring commenting parties to provide the agreement parties with the non-confidential portions of comments, or notice (where the whole comment is claimed to be confidential), appears unnecessary. This information would be available from the Commission upon request. Nor do we believe this procedure, whereby non-privileged comments will be available from the Commission upon request, will lead to unnecessary FOIA requests. A FOIA request is not required to obtain clearly non-confidential information. It is properly used in close situations where the Commission and requested may differ on the confidentiality of certain information, and it accords the requesting party certain procedural and legal rights. Finally, it is both administratively burdensome and not required by law, to incorporate all oral comments into a publicly available written record.

As to the suggestion that agreement parties should be allowed to rebut comments, the Commission will provide the opportunity for rebuttal only where the comments become part of the record in a Commission or court proceeding. Prior to the institution of a proceeding not right of rebuttal is provided.

The Commission is adopting the recommendations of Comment 20 that all requests for confidentiality be accompanied by citation and explanation of relevant legal authority for withholding. In the event the Commission determines that it is proper to release information for which confidentiality has been claimed it will notify the submitter prior to such release.

Comment 38 suggests that the words "a written statement" in the first sentence of § 572.603(a) be changed to "written comments." This modification is also made in the Final Rule.

Section 572.603(b). Section 572.603(b) provides that filing of comments does not entitle a party to a Commission reply, institution of a proceeding, discussion of the comment in any Commission or court proceeding, or participation in a proceeding.

Comment 34, while not taking issue with the substance of this paragraph, suggests that the Commission further limit all substantive communications regarding pending agreements between any third person and any Commission employee.

The body of law pertaining to *ex parte* communications only applies when a formal proceeding has been instituted and the Commission is acting as decisionmaker (5 U.S.C. 557(a)). The waiting period prior to the effective date of an agreement is not such a legal proceeding and no *ex parte* rights attach. In any formal proceeding involving an agreement the present Commission rules embodied at 46 CFR 502.11 and 502.61 appear sufficient. It is therefore unnecessary to further provide for *ex parte* restrictions in this section.

Comment 28 states that the provisions of § 572.603(b), when read in conjunction with the rules on negotiations in § 572.609, flatly bar commenters from participating in negotiations. While Comment 28 recognizes that commenters have no right to participate in negotiations, it requests that the section be amended to allow such participation where appropriate. Comment 28 also proposes that the section be clarified to permit a commenter to engage in follow-up communications with the Commission at the Commission's discretion.

No change to § 572.603(b) will be made. The legislative history indicates that the role of third parties should be limited to submitting comments. Conf. Rept. No. 600, 98th Cong., 2d Sess. 31 (1984). Moreover, the involvement of third parties could complicate and delay the negotiation process by introducing irrelevant or parochial interests. However, the information provided in a comment may be considered by the Commission in the negotiation process. The Commission, however, does interpret the present language of § 572.603(b) and § 572.609 to permit follow-up communications between Commission staff and third party commenters.

Section 572.604 Waiting Period.

Section 572.604 sets forth technical provisions governing the statutory waiting period.

Section 572.604(b). Section 572.604(b) provides that, unless a request for additional information is made or a court order obtained, an agreement becomes effective 45 days after filing with the Commission or on the 30th day after publication in the *Federal Register*. Comment 28 proposes that the Commission publish a notice when it reaches a final determination on a filed agreement and that any commenters receive a copy of the determination.

Currently, the Commission issues a notice of an agreement becoming effective pursuant to section 6(c) of the Act. This notice is not published in the

Federal Register but is available to the public in the Office of the Secretary. This procedure appears to be sufficient with respect to informing the public of the Commission's action. Accordingly, the suggested change is not adopted.

Section 572.604(c). Section 572.604(c) provides that the waiting period before an agreement becomes effective is suspended when the Commission makes an oral or written request for additional information. The waiting period resumes at the time of the receipt of the requested additional material or an adequate statement of the reasons for noncompliance.

Comment 38 urges the deletion of § 572.604(c) on the grounds that it is duplicative and less clear than similar provisions in section 572.606. A request for additional information is pertinent to this section because it has an effect on the waiting period before an agreement becomes effective. Paragraph (c) therefore is retained.

Comment 19 suggests that parties be notified within 15 days of receipt of an agreement if additional information will be needed. While the goal is to review all agreements expeditiously and, where necessary, notify parties as soon as possible of the need for additional information, a 15-day limit on requests would not allow sufficient flexibility in reviewing complex agreements.

Comment 39 proposes that the parties be allowed to request an extension or suspension of the waiting period. This procedure would be utilized where an agreement was particularly complex and additional time was needed for review or where negotiations were continuing between the parties and the Commission. Alternatively, Comment 39 proposes that the parties be allowed to postpone the waiting period by submitting amendments delaying the agreement's implementation date to a date beyond the 45-day statutory period.

We believe that it would be contrary to the provisions of the Act to extend the waiting period for other than a request for additional information or court order. The parties are also always free to include within the terms of the agreement a date for implementation subsequent to the expiration of the 45-day waiting period to defer implementation of the agreement, or to withdraw the agreement altogether without prejudice to refile.

Several comments (Comments 22, 27, 34, 39) urge that the procedures for requests for additional information be clarified. Comments 27 and 39 are concerned that routine communications between Commission staff and the agreement parties may be misconstrued as a request for additional information.

Similarly, Comment 34 suggests that confusion could be avoided by having one Commission official, preferably the Secretary, responsible for issuing requests for additional information. The Comment also proposes that this section be amended to require a specific authorization statement from an appropriate Commission official to accompany each request which would expressly identify the communication as a request for additional information.

Comments 22, 27 and 34 maintain that oral requests for additional information may be problematic. It is argued that the seven-day period for written confirmation of oral requests is too long. The concern is that the parties might not receive written confirmation of an oral request for additional information made after the 38th day of the waiting period until after they had begun to implement the agreement. Comments 22 and 27 suggest abandonment of the use of oral requests and Comment 34 proposes that an oral request be made only simultaneously or subsequent to the mailing of the written request.

The present procedures contained in § 572.604(c) governing requests for additional information appear adequate. When either an oral or written request for additional information is made, it will be unambiguously identified. There is no need either to have only one official make the request or to include a specific authorization statement. In any situation where an oral request is intended to suspend the effective date of an agreement, that fact will be made clear to the filing parties.

Comment 24 argues that the resumption of the waiting period begins automatically after filing of the response to the request, or submission of the statement of noncompliance. This Comment argues that the Commission has no authority to evaluate the adequacy of the response and only the United States District Court for the District of Columbia can further suspend the waiting period. The Commission did not intend the language "adequate" statement of reasons for noncompliance to affect the resumption of the running of the waiting period. We have adopted the suggested change and the word "adequate" has been deleted.

Section 572.605 Request for Expedited Approval.

Section 572.605 implements section 6 of the Act and sets forth grounds and procedures for applying for and granting expedited approval.

Comment 39 proposes that § 572.605 be amended to permit parties to request expedited approval after filing a

response to a request for additional information under the same procedures for expedited approval otherwise applying.

The Commission concurs with this suggestion. It is clearly proper under section 6(e) of the Act to consider expedited approval for agreements whose effective date is suspended by the filing of a request for additional information. An appropriate modification has been made in § 572.605 of the Final Rule.

The Commission is also adding a new paragraph (c) to this section to provide for expedited approval of cancellations of agreements and modifications which reflect changes in conference membership, officials of the agreement, and neutral body authority and procedures. This addresses the desire expressed in comments that these matters be effectuated without unnecessary delay. The Commission will consider the institution of a separate proceeding to exempt these categories of agreements from the waiting period requirements of section 5 of the Act and allow them to become effective upon filing. However, given the notice requirements of section 16 of the Act, that relief cannot be granted within the scope of this proceeding.

Section 572.606 Requests for Additional Information.

Section 572.606 implements section 6(d) of the Act which authorizes requests for additional information.

Section 572.606(a) and (c). Section 572.606(a) provides that the Commission may request additional information, prior to the expiration of the waiting period. When a full response is not supplied, the filing party must submit a statement of reasons for noncompliance.

Section 572.606(c) provides that a request for additional information may be made orally or in writing, but when made orally, written confirmation will be mailed within seven days of the request.

Comment 26 proposes that this action be amended to provide a statement that the Commission will attempt to make requests for additional information early in the waiting period. Only in exceptional circumstances would requests be made in the final days prior to the effective date.

There is no need to amend paragraph (a) as suggested. All requests for additional information will be made as promptly as possible. Of course, the timing of such requests will necessarily vary with the complexity of the agreement.

Several comments (Comments 22, 24, 27, 38) objected to the use of oral

requests for supplementary information. The comments express concern with the ambiguities associated with oral requests, particularly when the request is made in the last days prior to the effective date and the parties are making plans to implement the agreement. Comments 22 and 24 submit that the parties are entitled to the certainty of a written request which would be addressed to specific, relevant and readily available material and be specifically identified. Comment 24 suggests that an oral request for additional information only be permitted if written confirmation is received prior to the 45th day of the waiting period.

Section 6(c) of the Act does not require requests for additional information or documentary matter under section 6(c)(2) to be made in writing. It only requires that they are made within the 45-day period. The Commission therefore retains the option to use oral requests followed by written confirmation for further information. When an oral request for additional information is issued the Commission will, as a matter of course, advise the parties of the consequences of this procedure. In the unlikely event parties are unsure of the nature of an oral request for further information, prior to receipt of written confirmation, they may contact the Director, Bureau of Agreements and Trade Monitoring for clarification.

Section 572.606(d). Section 572.606(d) provides that the Commission will specify a reasonable period for a party to reply to a request for additional information.

Comments 24 and 27 assert that the Commission does not have the authority to set a time limit for response. They submit that there is no burden on the Commission until the information is supplied and, therefore, the Commission should not be concerned when, if ever, the information is supplied. They propose that § 572.606(d) be deleted.

The purpose of providing for a reasonable period to respond is to conserve the Commission's resources. Once the Commission undertakes the review of a filed agreement it is beneficial to complete the review process and not have filed agreements pending indefinitely while awaiting responses to requests. This provision is necessary to maintain the orderly management of the agreement review process. In all cases, parties will be provided ample time in which to respond. Parties may always petition for more time, if necessary.

Section 572.606(e). Section 572.606(e) is added to the Final Rule to provide for notice to commenting parties of a

request for additional information. The purpose to this provision is to allow for further comment.

Section 572.607 Failure to Comply With Requests for Additional Information.

Section 572.607 implements section 6(i) of the Act which authorizes the Commission to seek court enforcement of its information requests.

Section 572.607(a). Section 572.607(a) of the Interim Rule provides that a failure to comply results "when the party responsible for filing the request" fails to substantially respond. Comment 34 suggests that the reference should be to "a person filing an agreement, or an officer, director, partner, agent or employee thereof." This suggestion would clarify this section and has been adopted.

Comment 24 suggests that the word "satisfactory" be deleted on the ground that if a statement of reason for noncompliance is submitted only a court can evaluate its acceptability.

When the Commission believes a statement of reasons for noncompliance is inadequate it may bring an action in court pursuant to section 6(c)(2)(B) of the Act. The court's function will be to evaluate the sufficiency of the statement of reasons for noncompliance and take appropriate remedial action. This section is not intended to supplant the court's function. This suggested change, however, is not necessary.

Comments 27 and 34 assert that the Commission is not authorized to prescribe a period of time for reply to requests for additional information and thus cannot, pursuant to § 572.607(a), deem that a failure to reply has resulted when a response is not received within that time period. Comment 34 maintains that the only applicable time period is that provided for in section 6(c) of the Act.

These arguments are not convincing. The time periods provided for in section 6(c) of the Act only apply after a response has been received. They do not pertain to the period between the request and the response. As indicated with respect to § 572.606(d) above, the establishment of a time period for response to a request for additional information is necessary to the orderly administration of the agreements program. This does not mean, however, that the Commission will bring a court action pursuant to section 6(i) of the Act when no information has been filed, thereby compelling the parties to file a response and start the running of the waiting period on an agreement they may prefer to withdraw. Finally, where

the parties have filed a response to a request for information which is inadequate, the Commission may bring an action pursuant to section 6(i) to compel a more responsive reply and extend the waiting period.

Section 572.607(b). Section 572.607(b) implements the provisions of section 6(i) of the Act which permits the Commission to bring an action in District Court where there has been a failure to substantially comply with a request for additional information.

Comment 24 would remove the word "where" from the first sentence of this section and substitute the words "when it considers that". Comment 24 seeks a clarification that the Commission is not asserting authority reserved for a court under section 6(i) of the Act.

Before the Commission brings an action pursuant to section 6(i) of the Act it must first reach its own finding on the substantiality of a reply to a request for additional information. This finding does not substitute for the court's determination of the adequacy of the reply. To clarify the Commission's function, the recommended change in language has been made.

Section 572.608 Confidentiality of Submitted Material.

Section 572.608 implements section 6(j) of the Act which provides that all information submitted by a filing party other than the agreement itself shall be exempt from disclosure under the FOIA.

Section 572.608(a). Section 572.608(a) provides a general grant of confidentiality to the filing parties for all information submitted to the Commission and lists particular categories of protected information including the Information Form, voluntary submissions of additional information, reasons for noncompliance, and replies to requests for additional information.

Comment 30, consistent with its recommendations concerning § 572.603 pertaining to comments from third parties, suggests that confidentiality be extended to third parties who submit information. Comment 30 submits that nondisclosure will encourage better quality and more detailed comment.

As indicated above, the Commission does not have authority under the 1984 Act to exempt third party comments from disclosure except in conformance with FOIA and the Trade Secrets Act.

Section 572.608(b). Section 572.608(b) provides for the statutory exception to the overall policy of nondisclosure of information submitted by parties filing an agreement. Such information may be disclosed in an administrative or

judicial proceeding or in response to a proper request from Congress.

Comment 24 suggests a change in § 572.608(b)(1) by adding the phrase "but only if disclosure takes place in the course of such proceedings" after the words "relevant to". The purpose of the change is to allow information to be released only in the course of a proceeding and not just where that information may be "relevant" to that proceeding.

The language which Comment 24 objects to, "relevant to . . . administrative or judicial proceeding", is adopted verbatim from section 6(j) of the Act. In order to preserve the full scope of this statutory provision, no change in section 572.608(b) is made.

Section 572.608(c). Comment 28 suggests that this section be amended to allow a filing party to waive nondisclosure. Although the Commission itself may not disclose information filed by the parties to an agreement, the parties themselves are not bound by the provisions of section 6(j) of the Act. This section therefore has been amended to add a new paragraph (c) which expressly recognizes the parties' right to make a voluntary disclosure. The rule requires, however, that parties making such a disclosure promptly inform the Commission of their action.

Section 572.609 Negotiations.

Section 572.609 makes clear that the negotiation process may take place at any time after the filing of an agreement up to the conclusion of an injunctive proceeding. The negotiation process will thus be available throughout the pendency of an agreement to resolve differences over an agreement. The negotiation process is limited to the filing party and Commission personnel. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

The most significant issues concerning this section focus on whether a modification which is the result of negotiations must be published in the **Federal Register**, and the proper role of third parties in the negotiation process. Comment 28 submits that modifications which expand the parties' authority must be published in the **Federal Register**. Comment 26 takes the opposite view and further asserts that the waiting period should not be suspended.

It is unlikely that, as a result of negotiations, an agreement's authority would be expanded. However, in the event that expansion of authority does result from the negotiations, the agreement would be subject to filing as a new agreement pursuant to section 5

of the Act and the provisions of this part. Notice of the filing of the new agreement would therefore be published in the **Federal Register**, pursuant to § 572.602, provided it was not rejected for filing or technical deficiencies.

Comment 39 supports the present version of § 572.609 and notes that third parties are properly excluded from negotiations. Conversely, Comment 28 maintains that third parties should not be flatly barred from involvement in negotiations. The issue of involvement of third parties in negotiations has already been discussed in connection with § 572.603(b). No changes are warranted.

Finally, Comment 24 suggests a change in § 572.609 to clarify that negotiations concerning injunctive proceedings pertain exclusively to injunctions brought pursuant to section 6(h) of the Act.

Because negotiations pursuant to § 572.609 are not intended to be limited to section 6(h) injunctions, the suggested change has not been made. The Commission is not only authorized to seek injunctive relief pursuant to section 6(h) of the Act for violation of the general standard but also pursuant to section 6(i) for failure to substantially comply with a request for additional information and section 11(h) for actions in violation of the Act.

Subpart G of the Rules—Reporting and Record Retention Requirements

Subpart G contains rules which implement the reporting and record retention provisions of the Act. Its purpose is to ensure that the Commission has sufficient information to adequately monitor the concerted activities of regulated parties.

A number of comments object to the reporting and recordkeeping requirements of Subpart G. They object to the broadened definition of "meeting" for which minutes are required, the identification of documents circulated to the members in connection with meetings and the filing of an index on a quarterly basis of all documents distributed to the members and not otherwise filed with the Commission. These comments contend that, in many instances, the list of documents would be massive, and that to require their filing would be an unwarranted intrusion on due process rights. These requirements are said to be an undue and unreasonable burden upon the industry and to be contrary to the legislative intent of the 1984 Act.

It is clear that Congress intended a law which would enable the ocean shipping industry to fashion agreements

in a manner which meets their commercial needs and to have such agreements become effective within a relatively short period, unless there is an indication that such agreements might be contrary to the standard set forth in section 6(g) of the Act. However, it is also clear that Congress intended that the Commission maintain a degree of surveillance over the concerted activities of ocean common carriers and marine terminal operators, adequate to ensure that they do not violate the standards and prohibitions set forth in the Act and that they comply with the mandatory provisions expressly set forth therein. This imposes a greater rather than a lesser surveillance responsibility on the Commission, when compared with the provisions of the 1916 Act.

Upon consideration of the comments submitted and reevaluation of its information needs, the Commission has made several revisions to its Final Rule which relax the record reporting and retention requirements. The Final Rule requires the filing of minutes on the same basis as minutes were required under 46 CFR 537.3 of the former regulations, namely for meetings where the parties are authorized to take final action as opposed to being authorized to take any action. The requirement that the minutes specify any documents distributed to inform or assist the members is deleted. In addition, the index of documents requirement is being modified to include only those documents which are circulated to members and used to reach a final decision on specified matters.

These amendments strike a balance between the enhanced freedom the ocean shipping industry enjoys and the need to ensure that the Commission has the information needed to fulfill its responsibilities under the 1984 Act.

Several comments (Comments 16, 17, 22, 34) allege that the information collection requirements of Subpart G violate the Paperwork Reduction Act of 1980 (44 U.S.C. 3501). The United States Office of Management and Budget (OMB) is charged with the responsibility of reviewing agency regulations for compliance with the Paperwork Reduction Act. The Commission has followed the proper procedures for clearance of Part 572 by OMB. The collection of information requirements contained in this part have been submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act and have been assigned an OMB control number. See § 572.991.

Comment 28 contends that consortium agreements should be included within

the coverage of Subpart G and subjected to reporting and indexing requirements. Many consortia and joint service agreements are by their own terms required to submit reports. The addition of such agreements within the coverage of Subpart G would appear to be beyond the scope of this rulemaking proceeding. Should there develop a need to obtain such information in order to effectively monitor consortia, then the Commission will consider an appropriate amendment to this subpart at that time.

Section 572.701 General Requirements.

Section 572.701 contains certain general requirements which apply to all reports required by this subpart.

Section 572.701(b)—Serial Numbers of Reports. Section 572.701(b) provides that each filed report should be assigned a serial number. Comments 13 and 34 state that the serial numbering system should be made optional and that conferences should be allowed to continue to use their established numbered minute systems. It was not the purpose of this requirement to impose a precise numbering system but rather to establish a system for identifying minutes which might be missing. Accordingly, this section is being amended to add a provision which allows any conference or rate agreement which has its own sequential numbering system to continue to use that system in lieu of the system set forth in this section.

Section 572.701(c)—Retention of Records. Section 572.701(c) provides that a copy of each document referenced in the index of documents submitted pursuant to § 572.704 must be retained by the parties for a period of three years and be made available to the Commission upon request. As indicated below, the volume of documents required to be indexed has been substantially reduced. However, the retention of documents is of such importance for surveillance purposes that this requirement shall be retained without change in the Final Rule.

Three comments (Comments 13, 34, 39) object to the provision in this section which states that the Commission may obtain documents upon written request. This objection similarly pertains to § 572.701(d) which also states that documents shall be made available upon request. The comments maintain that the judicial precedent pertaining to section 21(a) of the 1916 Act (46 U.S.C. app. 820), which is similar to section 15(a) of the 1984 Act (46 U.S.C. app. 814), and forms the basis for this subpart, should be followed.

The procedures used for requests for documents under the 1916 Act will be

continued and, in situations pertaining to issuance of a request for documents pursuant to § 572.701 (c) and (d), the Commission will state its basis for seeking the documents.

Section 572.701(d). Section 572.701(d) provides that the Director, Bureau of Agreements and Trade Monitoring may request that documents be furnished within a specified time. These documents will be received in confidence.

Comments 13, 22, and 34 maintain that the requirement that documents must be produced upon request is contrary to due process of law. They submit that parties should be permitted an opportunity to oppose the request. Comment 39 maintains that this record production requirement constitutes an unreasonable search and seizure. This objection is without merit. Notice and opportunity for hearing are not a prerequisite to issuance of a request for documents pursuant to section 572.701(d). *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961).

Comment 26 objects to the fact that the Director, Bureau of Agreements and Trade Monitoring issues a request for documents. It is urged that the former procedures, applying to section 21(a) of the 1916 Act, under which the Commission itself issued the request for documents, be continued. No modification to this section is necessary. Requests for documents made by the Director may be appealed to the Commission.

Finally, Comment 34 points out that privileged documents such as attorney-client communications are not exempted from the scope of a request for documents. There is, however, no need to amend this section to specifically exclude information which may already be protected by law.

Section 572.701(e). Section 572.701 (e) specifies times when documents must be filed, one of which is after the issuance of a request for documents. Comment 34 refers to its objections pertaining to § 572.701 (c) and (d) and asserts that this section should be deleted. These concerns have already been addressed above and no change is required in this section.

Section 572.702 Filing of Reports Related to Shippers' Requests and Complaints and Consultations.

Section 572.702 further implements section 5(b) of the Act which requires conferences to provide for a consultation process and to establish procedures for considering shippers' requests and complaints.

Section 572.702(a)—Shippers'

Requests and Complaints. Section 572.702(a) provides that conferences shall annually file with the Commission a statistical report summarizing activity in several areas pertaining to shippers' requests and complaints. Comment 33 suggests that these reports should identify shippers' associations requests separately from those of individual shipper requests. This change is said to be necessary so that the Commission may carry out its responsibilities to administer and enforce section 10(b)(13) of the Act, which prohibits common carriers from refusing to negotiate with a shippers' association. Comment 27, on the other hand, contends that reports on the number of shipper complaints is unnecessary.

The contents of reports required under this section has been kept to a minimum. Only statistical totals without specific details are required. However, these statistics are important to determine the degree of conference responsiveness to sections 5(b), (6) and (7) as well as to section 10(b)(13) of the Act. With regard to section 10(b)(13) it would be useful to have the statistical reports separately indicate shippers' associations or groups and § 572.702(a) has been amended accordingly in the Final Rule.

Section 572.702(b)—Consultations.

Section 572.702(b) requires each conference to file an annual report setting forth a statistical summary of the number of consultations requested and conducted during the calendar year. Several of the comments already discussed in connection with § 572.702(a) make similar arguments with regard to this section. Comment 33 believes that this section also should provide for the separate compilation of statistics on consultations with shippers' associations. Comment 27 argues that this section is unnecessary. Comment 24 contends that the requirement to report on consultations should be eliminated because it will not produce any meaningful information and because it is contrary to the statutory goal of minimizing government intervention.

The reports required by § 572.702(a) are necessary and useful statistical information on the responsiveness of conferences to shippers' concerns which would enable the Commission to determine whether a closer scrutiny of conference consultation activities might be warranted. This section is, however, modified in the Final Rules as was § 572.702(a) to require that reports separately identify shippers' associations and shippers' groups.

Section 572.703 Filing of Minutes.

Section 572.703 defines the term "meeting" and requires certain types of agreements to file minutes of meetings. Certain matters, such as purely administrative discussion, are exempt from the filing requirements of this section.

Section 572.703(a)—Meetings. Section 572.703(a) defines "meetings" within the meaning of this section. It was initially considered desirable to have minutes of all meetings regardless of whether final action was contemplated. Upon further consideration and in light of the comments received, there would appear to be no need to require the submission of minutes of meetings which do not contemplate the taking of final action.

Therefore, this section is amended to provide that minutes need only be provided for meetings which authorize the taking of final action. This modification, in effect, continues the previous requirements under the 1916 Act. This amendment should satisfy the concerns of those comments (Comments 13, 25, 26, 34, 38, 39) which argued that the proposed definition of a "meeting" was too broad.

Section 572.703(b)—Content of Minutes. Section 572.703(b) of the Interim Rule required that the minutes identify all documents distributed at the meeting to inform or assist the members. This requirement is deleted from the Final Rule and the Commission will rely primarily on the index of documents required by § 572.704. This change should meet the concern of those comments (Comments 17, 24, 25, 26, 29, 34, 38, 39) objecting to the minutes content requirement in the Interim Rule.

Comment 29 states that the minutes requirement should not apply to meetings of pooling and equal access agreements in this section. This would have the effect of eliminating not only the minute filing requirements for such agreements but all reporting and record keeping requirements under Subpart G. Comment 38 states that the references to pooling, equal access and discussion agreements should be deleted.

Adequate surveillance under the 1984 Act is of particular importance with respect to pooling and equal access agreements. Therefore, it is necessary to obtain minutes from the parties to such agreements as part of that surveillance program. Final action taken by members of discussion agreements may also have significance for a particular trade. Therefore, the reference to pooling, equal access and discussion is retained in the Final Rule.

Section 572.704 Index of Documents.

Section 572.704 requires that agreements covered in § 572.703(a) index all documents which are distributed. Section 572.704(b) further requires this index to be filed with the Commission on a quarterly basis.

This section evoked considerable comment. Nine comments were received in objection (Comments 13, 16, 17, 25, 26, 29, 34, 38, 39). Seven of these comments (Comments 13, 16, 17, 26, 34, 38, 39) urge that the indexing requirement be deleted because it is unduly burdensome, unclear in its application, and contrary to one of the purposes of the Act, namely minimizing of government regulation. Comment 25 objected to the index but in the alternative suggested that, if retained, the Commission eliminate the double reporting of documents which must be identified in conference minutes and which also must be indexed.

The index requirement is modified to include only documents leading to final decision on specified matters. This should reduce the volume of materials to be indexed and limit the indexed documents to those which have substantial regulatory significance. The concern about double reporting expressed by Comment 25 has been addressed by eliminating the requirement in § 572.703(b) that minutes identify documents which are distributed.

Comment 29 requests that pooling and equal access agreements be permitted to submit, in lieu of the index, periodic and final accounting statements.

The requirement that pooling and equal access agreements must, where applicable, submit an index of documents distributed to members is retained. Accounting statements are not the equivalent of, or a substitute for, indexing of documents. The specificity of a document index is necessary to fulfill monitoring responsibilities under the Act. Parties need only identify the documents, not furnish the documents themselves, unless specifically requested.

Section 572.705 Waiver of Reporting and Record Retention.

Section 572.705 provides for a waiver of any provision of Subpart G upon a showing of good cause. No comments were received on this section and no substantive changes have been made to this section in the Final Rule.

Subpart H—Transitional Rules

Subpart H of the Interim Rule prescribes mandatory provisions in existing conference and interconference

agreements and addresses expiration dates in existing agreements. As discussed more fully below, the mandatory provisions in § 572.801 are deleted from the Final Rule. Those portions of §§ 572.802 and 572.803 which have a continuing purpose are transferred to other subparts of Part 572. All of the sections of Subpart H are therefore either deleted or relocated and the Subpart H designation shall be reserved for possible future use.

Section 572.801 Mandatory Provisions In Existing Conference Agreements

The purpose of § 572.801 was to facilitate the transition from regulation of agreements under the 1916 Act to the regulatory regime of the 1984 Act. In particular, it was important during the transitional phase to establish a mechanism to achieve compliance with section 5(b) of the Act on or before June 18, 1984, the effective date of the Act. To this end, the Commission required that conferences indicate their adoption of certain mandatory provisions set forth in § 572.801. This procedure worked to assure that conference agreements achieve compliance with section 5(b) of the Act.⁴ Because the purpose of this section has been achieved, there is no need to retain it in the Final Rule.

Conferences have been permitted to draft their own amendments to supersede the Commission prescribed provisions and to comply with the statutorily mandated requirements. This procedure is continued in the Final Rule. Because this section is being deleted, there is generally no need to address the comments (Comments 22, 30, 31, 38) which proposed specific changes to this section. One comment, however, does merit further discussion at this time.

This U.S. Department of Justice (DOJ) submitted an extensive comment which focused on the right of independent action under section 5(b)(8) of the Act. DOJ contends that the model independent action provision contained in § 572.801(e) of the Interim Rule should be strengthened and made mandatory for all conference agreements in order to ensure that independent action fulfills its purpose under the 1984 Act. Moreover, DOJ urges the Commission, by rule, to expressly prohibit: (1) All collusion among carriers concerning any carrier's decision to exercise or not exercise its right of independent action;

(2) the imposition of procedural barriers on the right of independent action; and (3) acts of retaliation against carriers who exercise their right of independent action. To that end, DOJ's comment includes a proposed model conference agreement independent action clause which contains extensive safeguards for the exercise of independent action.

DOJ's proposal is not adopted in the Final Rule. First, this proposal is so far reaching as to be clearly beyond the scope of the current rulemaking proceeding. A separate rulemaking proceeding would be necessary with full opportunity for comment before such a comprehensive rule could be adopted. Second, there is no factual record to provide a basis for the DOJ proposal. Unlike the situation in the motor carrier industry cited by DOJ, where the Interstate Commerce Commission imposed procedures for independent action after it found that the statute was being frustrated, the Commission has only limited experience with independent action under the 1984 Act. At this time, the Commission believes that conferences should be free to draft their own independent action provisions and that such freedom is consistent with the deregulatory spirit of the Act. The Commission is aware of the critical role that independent action plays under the statutory scheme as a counterbalance to conference economic power. Therefore, such provisions receive close scrutiny in the review process.

Where it appears that a particular independent action provision may inhibit independent action, the Commission has sought and obtained modification of the provision by the parties through the negotiation process. These negotiations have led to the deletion from agreements of independent action provisions which mandate that a member taking independent action attend a meeting and explain the independent action before the action may go into effect and also provisions which provide for mandatory compromise of independent action. The negotiation process has worked thus far to remove objectionable independent action procedures from agreements. At this time it therefore does not appear necessary to undertake a rulemaking proceeding regarding independent action. However, should there be any indication that the right of independent action is being interfered with in any way, such a rulemaking proceeding will be considered.

Section 572.802 Mandatory Provisions In Existing Interconference Agreements

Section 572.802 in the Interim Rule provided that existing interconference agreements and agreements between carriers not members of the same conference must provide for independent action. Comment 38 suggests that § 572.802 be transferred to § 572.502(b). This suggestion has been adopted.

Section 572.803 Expiration dates In Existing Agreements

Section 582.803 provides that expiration dates in existing agreements remain in effect on and after June 18, 1984. The section further provides that parties to agreements with expiration dates must file any modification seeking renewal for a specific term, or elimination of the expiration date, in sufficient time to accommodate the waiting period required under the Act. Comment 38 suggests that § 572.803(b) should be transferred to § 572.401. This suggestion is adopted.

Subpart I—Penalties

Subpart I prescribes penalties for violations of Part 572 as provided for in section 13(a) of the Act.

Section 572.901 Failure to File

Sections 4 and 5(a) of the Act provide for the filing of certain agreements with the Commission. Failure to file such an agreement is a violation of section 5(a) of the Act and Subpart D. This failure to file is subject to the penalties of section 13(a) of the Act (46 U.S.C. app. 1712(a)). Maximum penalties are \$5,000 for each violation unless the violation was willfully and knowingly committed, in which case the maximum penalty is \$25,000 for each violation.

Section 572.901 is amended to add the phrase "pursuant to sections 4 and 5(a) of the Act and this part and not exempted pursuant to section 16 or excluded from filing by the Act". This change clarifies that only agreements subject to the Act and requiring filing can be penalized for failure to file, as opposed to agreements subject to the Act but which do not require filing. This responds to Comments 34 and 38 which suggested these changes.

Section 572.902 Falsification of Reports

Falsification of any report required by the Act and Part 572, including falsification of any item on the Information Form, is made subject to the civil penalties set forth in section 13(a) of the Act. Such violations may also be

⁴A number of persons filed emergency comments (Comments 3, 4, 5, 6, 7, 11, 14 and 18) which either in whole or in part sought modifications of these mandatory provisions. On June 12, 1984 the Commission made certain amendments to the mandatory provisions in the Interim Rule in response to the concerns expressed in the emergency comments.

subject to criminal sanctions under 18 U.S.C. 1001.

Comment 29 challenges the Commission's authority to provide by rule for penalties for falsification of reports when the Act does not specifically proscribe such activity.

Section 17(a) authorizes the Commission to prescribe rules necessary to carry out the Act and section 13(a), in turn, establishes penalties for violations of the Act and regulations issued thereunder. It is essential that information submitted to the Commission be truthful information if it is to adequately administer the Act. The penalty provision furthers this fundamental purpose.

Comment 29 further asserts that this section is unnecessary because 18 U.S.C. 1001 already makes it a violation of the criminal code of the United States to intentionally make false statements within the context of any matter arising within the jurisdiction of a federal agency.

Section 572.902 is not superfluous. To supplement the criminal penalties under 18 U.S.C. 1001, it provides for civil penalties pursuant to section 13(a). Not all situations involving falsification of reports might merit the imposition of criminal penalties. In some situations civil penalties may be appropriate. Moreover, the reference to 18 U.S.C. 1001 in § 572.902 is a useful reminder of possible criminal liability.

Finally, Comment 29 maintains that the choice of the word "falsification" makes § 572.902 overbroad. It is submitted that unintentional misstatements could be construed as "falsifications" and thereby made subject to penalties.

Section 572.902 is amended by adding the word "knowing" before the word "falsification" where it appears. This modification clarifies that only parties who intentionally, and not mistakenly, submit false information will be subject to penalties.

Comment 22 submits that the penalties provided for in § 572.902 are excessive when considered in light of the difficulty of ascertaining some of the data required on the Information Form.

This Comment appears to be primarily addressed to the content of the Information Form. There should be no misunderstanding, however, of the application of the penalties provisions except in cases where parties knowingly falsify information. Parties will not be subject to penalty under Subpart I where they are unable to supply data requested on the Information Form.

Appendix A to Part 572—Information Form and Instructions

Commission Authority to Require Filing of the Information Form

Section 572.405 requires the party filing certain agreements to provide with the agreement information that is necessary under the Act to review the agreement. The required information is to be provided in the Information Form set forth in Appendix A. Where the filing party is unable to supply a complete response, the party should submit either estimated data with an explanation as to why the precise data are not available or a detailed statement of the reasons for noncompliance and the efforts made to obtain the required information.

Six comments address the issue of the Commission's authority to require the filing of the Information Form. Four comments disagree that the Commission has the authority to require the Information Form to accompany the filing of certain agreements. These comments make two related arguments in support of their position: one, there is no explicit obligation for parties filing agreements under section 5(a) of the Act to submit supplemental detailed information concerning competitive factors with every agreement at the time of its filing; and two, the Information Form, which requests information relevant to the general standard, cannot be the basis for rejection of an agreement under section 5(a) of the Act, which contains no reference to the general standard.

Authority to require the Information Form is manifest for three main reasons. First, the statute clearly and explicitly authorizes the Commission to require that information accompany the filing of agreements and the agreements that do not meet this requirement may be rejected. Specifically, section 5(a) of the Act authorizes the Commission to "prescribe * * * the additional information and documents necessary to evaluate the agreement" (46 U.S.C. app. 1704(a)). The legislative history to section 5 of the Act specifies that the filing requirements are intended "only for information relevant to the Commission evaluation of an agreement rather than for information based on broad standards unrelated to that agreement." (H.R. Report 98-600, 98th Cong., 2d Sess. 28 (1984)). Section 6(b) of the Act authorizes rejection of any agreement filed under section 5(a) of the Act that does not meet the requirements of section 5 of the Act.

Congressional intent concerning the evaluation of an agreement prior to the agreement's effective date is interpreted

to require not only a review pursuant to the section 6(b) standard (for compliance with section 5 requirements), but also an analysis based on the section 6(g) general standard for substantially anticompetitive agreements. Moreover, the authority under section 5(a)—to prescribe information to be filed with the agreement—differs from the authority under section 6(d)—to require additional information to be submitted after the agreement has been filed but prior to its effective date. The initial information filing requirements are designed to provide only the information needed to determine whether or not the agreement raises substantial issues of unreasonable and anticompetitive effects under the section 6(g) general standard. Where such anticompetitive effects are likely, additional information that is necessary in order to make a determination under section 6(g) whether or not to seek to enjoin the agreement may be requested under section 6(d).

Second, Congress has specifically cited in legislative history relevant portions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as the model for the Commission's agreement review procedures. Pursuant to the Hart-Scott-Rodino Act, the Federal Trade Commission (FTC) developed a report form for information to aid the FTC in its preclearance review of proposed acquisitions and mergers ("Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions").

Third, Congressional policy pronouncements in the Act and the legislative history indicate that one of the purposes of the Act was to end the delay in the processing of agreements and to provide a streamlined regulatory process. Submission of relevant information at the time an agreement is filed that is not available to the Commission but is readily available to the filing party will expedite the processing of agreements.

Two comments specifically refer to the Commission's authority to require an initial Information Form related to the general standard. Comment 23 states that if an information filing requirement is prescribed, it must be limited to those instances where the agreement or modification raises a question under the general standard. Comment 34 accepts the premise that useful information not available to the Commission, but readily available to the parties filing substantially anticompetitive agreements, may be required in conjunction with such filings. Such

requirements, according to Comment 34, will significantly reduce the need to request additional information from the filing parties, thereby aiding the review process.

In consideration of the above, it is concluded that the 1984 Act does confer the authority to require the submission of the Information Form in conjunction with the filing of certain agreements.

General Discussion of the Information Form

A number of comments argue that the Information Form is "excessive and irrelevant", "burdensome and unnecessary", seeks information not "readily available", or "resuscitates" the *Svenska* standard. Specific comments will be addressed in the discussion of the particular part of the Information Form. However, it should generally be stated that the requirements outlined in the Information Form are within the statutory limits on information gathering powers granted the Commission under sections 5 and 6 of the Act. The data requirements in the Information Form conform to the complicated decision calculus, described in the legislative history, that is required in order to render a determination that an agreement is or is not violative of the section 6(g) general standard. In the Interim Rule, the Commission stated,

The Commission recognizes that the amount of information requested on the Information Form is significant. These information needs may be refined as the Commission gains experience under the general standard and determines what is relevant and essential to that review. In addition, the Commission plans to develop its own internal sources of trade information and as this information becomes available may be able to reduce the amount of information requested on the Form.

Since the publication of the Interim Rule, valuable experience has been gained in applying the Information Form to the analysis of agreements under the general standard. Moreover, the Commission has acquired and begun to utilize Journal of Commerce and Bureau of Census data sources which, when used in conjunction with its trade monitoring capabilities, provide a better picture of the competitive implications of ocean carrier agreements.

Moreover, the Information Form, as promulgated in the Final Rule, is not set in concrete, but will in all probability continue to evolve in order to appropriately reflect the Commission's regulatory needs in light of its data resources and changes in the regulated industry. Therefore, in the Final Rule there has been a general reduction in the amount of information required in the

Form. Specific changes to the Information Form are indicated in the particular Part together with a discussion of the comments and the amendments to the Information Form.

Part by Part Discussion

Part I—Agreement Name. Part I requires the filing party to provide the full name of the agreement. One comment addressed this part simply to indicate that this requirement (along with Part II) was not objectionable as a quick identifier of the agreement. Accordingly, Part I will remain unchanged in the Final Rule.

Part II—Agreement Type. Part II requires the filing party to indicate whether or not the agreement authorizes the parties to collectively fix rates (Part II(A)), to pool cargoes or revenues (Part II(B)), or to establish a joint service or consortium (Part II(C)).

In the Interim Rule, the instructions to the Information Form state that the nature of the agreement determines the extent of information required. Specifically, the instructions require only those agreements that provide for rate-fixing, pooling or joint services/consortia to complete Parts III and IV, which seek information on market share and market competition. Such requirements are justified in the instructions on the basis that "these three types of agreements of all agreements historically filed with the Commission are the most likely to trigger the 6(g) standard because of their potential to create excessive market power."

Part II and the Instructions have been amended to clarify and conform Part II with the intention that only those agreements that provide for rate-fixing, pooling or joint services/consortia or significant modifications to such agreements are required to complete Parts III and IV. Parties filing amendments to agreements should refer to section 572.403(a) for guidance as to which amendments require the Information Form. Furthermore, the requirement that a completed Information Form include Part VIII (Reports, Studies or Other Research) for all filing parties has been limited to only those parties that have answered "yes" to any question in Part II (see the discussion under Part VIII).

Comment 23 states that only those types of agreements mentioned in Part II that could raise questions under the general standard should be required to file the Information Form. In particular, the comment argues that the Information Form should only be required for those agreements or modifications that authorize or directly increase the

authority of the parties to: (1) fix ocean rates; (2) allocate cargo or revenue between or among them; or, (3) reduce service at United States ports; and, which may also result in a significant reduction in competition.

The Commission generally agrees with the comment. The Information Form, as formulated in the Final Rule essentially conforms to the comment's suggestion. Part II identifies three types of agreements, the first two of which are identical to the first two agreement categories cited by the comment. Part V requires those agreements with service authority to specify any reduction in service that is likely to occur as a result of the agreement. Thus, Part V addresses those agreements in the comment's third agreement category.

Moreover, for all other agreements, the requirements imposed by the Information Form are minimal. In particular, the only parts of the Information Form required under the Final Rule for parties filing agreements, other than rate-fixing, pooling and joint service agreements, or agreements with service authority, or those agreements exempted from the filing requirement, are Parts I, II, VI and IX. For most agreements, all that these parts require is checking a box or entering name, address and signature. Other than those "Part II agreements" discussed above, the only other substantive requirement would be imposed upon those agreements that are required to complete Part VI. Because restrictions imposed by governments are the most effective limitations on competition in the ocean liner trades, Part VI captures important information for analysis under the general standard. For example, certain agreements that facilitate access to cargoes subject to foreign cargo preference laws or decrees which are not otherwise required to indicate any market information on the Form would be required to complete Part VI.

Five comments address the requirement that certain types of agreements must complete Parts III and IV of the Information Form.

Two comments refer specifically to the inclusion of joint service agreements in Part II. Comment 18 argues that the implication that joint service agreements are likely to be violative of the general standard should be rejected. Comment 30 supports the requirement that joint service/consortium agreements complete Parts III and IV, citing the potential for this type of agreement to reduce competition especially if the cooperating carriers dominate the relevant trade.

There are two major concerns with joint services under the general standard. The first, which was mentioned in Comment 30, involves a situation where two or more of the parties to the proposed joint service currently have an *existing* service in the trade. Thus, the formation of the joint service eliminates the existing competition between or among the parties in the relevant trade(s). The second concern involves the entry into a trade of a new joint service which is so large as to be able to exercise market dominance in the trade it plans to enter.

In order to assess the competitive impact of a new joint service agreement, the filing of an Information Form with such agreements will continue to be required. Therefore, no change is made in the Final Rule in this regard.

Comments 28, 28 and 38 argue that conference agreements are less likely to raise issues under the general standard than service coordination, pooling and joint service agreements. They also argue that information required for conference agreements is excessive and should be deleted or reduced.

The Commission concurs in part with these comments that conference agreements "apart from extraordinary circumstances" are not likely to be violative of the general standard and that the specific statutory restrictions on conference activities diminish the ability of a conference to abuse its position of dominance in a trade. However, such a view, which appears to comport with Congressional intent, does not remove the Commission's responsibility under the Act to review conference agreements for possible violations of the Act. Such a review must consider accepted economic principles which hold that explicit collusion in the form of price-fixing agreements may result in prices that are higher than competitive levels.

There is, however, no presumption that conference agreements will violate the general standard. In setting out the requirements for completing the Information Form, in particular Parts III and IV concerning market share and market competition, the Commission considered those agreements among all the types of agreements with which it was familiar that had the greatest potential to reduce competition and create market power in such a manner as to raise concerns under the general standard. The Commission adheres to its belief that in the unusual and severe cases where the general standard may be violated, either one or a combination of rate-fixing, pooling or joint service agreements will be involved. Consequently, the Commission will

continue to apply the more rigorous data requirements contained in Parts III, IV and VIII for conference agreements.

Two comments argue that certain classes of agreements should be added to those having potential substantial anticompetitive implications and that further information filing requirements should be imposed. Comment 28 specifically criticizes the failure to subject service coordination agreements (i.e., "cross chartering combined with joint control over sailings and itineraries") to greater scrutiny than conference agreements. The comment urges that service coordination agreements be required to complete Parts III and IV, and Part VII (Benefits of the Agreement), the completion of which is now voluntary for all types of agreements. Comment 30 proposes the addition of all equal access agreements to those agreements required to complete Parts III and IV.

In partial response to Comment 30, it should be noted that equal access agreements invariably arise in response to the actions of a government and, therefore, require the completion of Part VI. However, in considering these and other recommendations for inclusion in the Final Rule, care must be taken to ensure that all parties affected by the Final Rule have the opportunity to comment. The Commission cannot create new filing requirements for a class of agreements without first availing the affected parties with the opportunity to comment. The Commission may in a separate rulemaking procedure consider and propose rules that would address the issues raised in Comments 28 and 30. Accordingly, the Commission here withholds any further discussion of these aspects of Comments 28 and 30.

Comment 39 recommends that the requirement to submit an Information Form together with the required information contained therein should be "tailored to the type of agreement filed."

The Commission concurs with this comment. The Commission has, consistent with its agreement review responsibilities under the Act, required the Information Form only for new agreements (excluding marine terminal agreements, assessment agreements and exempted agreements) and modifications of agreements that may present substantial issues of competitive harm under the general standard. Moreover, the requirement to complete certain parts of the Form (e.g., Parts III, IV, V and VIII) is, in fact, tailored to the type of agreement involved.

Part III—Market Share Information. Part III requires those parties answering "yes" to Part II (A), (B) or (C) to provide

the combined market share of all parties to the agreement (Part III(C)) by providing the amount of liner cargo carried by all parties to the agreement in each sub-trade (Part III(A)) and dividing this amount by the total amount of cargo carried on all liner vessels operating in each sub-trade (Part III(B)). Background Information to Parts III and IV indicates that the amount of cargo is to be given in both weight tons and on a dollar value basis. Sub-trade is defined as liner movements between each foreign country and each U.S. port range within the scope of the agreement, where a port range is identical to the Bureau of Census' U.S. Coastal District. Liner service refers to a definite, advertised schedule, giving relatively frequent sailings at regular intervals between specific U.S. ports or port ranges and designated foreign ports or port ranges.

A number of comments address this part. They express a common concern that the information required in Part III is irrelevant, excessive, burdensome, and meaningless. The earlier discussion of the authority to require filing parties to submit an Information Form with certain agreements addressed the question of the relevancy of the Information Form.

A number of comments generally recommend that carriers be allowed to submit data in the form in which they actually keep it and use it. Several comments urge that market share should be requested as a good faith estimate based on available data and an explanation of the estimating process. Comments on specific data filing requirements in Part III are summarized below. The discussion of the comments and the Commission's statement of its course of action will not follow the summary of each topic, but will pertain to all comments to Part III at the end of this section.

Sub-trade. Comments referring to the requirement that data be given by sub-trade generally object to it on the grounds that trade data is not kept by carriers on a sub-trade basis, and, therefore, such data is not readily available or within the parties' grasp. Cargo data, according to several comments, is kept by carriers on a port, or port range or rate group basis. Moreover, according to two comments (23, 26), the separation of foreign port ranges into foreign countries and the division of U.S. port ranges along the lines of Customs districts does not reflect the markets or trade routes over which carriers actually compete. With intermodalism, Comment 26 argues, the U.S. West Coast should be one port range, not two, because of the ease with

which interior point and minilandbridge traffic can shift from one state to another.

Amount of Cargo on a Weight Ton and Dollar Value Basis. Six comments object to the requirement that cargo data be given in dollar value, two of which also object to a weight ton basis requirement. These comments generally argue that the dollar value of the cargo is not a significant statistic to the carriers so they do not ordinarily keep records of the cargo's dollar value. The dollar value is available through the Bureau of Census, but it is not within the parties' grasp. Comment 36 states that because cargo data compiling methods differ from trade to trade, parties should be permitted to specify the unit of measurement in submitting cargo data if weight ton and dollar value measure are unavailable.

Non-Party Cargo Data (Part III(B)). Comments generally argue that the cargo data collection problems for parties are increased when they are applied to nonparties to the agreement. Several comments maintained that the carriers do not have ready access to cargo information relating to their competitors in a trade. The most reliable information on carrier cargo statistics is Bureau of Census, which should, according to Comment 34, be purchased by the Commission directly instead of being purchased by the parties and then submitted to the Commission. This comment urges that Part III(B) be eliminated along with Part III(C).

Liner Service. Comment 30 recommends that the Commission specify in the Instructions to the Form where it defines liner terms that these definitions and descriptions apply only in the context of the Information Form. Such a clarification would preclude any confusion as to what persons are subject to the Act. For example, bulk parcel tankers may meet the definition of a liner service but, according to the comment, are not subject to the Act.

The Commission generally agrees with the comments to Part III. The Commission does not wish to impose excessive burdens on the filing parties or to require the submission of data not within the parties' grasp. Moreover, the data submitted should be meaningful, that is, the data should not be an artificial manipulation of disparate data (e.g., a combination of parties' business records and Census data in order to derive market share). More importantly, the Commission, which now has access to both the Bureau of Census and Journal of Commerce data bases, is aware, as several comments argued, that these data bases contain weight and dollar value data which are not perfect

indicators of market share. More relevant and preferable as a measure of market shares are revenue tons, which may include measurement tons or weight tons, or container statistics measured in TEU's. Such data, where provided, can augment internal data sources.

Accordingly, the Final Rule will indicate that market share data provided in Parts III (A), (B), and (C) may be estimated based on data available to the filing party. All estimates should be accompanied by an explanation indicating how the estimates were derived (an explanation of why precise data are not available is no longer required for Parts III or IV; see discussion of § 572.405). "Available" data is data within the parties' grasp, that is, data that the parties have already acquired, or would ordinarily acquire in the course of undertaking such commercial decisions embodied in their proposed agreement. The Instructions and Explanation and the Information Form will be amended to require that market share data be provided for each sub-trade within the scope of the agreement only where such data is available to the parties or where sub-trades represent the relevant market for liner service. Where the relevant market for liner service is more accurately represented by the entire geographic scope of the agreement, or by certain foreign port ranges (rather than foreign country), or by combinations of U.S. port ranges, the parties may provide market share on that basis. The geographic scope for which market share information is provided should be clearly defined.

Market share data may be provided in units that are ordinarily kept and used by the parties. The data is to be provided for the most recent twelve-month period for which data are available. Where estimates have been made, the filing party should so specify and indicate the basis of their derivation. Units of measurement should be clearly indicated for all data provided.

The Instructions and Explanation will also indicate that the definition of liner service and other liner terms is relevant only to the Information Form and does not affect the determination of persons subject to the Act based on the Act itself or the Final Rule.

Part IV—Market Competition. Part IV requires the filing party to provide the names of all non-party liner operators currently serving each sub-trade (Part IV(A)(1)), the names of all liner operators serving alternative liner routings competing for cargoes carried in each sub-trade (Part IV(A)(2)), and a

description of the extent of competition offered by such liner operators (e.g., estimates of market share or underutilized capacity in alternative liner routings, Part IV(A)(3)). This part also requires the identification of all nonliner competitive substitutes (e.g., bulk or air freight, Part IV(B)(1)) and estimates of the percentage of liner cargo that is currently carried by nonliner operators (Part IV(B)(2)).

Eight comments address this part. Five comments argue that much of the data required in this part is not known and not readily obtainable, or if provided by the parties is not meaningful or accurate. These comments generally indicate that data provided in this part would be only an educated guess or a matter of judgment.

Several comments address the relevance of the information required. Comment 28 argues that non-party liner market share adds nothing to market share analysis. Comments 28 and 39 state that data on non-liner competition is not meaningful or helpful to the review of the agreement. However, Comment 38 maintains that such data for liner and non-liner competition would only be relevant to a market share analysis. Comment 34 contends that the need for such data is specified in the legislative history to the Shipping Act of 1984, but the Congressional intent is that such information would be better provided by third-party sources. Comment 27, in arguing that the required information is not readily available to carriers, states that the Commission should recognize the fact that liner and nonliner competition make liner freight rates reasonable.

Comments 23 and 34 recommend that Parts IV(A) (2), (3) and IV(B) should be optional because the data provided serves the parties' interests. Comments 27 and 36 recommend that Parts IV(A) and IV(A)(1) be deleted. Comment 36 requests the addition of certain qualifying terms that would make the data requirements less precise and more at the discretion of the parties.

The Commission recognizes the difficulty of providing precise data in response to the requirements of Part IV. The instructions to this part in the Interim Rule allow the use of estimates in the determination of percentages indicating the extent of liner and non-liner competition in Parts IV (A) and (B), respectively. Parties are expected to have some knowledge of the identity of their competitors and, at least approximately, the degree to which non-party liner operators and certain non-liner operators are competitive with the parties.

The Commission agrees with one comment that the presence of liner and non-liner competition should militate against unreasonably high rate levels. Moreover, the need and relevance of such information to the review of agreements under the general standard is clearly indicated in the legislative history. The extent of liner and non-liner competition aids in the determination of the relevant market share and is necessary in order to determine the potential market power of parties to an agreement operating in that market. The specification of such liner and non-liner competition may tend to decrease the market share of the parties to their benefit in the analysis under the general standard.

The Commission is developing or acquiring data sources that should enable it to supplement the parties' data on the competitive conditions in most ocean trades. However, the Commission, in order to assist and expedite its preliminary review of agreements under the general standard, requires information that the parties could be expected to have concerning their competitors that would complete or support the Commission's data.

Because of the relevance of this information to the preliminary review of an agreement, the Commission continues to require in the Final Rule, parties with affirmative answers to Part II (A), (B) and (C) to complete Part IV. The Final Rule will indicate that the data required can be estimated. Parties should continue to identify the sources for such estimates. The units of measurement to be used in providing cargo data are at the discretion of the parties. However, all units of measurement must be clearly identified. The parties need not, for their responses to Part III or Part IV, utilize any data sources that they have not already acquired, or would not ordinarily acquire in the course of undertaking such commercial decisions embodied in their proposed agreement.

Part V—Service to the Shipping Public Under the Agreement. Part V requires the filing party to identify all U.S. ports expected to be served under the agreement (Part V(A)), to specify each party's reduction in frequency to each port within the scope of the agreement (Part V(B)), and to specify any elimination of service to any U.S. port within the scope of the agreement which occurs as a result of the implementation of the agreement (Part V(C)).

Six comments address Part V. The consensus of the comments is that information concerning the reduction or elimination of service should be

required only of agreements that have the authority to reduce service.

Ratemaking agreements that do not, according to Comment 32, "seek to control the fact or frequency of any member line's service" should not be required to complete Part V.

The intent of Part V is to obtain information, not otherwise available, that is essential to an analysis under the general standard of reductions in service resulting from the agreement. Clearly, agreements with no service authority cannot be construed as having the potential, through a reduction in competition, to unreasonably reduce service levels. Consequently, the completion of Part V will be required only for those agreements that have service authority. Service authority is defined as including either or both of the following authorities allowing parties to agree between or among themselves: to allocate (or otherwise provide) tonnage or capacity between or among carriers serving the trade(s); to establish a schedule of ports or otherwise allocate ports which each carrier will serve and/or the frequency of each carrier's calls at those ports.

Comment 27 indicates that Part V is relevant, but Part V's emphasis on service to ports is contrary to the Act's intent, which is "to permit carriers to structure their own affairs and thereby provide more efficient service to shippers." Because it does not follow that a reduction in service to ports is a reduction in service to shippers, the Commission should, according to this comment, readjust its focus on ports to address the issue of service to shippers.

The frequency of port calls is used because it is a readily available index of service to shippers. There are, of course, other indices that indicate the service to shippers (including, for example, capacity, type of vessel, transit time, number of handlings). However, to require such data would likely present filing parties with an unduly burdensome data collection task. Moreover, such data would likely be of marginal use for the analysis of most agreements under the general standard. If reductions in frequency or the elimination of service to ports are indicated in Part V, which, when combined with the Commission's general knowledge of trade conditions, are sufficient enough to present questions under the general standards, the Commission may at that time seek additional information either informally or under the authority of section 6(d) of the Act in order to more specifically address the impact of the agreement on service to shippers. Consequently, in lieu of any specific suggestions in the

comment as to how service to shippers could be more accurately and practicably determined and obtained, the Commission will continue to utilize port calls as one initial proxy for service to shippers.

Comment 23 maintains that the reference to indirect port calls via surface carriage in the instructions to Part V(A) implies that, for the purposes of responding to Part V(A), a "port" could include inland points and that port calls could include pick-up or delivery at such inland points by railcars and trucks. Comment 23 also recommends that port calls required by Part V(B) refer only to direct or indirect calls by vessels under the direct operational control of the parties.

The Commission is persuaded that potential problems may exist involving excessive data required in Part V for indirect intermodal service and for service by vessels not under the operational control of the parties. Consequently, the use of the term "port calls" in the Information Form and Instructions is changed to delete reference to surface carriage and to account only for port calls by vessels under the direct operational control of one or more parties to the agreement. For the purpose of the Information Form, the term "port" means the place with a harbor that an ocean carrier serves, either directly by oceangoing vessel or indirectly by feeder service. The use of this definition is applicable only to the Information Form and in no way changes the meaning of "port" as referenced elsewhere in the Final Rule. The identification of other forms of indirect service such as intermodal service (e.g., interior point of miniland-bridge service) or transshipment may be provided on a voluntary basis by the parties where such data may assist and expedite the analysis of the agreement's impact on service, but it will not be required with the initial filing. The Commission may, however, request such data pursuant to its authority under section 6(d) of the Act where substantial reductions in service are indicated both by the agreement and by the analysis under the general standard of the agreement and the relevant trade(s).

Comment 36 recommends that Part V(A) be changed to require only the identification of those ports "expected" to be served, and that Part V(B) be amended to require an estimate of any change in the frequency of port calls, rather than reduced sailings.

With regard to the comment's concerns with Part V(B), the analysis of services under the general standard pertains to unreasonable reductions in

the level of service. The Commission need only, therefore, require parties to provide reductions in service that will occur as a result of the implementation of the agreement. With regard to the suggestion that Part V(A) indicate those ports expected to be served, the instructions to Part V(A) already so state. Consequently, Part V(A) will be changed to conform to the instructions.

Comment 26 refers to Part V(B) (2) which specifies that the elimination of service to any port need only be indicated where it occurred "as a result of the implementation of the agreement." This comment urges that similar restrictive language be applied to Part V(B) (1) as well.

Part V(B), seeks information concerning the reduction or elimination of service at any port within the scope of the agreement for the purpose of analyzing the impact of an agreement under the general standard. Consequently, the Commission is only interested in Part V(B) (1), as it is in Part V(B)(2), insofar as the specified reduction of service is likely to occur as a result of the implementation of the agreement. The Final Rule will, therefore, reflect the change in language urged by Comment 26.

Part VI—Foreign Government Involvement in the Liner Market. Part VI requires the filing party to indicate whether or not the agreement was entered into as a direct or indirect response to any law, decree or other action promulgated or otherwise implemented by a foreign government (Part VI(A)). Where the filing party has so indicated, then all such governmental actions that have led to the agreement should be specified (Part VI(B)). The filing party is also required to indicate whether or not the governmental action limits access to the carriage of liner cargoes (Part VI(C)) and, if so, to explain how access is limited (Part VI(D)) and to provide the percentage of liner cargo carried within the scope of the agreement to which access is limited (Part VI(E)).

Four comments address Part VI. Comment 22 has "no quarrel" with this part. Comment 26 states that the instructions to this Part should be clarified so that Parts VI (C), (D) and (E) are required only where Part VI(A) is answered in the affirmative. The concerns of Comment 26 can be alleviated by reference in the Information Form to Part VI(C) which clearly refers to Part VI(A), and to Parts VI (D) and (E), which clearly refer to Part VI(C).

Comment 34 argues that Part VI is not relevant with respect to ratemaking agreements and, therefore, should not be

applicable. The Commission concurs that most conference agreements have not usually been established in direct or indirect response to government laws, decrees, etc. Nonetheless, certain laws of foreign governments do require that a carrier, in order to carry cargo in that country's oceanborne foreign commerce, be a conference member. The Commission will retain the requirement that parties filing conference agreements or significant amendments to such agreements answer the pertinent portions of Part VI.

Comment 38 states that government laws are not relevant to any standard pertaining to the rejection of an agreement under sections 6(b) or 6(g) of the Act. Moreover, even if such laws were relevant, no reason is given, according to this comment, as to why Part VI should apply to foreign government and not U.S. laws.

The inclusion of Part VI, as explained in the Interim Rule, is based on the premise that, given the contestability of the liner shipping industry, in all but the rarest cases, only the actions of governments can effectively restrict entry to a trade. In such cases where entry is so restricted, excessive market power is most likely to arise and present significant issues of potential competitive harm under the general standard. Thus, the Commission rejects the claim made by Comment 38 that information concerning foreign government involvement in the liner trades is not relevant to the preliminary review of an agreement under the general standard. The general authority to reject agreements under section 6(b) is addressed earlier in the discussion of Appendix A.

It may be helpful to reiterate and further clarify what is meant by an agreement that is a direct or indirect response to a governmental law, decree or other action. Where, for example, laws of a foreign government require that a carrier, in order to carry cargo in that country's oceanborne foreign commerce, must be a conference member, then an agreement that establishes a conference in order for the parties to enter that trade would be a direct response to such governmental laws and, thus, would be required to answer Part VI. Moreover, a commercial agreement that was in response to a governmental action that was itself in response to the concerted actions of other governments would also be required to complete Part VI. For example, any commercial space charter agreement that was filed in response to laws promulgated by a government that sought to impose cargo sharing schemes through such space chartering

agreements and, in such a fashion, implement the UNCTAD Code of Liner Conduct, would be required to complete Part VI.

In addition, the treatment of equal access agreements should be clarified in light of Comment 30, which states that equal access agreements may not be in response to the actions of governments. Such agreements, which facilitate access by certain carriers to cargoes subjected to government preference laws, decrees or other practices necessarily intersect a foreign government into liner shipping and, therefore, require the completion of Part VI, which the instructions to the Information Form in the Final Rule will state.

An agreement that was an indirect response to a governmental action would be any agreement that facilitated the implementation of government laws, decrees, etc., or an agreement that flowed from such governmental action. An indirect response to the example stated above would be the creation of a pool that facilitates cargo sharing within the conference even though the pool was not *per se* required by such governmental action.

Only foreign government laws have been addressed in Part VI because the Commission is either familiar with or can easily obtain the information it requires concerning U.S. cargo preference laws. The involvement of foreign governments in liner markets is not necessarily so easily determined.

Part VII—Benefits of the Agreement. Part VII requests the filing party to indicate the benefits of the agreement that will accrue to the parties to the agreement (Part VII(A)) and to shippers and U.S. commerce generally (Part VII(B)). In response to emergency comments, the Information Form was amended to make the completion of Part VII voluntary.

Seven comments address this part. Three comments are generally supportive of this part's inclusion in the Form. Comments 22 and 34 assert that the provision of the agreements' benefits will generally bolster the parties' case. Comment 26 concurs with the amendment to the Interim Rule that makes the completion of Part VII voluntary.

The three comments that oppose Part VII (Comments 27, 32, 37) generally take the position that a statement of benefits and substantiating data is a request for an advance justification of the agreement, placing the burden of proof on the parties to an agreement. These comments believe that Part VII

reinstates the *Svenska* standard and subverts the intent of the Act.

The Commission included Part VII in the Information Form in order to allow the parties to provide any information concerning increases in efficiency that may offset any reduction in competition resulting from the agreement. Such information would assist the Commission in its review of an agreement under the general standard, which, as outlined in the legislative history, compels the consideration of efficiency benefits. Such benefits may offset any negative effects of an agreement that are found likely to result in a substantial reduction in competition. Part VII allows those persons filing the agreement who are likely to be most knowledgeable about the agreement's resulting efficiencies to demonstrate those benefits. The completion of Part VII should be to the advantage of the filing parties. Moreover, it is not a mandatory requirement.

The Commission will make no *a priori* judgments concerning the benefits of an agreement based on the completion or lack of completion of Part VII. In the absence of the completion of Part VII the Commission, where it is deemed necessary, will on its own undertake the determination of the agreement's benefits. Where Part VII has been completed, the Commission will determine the validity of the efficiencies claimed and enter, again where necessary, its assessment of the agreement's benefits into its analysis of the agreement under the general standard. The Commission does not, therefore, view Part VII as a reinstatement of any aspect of the Commission's agreement approval standards under the Shipping Act, 1916. Part VII will remain unchanged in the Final Rule.

Part VIII—Reports, Studies or Other Research.—Part VIII requires the filing party to identify any reports, studies or other research that were prepared in order to determine the need for the proposed agreement.

Nine comments address this part. All oppose the requirement. These comments contend that it is: an unnecessary regulatory requirement; irrelevant to the general standard; so broad as to be incomprehensible; an invasion of confidential business information; a reinstatement of the *Svenska* test; the first leg of a fishing expedition that is arbitrary and capricious because of the absence of any exploration in the public record; an unnecessary processing delay; discoverable under 6(d) but not 6(b); and, finally, a return to existing law

requiring the parties to show that less anticompetitive alternatives exist.

The Commission believes that a clarification of Part VIII may adequately respond to these comments' objections. The Commission's goal in requiring parties to identify any reports made in conjunction with the proposed agreement is to avail the Commission staff of information within the parties' grasp that would assist and expedite the preliminary review of the agreement under the general standard. The use of the word "need" in the phrase "... for the purpose of analyzing, formulating or assessing the need for the proposed agreement..." is perhaps unfortunate. The Commission does not desire nor does it review as a proper burden to be placed on filing parties an *a priori* justification for the agreement on the basis of the commercial need for the agreement, or on the basis that no less anticompetitive alternatives to the agreement exist. The Commission is interested in any data the parties have gathered relevant to the competitive conditions in the relevant trade(s) and the competitive implications of the agreement. Specifically, this part is intended to solicit information on any studies commissioned or carried out by the parties pursuant to the agreement that examine rates, service levels and number and strength of competition in the relevant trades, or that forecast the effect of the agreement on such parameters.

In light of the comments and in order to clarify Commission intent with respect to Part VIII, the Commission is amending Part VIII and all references to this Part in the Instructions and Explanations to the Form to conform to the amended language. In order to minimize the burden on filing parties, only where the filing party has answered "yes" to Part II(A), (B), or (C) will Part VIII be required to be completed. The instructions to Part VIII will now read as follows:

Part VIII requires a filing party that has answered "YES" to Part II(A), (B) or (C) to identify any reports, studies or other research that were prepared by or for any or all of the parties for the purpose of analyzing, formulating or assessing the competitive conditions in the relevant trade(s) affected by the agreement, or the competitive impact of the agreement on the relevant trade(s) affected by the agreement.

Part IX—Identification of Person(s) to Contact Regarding the Information Form and Certification of Authenticity. Part IX solicits the name(s) of the person(s) that the Commission may contact regarding any questions concerning the Information Form or a request for additional information. This part also

requires a certification of the authenticity by the filing party of the information provided in the Form.

Three comments address Part IX. These comments generally oppose the certification requirement in Part IX(C) as burdensome and redundant. Comment 23 claims that the specific instructions for certification in Part IX(C) require an unreasonable confirmation of factual and legal conclusions regarding the accuracy and completeness of the Form. All comments refer to 18 U.S.C. 1001, which is itself specifically referenced in § 572.902 of the Rules. These comments urge the elimination of Part IX or the modification of its text to allow the filing parties to draft the certifications.

The Commission is persuaded that the text of Part IX(C) may present the parties with burdensome certification requirements. The Commission views, however, that a separate certification of the accuracy and completeness of the Information Form is important to the enforcement of the general standard. In order to relieve the filing parties of burdensome requirements, the Commission is simplifying the certification oath and eliminating the notarization requirement. The certification oath will read as follows:

This Information Form, together with any and all appendices and attachments thereto, was prepared and assembled in accordance with the instructions issued by the Federal Maritime Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made, the information is, to the best of my knowledge, true, correct and complete.
Name (please print or type) _____
Title _____
Relationship with parties to agreement _____
Signature _____
Date _____

III. Conclusion

This Final Rule, and the accompanying Information Form, are intended to implement the various agreements provisions of the Act in accordance with the 1984 Act's guiding policies. The changes made to the Interim Rule in response to the comments filed in Dockets Nos. 84-26 and 84-32 are intended further to facilitate the filing of agreements by parties and the review and monitoring of agreements by the Commission. These changes generally have reduced the regulatory burden on the ocean shipping industry and have retained only those requirements which are essential to the fulfillment of the Commission's regulatory responsibilities. The Commission believes that the Final Rule establishes a nondiscriminatory regulatory process with a minimum of

government intervention and regulatory costs.

The Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that these rules will not have a significant economic impact on a substantial number of small entities, within the meaning of that Act. The primary economic impact of these rules would be on ocean common carriers which generally are not small entities. A secondary impact may fall on shippers, some of whom may be small entities, but that impact is not considered to be significant.

List of Comments and Pleadings Filed in Docket No. 84-26

1. Hoppel, Mayer & Coleman. May 30, 1984.
2. Philadelphia Port Corporation. May 31, 1984.
3. Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea Atlantic and Gulf Freight Conference. June 4, 1984.
4. Associated Latin American Freight Conferences; United States Atlantic & Gulf/Panama Freight Conference; Atlantic & Gulf/West Coast of South America Conference; East Coast Colombia Conference; United States Atlantic 7 Gulf/Southeastern Caribbean Conference; United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Freight Association; United States Atlantic & Gulf/Ecuador Freight Conference; United States Florida/Ecuador Steamship Conference; South Atlantic & Gulf/Panama & Costa Rica Rate Agreement; South Atlantic & Gulf/Guatemala El Salvador & Honduras Rate Agreement. June 1, 1984.
5. Inter-American Freight Conference; Inter-American Freight Conference River Plate/Puerto Rico and U.S. Virgin Islands/River Plate; Pacific Coast/River Plate Brazil Conference. June 1, 1984.
6. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic Freight Conference; Israel/U.S. North Atlantic Ports Westbound Freight Conference; Med-Gulf Conference; Mediterranean-North Pacific Coast Freight Conference; North Atlantic Israel/Eastbound Freight Conference; North Atlantic Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference. June 4, 1984.
7. Thailand Pacific Freight Conference. June 5, 1984.
8. Pacific Westbound Conference; Pacific Straits Conference; Pacific/Indonesian Conference. June 1, 1984.
9. Graham & James. June 4, 1984.
10. Inter-American Freight Conference, Puerto Rico and U.S. Virgin Islands. June 5, 1984.
11. Chemical Manufacturers Association. June 6, 1984.
12. U.S. Flag Far East Discussion Agreement. June 8, 1984.
13. North Atlantic/United Kingdom Freight Conference; North Atlantic/French Atlantic Freight Conference; North Atlantic Continental Freight Conference; North Atlantic/Baltic Freight Conference; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; Continental North Atlantic Westbound Freight Conference; North Atlantic Westbound Freight Association; United Kingdom & U.S.A. Gulf Westbound Rate Agreement; Continental U.S. Gulf Freight Association; Gulf United Kingdom Conference; Gulf European Freight Association. June 11, 1984.
14. U.S. Department of Justice. June 15, 1984.
15. National Maritime Council. July 24, 1984.
16. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Med-Gulf Conference; Mediterranean-North Pacific Coast Freight Conference; New Zealand Rate Agreement; North Atlantic/Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. South Atlantic/Portuguese, Moroccan and Mediterranean Rate Agreement; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC). August 6, 1984.
17. North Atlantic/United Kingdom Freight Conference; North Atlantic/French Atlantic Freight Conference; North Atlantic Continental Freight Conference; North Atlantic/Baltic Freight Conference; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; Continental North Atlantic Westbound Freight Conference; North Atlantic Westbound Freight Association; United Kingdom & U.S.A. Gulf Westbound Rate Agreement; Continental U.S. Gulf Freight Association; Gulf United Kingdom Conference; Gulf European Freight Association; North Europe-South Atlantic Rate Agreement; U.S. South Atlantic-Europe Rate Agreement. August 10, 1984.
18. Johnson Scanstar. August 15, 1984.
19. City of Los Angeles Harbor Department. August 20, 1984.
20. Trans Freight Lines, Inc. August 23, 1984.
21. Port of Sacramento. August 24, 1984.
22. North Europe U.S. Pacific Freight Conference; Pacific Coast European Conference; Latin America/Pacific Coast Steamship Conference; Pacific Coast River Plate Brazil Conference; Pacific/Australia-New Zealand Conference; and their respective member lines. August 27, 1984.
23. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Med-Gulf Conference; Mediterranean North Pacific Coast Freight Conference; North Atlantic/Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. South Atlantic/Portuguese, Moroccan and Mediterranean Rate Agreement; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC). [Comment on Proposed Rule]. August 27, 1984.
24. U.S. Flag Far East Discussion Agreement. August 27, 1984.
25. Malaysia/Pacific Rate Agreement; Pacific/Indonesian Conference; Pacific Straits Conference; Pacific Westbound Conference. August 27, 1984.
26. Council of European & Japanese National Shipowners' Associations. August 27, 1984.
27. American President Lines, Ltd. August 27, 1984.
28. U.S. Gulf/Brazil Pooling Agreement; U.S. Pacific/Brazil Pooling Agreement; Brazil/U.S. Pacific Pooling Agreement; U.S. Gulf/Argentina Pooling Agreement. August 27, 1984.
29. Chemical Manufacturers Association. August 27, 1984.
30. U.S. Department of Justice. August 27, 1984.
31. U.S. Department of Transportation. August 27, 1984.
32. American Institute For Shippers' Associations, Inc. August 28, 1984.
33. North Atlantic/United Kingdom Freight Conference; North Atlantic/French Atlantic Freight Conference; North Atlantic/Continental Freight Conference; North Atlantic/Baltic Freight Conference; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; Continental North Atlantic Westbound Freight Conference; North Atlantic Westbound Freight Association; United Kingdom & U.S.A. Gulf Westbound Rate Agreement; Continental U.S. Gulf Freight Association; Gulf-United Kingdom Conference; Gulf-European Freight Association; North Europe-U.S. South Atlantic Rate Agreement; U.S. South Atlantic-Europe Rate Agreement. August 28, 1984.
34. Agreement No. 10305. August 29, 1984.
35. Sea-Land Service, Inc. August 27, 1984.
36. American West African Freight Conference. August 30, 1984.
37. Inter-American Freight Conference; Inter-American Freight Conference-Puerto Rico and U.S. Virgin Islands; Inter-American Freight Conference River Plate/Puerto Rico and U.S. Virgin Islands/River Plate. August 30, 1984.

39. Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; TransPacific Freight Conference (Hong Kong); New York Freight Bureau; Philippines/North America Conference; and their member lines. August 30, 1984.

List of Comments and Pleadings Filed in Docket No. 84-32

101. The "8900" Lines; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico (Med-Gulf) Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. Atlantic Ports/Italy, France and Spain Conference; The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC). October 17, 1984.

102. American President Lines, Ltd. October 17, 1984.

103. Council of European & Japanese National Shipowners Associations. October 17, 1984.

104. Far East Conference; Malaysia Pacific Rate Agreement; Pacific/Indonesian Conference; Pacific-Straits Conference. October 18, 1984.

105. The North European Conferences. October 18, 1984.

106. Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Trans Pacific Freight Conference (Hong Kong); New York Freight Bureau; Philippines/North America Conference. October 22, 1984.

107. Sea-Land Service, Inc. October 22, 1984.

108. Inter-American Freight Conference. October 22, 1984.

109. Atlantic & Gulf/West Coast South America Conference; East Coast/Colombia Conference; West Coast of South America Northbound Conference; United States Atlantic & Gulf/Ecuador Freight Conference; United States Florida/Ecuador Steamship Freight Association; United States Atlantic & Gulf/Venezuela Freight Association. October 22, 1984.

110. United States Atlantic & Gulf/Southeastern Caribbean Conference; United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Freight Association; United States South Atlantic & Gulf/Panama & Costa Rica Rate Agreement; United States Atlantic Gulf/Guatemala, Honduras & El Salvador Rate Agreement. October 22, 1984.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

By the Commission.

Francis C. Hurney,
Secretary.

Therefore, pursuant 5 U.S.C. 553; and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17, and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717) Part 572 of Title 46, Code

of Federal Regulations, is revised to read as follows:

PART 572—AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

Subpart A—General Provisions

- Sec.
572.101 Authority.
572.102 Purpose.
572.103 Policies.
572.104 Definitions.

Subpart B—Scope

- 572.201 Subject agreements.
572.202 Non-subject agreements.

Subpart C—Exemptions

- 572.301 Exemption procedures.
572.302 Non-substantive agreements and non-substantive modifications to existing agreements—exemption.
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Appendix A to Part 572—Information Form and Instructions

Authority: Secs. 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18, of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717).

Subpart A—General Provisions

§ 572.101 Authority.

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (U.S.C. 553), and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 ("the Act").

§ 572.102 Purpose.

This part implements those provisions of the Act which govern agreements by or among ocean common carriers and agreements (to the extent the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers. This part also sets forth more specifically certain procedures provided for in the Act.

§ 572.103 Policies.

(a) The Act requires that agreements be processed and reviewed according to strict statutory deadlines. This part is intended to establish procedures for the orderly and expeditious review of filed agreements in accordance with the statutory requirements.

(b) The Act requires that agreements be reviewed in accordance with a general standard as set forth in section 6(g) of the Act and empowers the Commission to obtain certain information to conduct that review. This part sets forth the kind of information for particular types of agreements which the Commission believes relevant to that review. Only that information which is relevant to such a review is requested. It is the policy of the Commission to keep the costs of regulation to a minimum and at the same time obtain information needed to fulfill its statutory responsibility.

(c) In order to further the goal of expedited processing and review, agreements are required to meet certain minimum requirements as to form. These requirements are intended to ensure expedited review and should assist parties in preparing agreements. These requirements as to form do not

affect the substance of an agreement and are intended to allow parties the freedom to develop innovative commercial relationships and provide efficient and economic transportation systems.

(d) The Act itself excludes certain agreements from filing requirements and authorizes the Commission to exempt other classes of agreements from any requirement of the Act or this part. In order to minimize delay in implementation of routine agreements and to avoid the private and public cost of unnecessary regulation, the Commission is exempting certain classes of agreements from the filing or information requirements of this part.

(e) Under the new regulatory framework established by the Act, the role of the Commission as a monitoring and surveillance agency has been enhanced. The Act favors greater freedom in allowing parties to form their commercial arrangements. This, however, requires greater monitoring of agreements after they have become effective. The Act empowers the Commission to impose certain recordkeeping and reporting requirements. This part identifies those classes of agreements which require specific record retention and reporting to the Commission and prescribes the applicable period of record retention, the form and content of such reporting, and the applicable time periods for filing with the Commission. These requirements assure that Commission monitoring responsibilities will be fulfilled.

(f) The Act requires that conference agreements must contain certain mandatory provisions. Each such agreement must: (1) state its purpose; (2) provide reasonable and equal terms and conditions for admission and readmission to membership; (3) allow for withdrawal from membership upon reasonable notice without penalty; (4) require an independent neutral body to police the conference, if requested by a member; (5) prohibit conduct specified in sections 10(c)(1) or 10(c)(3) of the Act; (6) provide for a consultation process; (7) establish procedures for considering shippers' requests and complaints; and (8) provide for independent action. Parties to conference agreements are free to develop their own mandatory provisions in accordance with the requirements of section 5(b) of the Act.

(g) An agreement filed under the Act must be clear and definite in its terms, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their present

operations and regulate the relationships among the agreement members.

§ 572.104 Definitions.

When used in this part:

(a) *Agreement* means an understanding, arrangement or association, written or oral (including any modification, cancellation or appendix) entered into by or among ocean common carriers and/or marine terminal operators, but does not include a maritime labor agreement.

(b) *Antitrust Laws* means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), 15 U.S.C. 1, as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), 15 U.S.C. 12, as amended; the Federal Trade Commission Act (38 Stat. 717), 15 U.S.C. 41, as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), 15 U.S.C. 8, 9, as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), 15 U.S.C. 13, as amended; the Antitrust Civil Process Act (76 Stat. 548), 15 U.S.C. 1311, note as amended; and amendments and Acts supplementary thereto.

(c) *Appendix* means a document containing additional material of limited application and appended to an agreement, distinctly differentiated from the main body of the basic agreement.

(d) *Assessment agreement* means an agreement, whether part of a collective bargaining agreement or negotiated separately, to the extent that it provides for the collectively bargained fringe benefit obligations on other than a uniform man-hour basis regardless of the cargo handled or type of vessel or equipment utilized.

(e) *Common carrier* means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that: (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (2) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) *Conference agreement* means an agreement between or among two or more ocean common carriers or between or among two or more marine terminal operators for the conduct or facilitation of ocean common carriage and which provides for: (1) The fixing of and adherence to uniform rates, charges, practices and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo for all members; (2) the conduct of the collective administrative affairs of the

group; and (3) may include the filing of a common tariff in the name of the group and in which all the members participate, or, in the event of multiple tariffs, each member must participate in at least one such tariff. The term does not include consortium, joint service, pooling, sailing or transshipment agreements.

(g) *Consultation* means a process whereby a conference and a shipper confer for the purpose of promoting the commercial resolution of disputes and/or the prevention and elimination of the occurrence of malpractices.

(h) *Cooperative working agreement* means an agreement which establishes exclusive, preferential, or cooperative working relationships which are subject to the Shipping Act of 1984, but which do not fall precisely within the arrangements of any specifically defined agreement.

(i) *Effective agreement* means an agreement approved pursuant to section 15 of the Shipping Act, 1916 or effective pursuant to an exemption under that Act, or filed and/or effective under the Act.

(j) *Equal access agreement* means an agreement between ocean common carriers of different nationalities, as determined by the incorporation or domicile of the carriers' operating companies, whereby such common carriers associate for the purpose of gaining reciprocal access to cargo which is otherwise reserved by national decree, legislation, statute or regulation to carriage by the merchant marine of the carriers' respective nations.

(k) *Independent neutral body* means a disinterested third party, authorized by a conference and its members to review, examine and investigate alleged breaches or violations by any member of the conference agreement and/or the agreement's properly promulgated tariffs, rules or regulations.

(l) *Information Form* means the form containing economic information which must accompany the filing of certain kinds of agreements.

(m) *Interconference agreement* means an agreement between conferences.

(n) *Joint service/consortium agreement* means an agreement between ocean common carriers operating as a joint venture whereby a separate service is established which: (1) Holds itself out in its own distinct operating name; (2) independently fixes its own rates, charges, practices and conditions of service or chooses to participate in its operating name in another agreement which is duly authorized to determine and implement such activities; (3) independently

publishes its own tariff or chooses to participate in its operating name in an otherwise established tariff; (4) issues its own bills of lading; and (5) acts generally as a single carrier. The common use of facilities may occur and there is no competition between members for traffic in the agreement trade; but they otherwise maintain their separate identities.

(o) *Marine terminal facilities* means one or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and ocean common carriers or between two ocean common carriers. This term is not limited to waterfront or port facilities and includes so-called off-dock container freight stations at inland locations and any other facility from which inbound waterborne cargo may be tendered to the consignee or outbound cargo may be received from shippers for vessel or container loading.

(p) *Marine terminal operator* means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier. This term does not include shippers or consignees who exclusively furnish marine terminal facilities or services in connection with tendering or receiving proprietary cargo from a common carrier by water.

(q) *Maritime labor agreement* means a collective-bargaining agreement between an employer subject to the Act or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing or administration of a multiemployer bargaining group; but the term does not include an assessment agreement.

(r) *Modification* means any change, alteration, correction, addition, deletion, or revision of an existing effective agreement or to any appendix to such an agreement.

(s) *Non-vessel-operating common carrier* means a common carrier that does not operate the vessels by which the ocean transportation portion is

provided and is a "shipper" in its relationship with an ocean common carrier.

(t) *Ocean common carrier* means a vessel-operating common carrier, but the term does not include one engaged in ocean transportation by ferry boat or an ocean tramp.

(u) *Ocean freight forwarder* means a person in the United States that (1) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers, and (2) processes the documentation or performs related activities incident to those shipments.

(v) *Person* means individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(w) *Pooling agreement* means an agreement between ocean common carriers which provides for the division of cargo carryings, earnings, or revenue and/or losses between the members in accordance with an established formula or scheme.

(x) *Port* means the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

(y) *Sailing agreement* means an agreement between ocean common carriers which provides for the rationalization of service by establishing a schedule of ports which each carrier will serve and/or the frequency of each carrier's calls at those ports.

(z) *Service contract* means a contract between a shipper or shippers' association and an ocean common carrier or conference in which the shipper or shippers' association makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of either party.

(aa) *Shipper* means an owner or other person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(bb) *Shippers' association* means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(cc) *Shippers' requests and complaints* means a communication from a shipper to a conference requesting a change in tariff rates, rules, regulations, or service; protesting or objecting to existing rates, rules, regulations or service; objecting to rate increases or other tariff changes; protesting allegedly erroneous service contract or tariff implementation or application, and/or requesting to enter into a service contract. Routine information requests are not included in the term.

(dd) *Space charter agreement* means an agreement between ocean common carriers whereby a carrier (or carriers) agrees to provide vessel capacity for the use of another carrier (or carriers) in exchange for compensation or services. The arrangement may include arrangements for equipment interchange and receipt/delivery of cargo.

(ee) *Through transportation* means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is an ocean common carrier, between a United States point or port and a foreign point or port.

(ff) *Transshipment agreement* means an agreement between an ocean common carrier serving a port or point of origin and another such carrier serving a port or point of destination, whereby cargo is transferred from one carrier to another carrier at an intermediate port served by direct vessel call of both such carriers in the conduct of through transportation. Such an agreement does not provide for the concerted discussion, publication or otherwise fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the transshipment service offered, the port of transshipment and the participation of the nonpublishing carrier.

Subpart B—Scope

§ 572.201 Subject agreements.

(a) *Ocean common carrier agreements.* This part applies to agreements by or among ocean common carriers to:

- (1) Discuss, fix, or regulate transportation rates, including through rates, cargo space recommendations, and other conditions of service;
- (2) Pool or apportion traffic, revenues, earnings, or losses;
- (3) Allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) Limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) Engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;

(6) Control, regulate, or prevent competition in international ocean transportation; and

(7) Regulate or prohibit their use of service contracts.

(b) *Marine terminal operator agreements involving foreign commerce.* This part applies to agreements (to the extent the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to:

(1) Discuss, fix, or regulate rates or other conditions of service; and

(2) Engage in exclusive, preferential, or cooperative working arrangements.

§ 572.202 Non-Subject agreements.

This part does not apply to the following agreements:

(a) Any acquisition by any person, directly or indirectly, of any voting security or assets of any other person;

(b) Any maritime labor agreement;

(c) Any agreement related to transportation to be performed within or between foreign countries;

(d) Any agreement among common carriers to establish, operate, or maintain a marine terminal in the United States;

(e) Any agreement among marine terminal operators which exclusively and solely involves transportation in the interstate commerce of the United States;

(f) Any agreement exclusively and solely among non-vessel-operating common carriers;

(g) Any agreement exclusively and solely among ocean freight forwarders.

Subpart C—Exemptions

§ 572.301 Exemption procedures.

(a) *Authority.* The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to the Act from any requirement of the Act if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce.

(b) *Optional filing.* Notwithstanding any exemption from filing, Information Form, or other requirements of the Act

and this part, any party to an exempt agreement may file such an agreement with the Commission.

(c) *Application for exemption.* Any person may apply for an exemption or revocation of an exemption of any class of agreements or an individual agreement pursuant to section 16 of the Act and this subpart. An application for exemption shall state the particular requirement of the Act for which exemption is sought. The application shall also include a statement of the reasons why an exemption should be granted or revoked and shall provide information relevant to any finding required by the Act. Where an application for exemption of an individual agreement is made, the application shall include a copy of the agreement.

(d) *Participation by interested persons.* No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

(e) *Federal Register notice.* Notice of any proposed exemption or revocation of exemption, whether upon application or upon the Commission's own motion, shall be published in the *Federal Register*. The notice shall include:

(1) A short title for the proposed exemption or the title of the existing exemption;

(2) The identity of the party proposing the exemption or seeking revocation;

(3) A concise summary of the agreement or class of agreements for which exemption is sought, or the exemption which is to be revoked;

(4) A statement that the application and any accompanying information are available for inspection in the Commission's offices in Washington, D.C.; and

(5) The final date for filing comments regarding the application.

(f) *Retention of agreement by parties.* Any agreement which has been exempted by the Commission pursuant to section 16 of the Act shall be retained by the parties and shall be available upon request by the Bureau of Agreements and Trade Monitoring for inspection during the term of the agreement and for a period of three years after its termination.

§ 572.302 Non-substantive agreements and non-substantive modifications to existing agreements—exemption.

(a) A non-substantive agreement or a non-substantive modification to an existing agreement is an agreement between ocean common carriers and/or marine terminal operators, acting

individually or through approved agreements, which:

(1) Concerns the procurement, maintenance, or sharing of office facilities, furnishings, equipment and supplies, the allocation and assessment of the costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals.

(2) Reflects changes in the name of any geographic locality stated therein; the name of the agreement or the name of a party to the agreement; the names and/or numbers of any other section 4 agreement or designated provisions thereof referred to in an agreement; the table of contents of an agreement; the date or amendment number through which agreements state they have been reprinted to incorporate prior revisions thereto or which corrects typographical and grammatical errors in the text of the agreement; or rennumbers or reletters articles or subarticles of agreements and references thereto in the text.

(3) Reflects changes in the titles or persons or committees designated therein or transfers the functions of such persons or committees to other designated persons or committees or which merely establishes a committee.

(b) A copy of the non-substantive modification shall be submitted for information purposes in the proper format but is otherwise exempt from the Information Form, notice and waiting period requirements of this part.

(c) Parties to agreements may seek a determination from the Director, Bureau of Agreements and Trade Monitoring as to whether a particular modification is non-substantive.

§ 572.303 Husbanding agreements—exemption.

(a) A husbanding agreement is an agreement between a principal and an agent both of which are subject to the Act and which provides for the agent's handling of routine vessel operating activities in port, such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, and linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operator; dealing with passenger and crew matters; and providing similar services related to the above activities. The term does not include an agreement which provides for the solicitation or booking of cargoes, signing contracts or bill of lading and other related matters, nor does it include an agreement that prohibits the agent from entering into similar agreements with other carriers.

(b) A husbanding agreement is exempt from the filing and Information Form requirements of the Act and of this part.

§ 572.304 Agency agreements—exemption.

(a) An agency agreement is an agreement between a principal and an agent both of which are subject to the Act, which provides for the agent's solicitation and booking of cargoes and signing contracts of affreightment and bills of lading on behalf of an ocean common carrier. Such an agreement may or may not also include husbanding service functions and other functions incidental to the performance of duties by agents, including processing of claims, maintenance of a container equipment inventory control system, collection and remittance of freight and reporting functions.

(b) An agency agreement between persons subject to the Act is exempt from the filing and Information Form requirements of the Act and of this part, except those: (1) Where a common carrier is to be the agent for a competing carrier in the same trade; or (2) which permit an agent to enter into similar agreements with more than one carrier in a trade.

§ 572.305 Equipment interchange agreements—exemption.

(a) An equipment interchange agreement is an agreement between two or more ocean common carriers for (1) the exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment; and (2) the transportation of the equipment as required, payment therefor, management of the logistics of transferring, handling and positioning equipment, its use by the receiving carrier, its repair and maintenance, damages thereto, and liability incidental to the interchange of equipment.

(b) An equipment interchange agreement is exempt from the filing and Information Form requirements of the Act and of this part.

§ 572.306 Nonexclusive transshipment agreements—exemption.

(a) A nonexclusive transshipment agreement is an agreement by which one ocean common carrier serving a port of origin by direct vessel call and another such carrier serving a port of destination by direct vessel call provide transportation between such ports via an intermediate port served by direct vessel call of both such carriers and at which cargo will be transferred from one to the other and which agreement does not: (1) Prohibit either carrier from entering into similar agreements with

other carriers; (2) guarantee any particular volume of traffic or available capacity; or (3) provide for the discussion or fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the service offered as being by means of transshipment, the port of transshipment and the participation of the nonpublishing carrier.

(b) A nonexclusive transshipment agreement is exempt from the filing and Information Form requirements of the Act and of this part, provided that the tariff provisions set forth in paragraph (c) of this section and the content requirements of paragraph (d) of this section are met.

(c) The applicable tariff or tariffs shall provide:

- (1) The through rate;
- (2) The routings (origin, transshipment and destination ports); additional charges, if any (i.e. port arbitrary and/or additional transshipment charges); and participating carriers; and
- (3) A tariff provision substantially as follows:

The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating, connecting or feeder carrier. Every participating connecting or feeder carrier which is a party to transshipment arrangements has agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement between the parties.

(d) Nonexclusive transshipment agreements must contain the entire arrangement between the parties, must contain a declaration of the nonexclusive character of the arrangement and may provide for:

- (1) The identification of the parties and the specification of their respective roles in the arrangement;
- (2) A specification of the governed cargo;
- (3) The specification of responsibility for the issuance of bills of lading (and the assumption of common carriage-associated liabilities) to the cargo interests;
- (4) The specification of the origin, transshipment and destination ports;
- (5) The specification of the governing tariff(s) and provision for their succession;
- (6) The specification of the particulars of the nonpublishing carrier's concurrence/participation in the tariff of the publishing carrier;
- (7) The division of revenues earned as a consequence of the described carriage;

(8) The division of expenses incurred as a consequence of the described carriage;

(9) Termination and/or duration of the agreement;

(10) Inter-carrier indemnification or provision for inter-carrier liabilities consequential to the contemplated carriage and such documentation as may be necessary to evidence the involved obligations;

(11) The care, handling and liabilities for the interchange of such carrier equipment as may be consequential to the involved carriage;

(12) Such rationalization of services as may be necessary to ensure the cost effective performance of the contemplated carriage; and

(13) Such agency relationships as may be necessary to provide for the pickup and/or deliver of the cargo.

(e) No subject other than as listed in paragraph (d) of this section may be included in exempted nonexclusive transshipment agreements.

Subpart D—Filing and Form of Agreements

§ 572.401 Filing of agreements.

(a) All agreements (including oral agreements reduced to writing in accordance with the Act) subject to this part and filed with the Commission for review and disposition pursuant to section 6 of the Act, shall be submitted during regular business hours to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Such filing shall consist of:

- (1) A true copy and 15 additional copies of the filed agreement;
 - (2) Where required by these regulations, an original and two copies of the completed Information Form referenced at §§ 572.403(a) and 572.405 and Appendix A of this part; and
 - (3) A letter of transmittal as described in paragraph (b) of this section.
- (b)(1) A filed agreement, to include such supporting documents as are submitted, shall be forwarded to the Commission via a letter of transmittal.
- (2) The letter of transmittal shall: (i) Identify all of the documents being transmitted including, in the instance of a modification to an effective agreement, the full name of the effective agreement, the Commission-assigned agreement number of the effective agreement and the revision, page and/or appendix number of the modification being filed; (ii) provide a concise, succinct summary of the filed agreement or modification separate and apart from any narrative intended to provide support for the acceptability of the

agreement or modification; (iii) clearly provide the typewritten or otherwise imprinted name, position, business address and telephone number of the forwarding party; and, (iv) be signed in the original by the forwarding party or on the forwarding party's behalf by an authorized employee or agent of the forwarding party.

(3) To facilitate the timely and accurate publication of the **Federal Register Notice**, the letter of transmittal shall also provide a current list of the agreement's participants where such information is not provided elsewhere in the transmitted documents.

(c) Any agreement and accompanying Information Form which does not meet the filing requirements of this section shall be rejected in accordance with § 572.601.

(d) Assessment agreements shall be filed and shall become effective upon filing. Assessment agreements need not be accompanied by an Information Form.

(e)(1) Expiration dates to existing agreements or specific provisions thereof, shall remain in effect on and after June 18, 1984.

(2) Parties to agreements with expiration dates shall file any modification seeking renewal for a specific term or elimination of a termination date in sufficient time to accommodate the waiting period required under the Act.

§ 572.402 Form of agreements.

The requirements of this section apply to all agreements except for cancellations, marine terminal agreements, and assessment agreements.

(a) Agreements shall be clearly and legibly typewritten on one side only of 8½ inch by 11 inch durable white loose-leaf paper, providing a margin of not less than three-quarters of an inch on all edges.

(b) The first page of every agreement or appendix shall be the Title Page and shall include:

(1) The name in which the agreement holds out service, or, in the absence of such a holding out, the full name of the agreement;

(2) Once assigned, the Commission-assigned agreement number;

(3) The generic classification of the agreement in conformity with the definitions in § 572.104;

(4) The date on which the entire agreement was last republished in accordance with § 572.403(g); and

(5) If applicable, the currently effective expiration date of the agreement and/or any specific provision thereof.

(c) Each agreement page (including modifications and appendices) shall be identified by printing the agreement name (as shown on the agreement Title Page) and, once assigned, the applicable Commission-assigned agreement number at the top of each page.

(d) Each agreement, appendix and/or modification filed will be accompanied by a separate signature page, appended as the last page of the item, which is signed in the original by each of the parties personally or by an authorized representative, indicating immediately below each such signature, the typewritten full name of the signing party and his or her position, including organizational affiliation.

(e) The body of the agreement shall contain:

(1) Immediately following the Title Page, a Table of Contents providing for the location of all agreement provisions.

(2) Following the Table of Contents, the body of the agreement setting forth the operative provisions of the agreement in the order prescribed by §§ 572.501 and 572.502. Any additional material/provisions shall be set forth as consecutively numbered articles.

(f) Any nonsubstantive provisions, as defined in § 572.302, may be separated from the main body of the agreement text by the inclusion of an Appendix to the agreement. Additional provisions which are permitted to be included in an Appendix are referred to in §§ 572.501(b)(3), 572.501(b)(6) and 572.502(a)(1). Such appendices must comply with the format requirements of paragraphs (a) and (c) of this section. Such appendices are to be serialized alphabetically with the first such Appendix being designated on its first page as "Appendix A."

(g) All pages subsequent to the Title Page shall be numbered in the upper right-hand corner. At the option of the parties, the numbering of the pages may start with the first page following the Title Page as Page No. 1 and continue consecutively thereafter; or, in the alternative, the pages containing the Table of Contents may be discretely numbering using consecutive Roman numerals with all pages subsequent to the Table of Contents being consecutively numbered beginning with Page No. 1. In either event, the first edition of any one page shall be designated in the upper right-hand corner as "Original Page No. —."

(h) All agreements shall conform to the format requirements of this section and § 572.403 and the organization and content requirements of §§ 572.501 and 572.502 according to the following schedule.

(1) Any new agreement shall conform when initially filed.

(2) Any restatement of a previously effective agreement filed subsequent to December 15, 1984, shall conform to the requirements.

(3) Any effective agreement which is modified subsequent to December 15, 1984, shall be restated in its entirety, including the modification, and shall conform to the requirements.

(4) Any other agreement not otherwise brought into conformity with these requirements shall be conformed and filed no later than October 1, 1985.

§ 572.403 Modification of agreements.

The requirements of this section apply to all agreements except for marine terminal agreements and assessment agreements.

(a)(1) Agreement modifications shall be: filed in accordance with the provisions of § 572.401; in the format specified in § 572.402 and this section; and accompanied by an Information Form.

(2) The Information Form shall be completed as it pertains to significant modifications of the agreement.

(3) Significant modifications, for the purposes of this section, are those that may result in a significant reduction in competition. Such modifications include but are not limited to: significant changes in the geographic scope of conference or pooling agreements which expand the scope to cover additional foreign countries or U.S. port ranges, including initial conference intermodal authority, or the extension of the scope of a joint service agreement to ports outside the scope of the existing joint service agreement currently served by two or more of the parties; additions to the number of parties in pooling or joint service agreements; significant reductions in service levels; significant changes in pool penalty provisions or carrying charges; and changes in cargo categories or descriptions that result in a significant increase in the amount of cargo subject to the pool, or changes in the allocation of cargo or revenue that significantly change the cargo or revenue shares of national or non-national flag lines.

(b) Agreement modifications shall be made by reprinting the entire page on which the matter being changed is published. Such modified pages shall be designated as "revised pages" and shall publish in the upper right-hand corner of the new page the consecutive denomination of the revision, e.g., "1st Revised Page 5."

(c) If a modification exceeds the page being modified and the parties do not

wish to modify the entire agreement, the additional material may be published on an original page, designated with the same number as the page being modified and with an alphabetical suffix, i.e. "Original Page 5a."

(d) The language being modified shall be indicated on the page filed as follows:

(1) Language being deleted or superseded shall be struck through; and,

(2) New and initial or replacement language shall immediately follow the language being superseded and be underlined.

(3) As an alternative to publishing such indications of change on the filed page, the filed page may be submitted devoid of such indications if the filing is accompanied by a page, submitted for information/illustration only, setting forth the proposed modifications in accordance with the format prescribed in paragraphs (d) (1) and (2) of this section.

(e) When a revised or new page is revised, or the entire agreement is reissued, the change indications in paragraphs (d)(1) and (d)(2) of this section are to be deleted from the republished pages.

(f) If a modification requires the relocation of the provisions of the agreement, such modification shall be accompanied by a revised Table of Contents page which shall report the new location of the agreement's provisions.

(g)(1) In the instance of an agreement which publishes the indications of modifications, specified in paragraph (d) of this section on the filed agreement page itself, then, not later than two years after the last modification to the agreement, the entire agreement shall be republished incorporating such modifications as have been made and shall supersede the previous edition of the agreement.

(2) Such republished agreement will be filed with the Commission in accordance with the filing (except as provided in paragraph (g)(3) of this section), format and content requirements of this part and shall contain nothing other than the previously effective language and such nonsubstantive modifications as are necessary to accomplish the republication.

(3) It is not required that the filing of a republished agreement as described in paragraph (g)(2) of this section, be accompanied by the Information Form or that it be filed in more than an executed original true copy.

§ 572.404 Application for waiver.

(a) Upon a showing of good cause, the Commission may waive the form, organization and content requirements of §§ 572.401, 572.402, 572.403, 572.501 and 572.502.

(b) Requests for permission to depart from the form requirements of this subpart shall be submitted in advance of the filing or submission of the materials to which the requested waiver would apply and shall state: (1) the specific regulations from which relief is sought; (2) the special circumstances requiring the requested relief; and, (3) the beneficial results anticipated to be obtained from the requested waiver.

§ 572.405 Information Form.

(a)(1) Except for marine terminal agreements and assessment agreements, the information required by the Commission for review of an agreement shall be provided in the Information Form set forth in Appendix A to this part.

(2) The filing party to an agreement subject to the Act shall complete and submit an original and two copies of the Information Form at the time that an agreement is filed. The Information Form shall be completed in accordance with this subpart, including the Instructions set forth in Appendix A. Copies of the form may be obtained in person at the Office of the Secretary or by writing to the Secretary of the Commission.

(b) A complete response in accordance with the Instructions to the Information Form shall be supplied to each item on the Information Form that is required to be answered. Whenever the party answering a required part of the Information Form (other than Parts III and IV) is unable to supply a complete response, that party shall provide, for each item for which less than a complete response has been supplied, either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain the required information. Use of estimated data with Parts III and IV requires no explanation of why precise data are not available.

(c) Any party filing the Information Form may supplement that Form with any other information or documentary material.

(d) The Information Form and any additional information submitted by a filing party under this section shall not be disclosed except as provided in § 572.608.

§ 572.406 Complete and definite agreements.

(a) Any agreement required to be filed by the Act and this part shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties.

(b) Except as provided in paragraph (c) of this section, agreement clauses which contemplate a further agreement or give the parties authority to discuss and/or negotiate a further agreement, the terms of which are not fully set forth in the enabling agreement, will be permitted only if the enabling agreement indicates that any such further agreement cannot go into effect unless filed and effective under the Act.

(c) Further specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial implementation and are permitted without further filing under section 5 of the Act only if the further agreement concerns routine operational or administrative matters, including the establishment of tariff rates, rules, and regulations.

Subpart E—Content and Organization of Agreements

§ 572.501 Agreement provisions—organization.

(a) All agreements, except for cancellations, marine terminal agreements, and assessment agreements, shall be organized and shall include the content as provided by this section. The "article" numbers hereinafter enumerated are reserved for their particular respective provision or authority as indicated in this section and § 572.502 and may not be used for any other subject or purpose nor may the specified subject matter appear elsewhere in the agreement except as herein provided. In the instance of a legitimately inapplicable provision, the article number and title are to be included in the text followed by the word, "None".

(b) All agreements shall organize and number the following articles in the following order and shall observe the guidelines as to content as provided in this section. Additional articles required to definitively express the complete understanding between the parties to the agreement and not otherwise incorporated in appendices to the agreement shall immediately follow the articles enumerated in this subpart (and, where applicable, in § 572.502) and shall be numbered consecutively, commencing with Article 14.

1. *Article 1—Full name of the agreement.*

2. *Article 2—Purpose of the agreement.*

3. *Article 3—Parties to the agreement.* List the current parties to the agreement to include for each participant: (i) the full legal name of the party to include any FMC-assigned agreement number associated with that name; and (ii) the address of its principal office (to the exclusion of the address of any agent or representative not an employee of the participating carrier or association). In the alternative to publishing the membership of the agreement in Article 3, the membership may be published in a designated appendix to the agreement and the designated appendix indicated by cross reference in Article 3.

(4) *Article 4—Geographic scope of the agreement.* State the ports or port ranges to which the agreement applies and any inland points or areas to which it also applies with respect to the exercise of the collective activities contemplated and authorized in the agreement.

(5) *Article 5—Overview of Agreement Authority.* State the authorities, as set forth in § 572.201 of this part, intended to be collectively exercised under the auspices of the agreement. To the extent that the summary provided does not represent the full arrangement between the parties, additional articles or appendices of the parties' own designation and subsequent to these enumerated articles will be required to provide the specification of the authority to be exercised and the mechanics of that exercise. Unless it is unsupported by such further explanation, Article 5 is not deemed to be definitive of the authority that the parties may collectively exercise pursuant to the agreement.

(6) *Article 6—Officials of the agreement and delegations of authority.* Specify, by organizational title, the administrative and executive officials determined by the parties to the agreement to be responsible for designated affairs of the agreement and the respective duties and authorities delegated to those officials. At a minimum: (i) the officials with authority to file agreements and agreement modifications and to submit associated supporting materials or with authority to delegate such authority; and, (ii) a statement as to any designated U.S. representative of the agreement required by this chapter. Where convenient, the contents of this article may be published in a designated appendix to the agreement and the designated appendix indicated by cross reference in Article 6.

(7) *Article 7—Membership, withdrawal, readmission and expulsion.*

Specify the terms and conditions for admission, withdrawal, readmission and expulsion to or from membership in the agreement, including membership fees, refundable deposits and other fees or charges associated with membership. Two-party agreements which do not involve any form of rate, charge or tariff determination or publication authority and which do not otherwise have any conditions of agreement participation other than the commitment of the physical resources of the respective parties are relieved of the requirements of this subparagraph. In such eventuality, the article number and name shall be accounted for as provided in paragraphs (a) and (b)(1) of this section.

(8) *Article 8—Voting.* Specify the procedures, including quorum requirements, by which the agreement membership exercises its collective authority to choose, endorse, decide the disposition of, defeat, or authorize any particular matter, issue or activity.

(9) *Article 9—Duration and termination of the agreement.* Specify, where applicable, the date on which the agreement terminates and describe the procedures to be followed to terminate the agreement.

§ 572.502 Organization of conference and interconference agreements.

(a) Each conference agreement in addition to Articles 1 through 9 contained in § 572.501, and such other matters as may be necessary to express the full understanding of the parties, shall include the following articles organized and including the content as provided in this section:

(1) *Article 10—Neutral body policing.* State that, at the request of any member, the conference shall engage the services of an independent neutral body to fully police the obligations of the conference and its members. Include a description of any such neutral body authority and procedures related thereto. In the alternative to publishing the neutral body and procedures description in Article 10, the description may be published in a designated appendix to the agreement and the designated appendix indicated by cross reference in Article 10.

(2) *Article 11—Prohibited acts.* State affirmatively that the conference shall not engage in conduct prohibited by section 10(c)(1) or 10(c)(3) of the Act.

(3) *Article 12—Consultation: Shippers' requests and complaints.* Specify the procedures for consultation with shippers and for handling shippers' requests and complaints.

(4) *Article 13—Independent action.* Specify the independent action

procedures of the conference. Such procedures shall provide that any conference member may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of the Act upon not more than 10 calendar days' notice to the conference and shall otherwise be in conformance with section 5(b)(8) of the Act.

(b)(1) Each interconference agreement, in addition to Articles 1 through 9 contained in § 572.501, and Articles 10, 11, and 12 contained in paragraph (a) of this section, shall include the following article: "*Article 13—Independent Action*" which specifies the independent action procedures of the agreement.

(2) Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier.

(3) Each agreement between conferences must provide the right of independent action for each conference.

Subpart F—Action on Agreements

§ 572.601 Preliminary review—rejection of agreements.

(a) The Commission shall make a preliminary review of each filed agreement to determine whether the agreement is in compliance with the filing requirements of the Act and this part and whether the Information Form is complete or where not complete, the deficiency is adequately explained.

(b)(1) The Commission shall reject any agreement that fails to comply with the filing and information requirements under the Act and of this part. The Commission shall notify in writing the person filing the agreement of the reason for rejection of the agreement. The entire filing, including the agreement, the Information Form and any other information or documents submitted, shall be returned to the filing party.

(2) Should the agreement be refiled, the full waiting period must be observed.

§ 572.602 Federal Register notice.

(a) A notice of any filed agreement which is not rejected pursuant to § 572.601 will be transmitted to the Federal Register within seven days of the date of filing.

(b) The notice will include:

- (1) A short title for the agreement;
- (2) The identity of the parties to the agreement and the filing party;
- (3) The Federal Maritime Commission agreement number;
- (4) A concise summary of the agreement's contents;

(5) A statement that the agreement is available for inspection at the Commission's offices; and

(6) The final date for filing comments regarding the agreement.

§ 572.603 Comment.

(a) Persons may file with the Secretary written comments regarding a filed agreement. Such comments will be submitted in an original and fifteen (15) copies and are not subject to any limitations except the time limits provided in the Federal Register notice. Late-filed comments will be received only by leave of the Commission and only upon a showing of good cause. If requested, comments and any accompanying material shall be accorded confidential treatment to the fullest extent permitted by law. Such requests must include a statement of legal basis for confidential treatment including the citation of appropriate statutory authority. Where a determination is made to disclose all or a portion of a comment, notwithstanding a request for confidentiality, the party requesting confidentiality will be notified prior to disclosures.

(b) The filing of a comment does not entitle a person to: (1) reply to the comment by the Commission; (2) the institution of any Commission or court proceeding; (3) discussion of the comment in any Commission or court proceeding concerning the filed agreement; or (4) participation in any proceeding which may be instituted.

§ 572.604 Waiting period.

(a) The waiting period before an agreement becomes effective shall commence on the date that an agreement is filed with the Commission.

(b) Unless suspended by a request for additional information or extended by court order, the waiting period terminates and an agreement becomes effective on the latter of the 45th day after the filing of the agreement with the Commission or on the 30th day after publication of notice of the filing in the Federal Register.

(c) The waiting period is suspended on the date when the Commission, either orally or in writing, requests additional information or documentary materials pursuant to section 6(d) of the Act. The waiting period resumes on the date of receipt of the additional material or of a statement of the reasons for noncompliance, and the agreement becomes effective in 45 days unless the waiting period is further extended by court order.

§ 572.605 Requests for expedited approval.

(a) Upon written request of the filing party, the Commission may shorten the review period. Accompanying the request, the filing party should provide a full explanation, with reference to specific facts and circumstances, of the necessity for a shortened waiting period. If the Commission decides to approve an abbreviated waiting period, the term will be decided after consideration of the parties' needs and the Commission's ability to perform its review functions under a reduced time schedule. In no event, however, may the period be shortened to less than fourteen days after the publication of the notice of the filing of the agreement in the Federal Register. When a request for expedited approval is denied by the Commission, the normal waiting period specified in § 572.604 will apply. Such expedition will not be granted routinely and will be granted only in exceptional circumstances which include but are not limited to: the impending expiration of the agreement; operational urgency; Federal or State imposed time limitations; or other reasons which, in the Commission's discretion, constitute grounds for granting the request.

(b) A request for expedited approval will be considered for an agreement whose waiting period has resumed after having been suspended by a request for additional information.

(c) Upon request of the filing party, cancellations of agreements and modifications to the following prescribed agreement provisions will be granted expedited approval fourteen days after publication of notice of filing in the Federal Register:

(1) *Article 3*—Parties to the agreement (limited to conference agreements).

(2) *Article 6*—Officials of the agreement and delegations of authority.

(3) *Article 10*—Neutral body policing (limited to the description of neutral body authority and procedures related thereto).

§ 572.606 Requests for additional information.

(a) The Commission may request from the filing party any additional information and documentary material necessary to complete the statutory review required by section 6 of the Act. The request shall be made prior to the expiration of the waiting period. All additional information and documentary material shall be submitted to the Director, Bureau of Agreements and Trade Monitoring, Federal Maritime Commission, Washington, D.C. 20573. If the request is not fully complied with, a statement of reasons for noncompliance

shall be provided for each item or portion of such request which is not fully answered.

(b) Where the Commission has made a request for additional information material, the agreement's effective date is 45 days after receipt of the additional material. In the event all material is not submitted, the agreement's effective date will be 45 days after receipt of both the documents and information which are submitted, if any, and the statement indicating the reasons for noncompliance. The Commission may, upon notice to the Attorney General, and pursuant to sections 6(i) and 6(k) of the Act, request the United States District Court for the District of Columbia to further extend the agreement's effective date until there has been substantial compliance.

(c) A request for additional information may be made orally or in writing. In the case of an oral request, a written confirmation of the request shall be mailed to the filing party within seven days of the communication.

(d) The party upon whom a request for additional information is made will have a reasonable time to respond, as specified by the Commission. The test of reasonableness shall be based on the particular circumstances of the request and shall be determined on a case-by-case basis.

(e) Notice that a request for additional information has been made will be published by the Commission and served on commenting parties. Such notice will indicate only that a request has been made and will not specify what information is being sought. Within fifteen (15) days following service of the notice, further comments on the agreement may be filed.

§ 572.607 Failure to comply with requests for additional information.

(a) A failure to comply with a request for additional information results when a person filing an agreement, or an officer, director, partner, agent, or employee thereof fails to substantially respond to the request or does not file a satisfactory statement of reasons for noncompliance. An adequate response is one which directly addresses the Commission's request. When a response is not received by the Commission within a specified time, failure to comply will have occurred.

(b) The Commission may, pursuant to section 6(i) of the Act, request relief from the United States District Court for the District of Columbia when it considers that there has been a failure to substantially comply with a request

for additional information. The Commission may request that the court:

(1) Order compliance with the request; and

(2) At its discretion, grant other equitable relief which under the circumstances seems necessary or appropriate.

(c) Where there has been a failure to substantially comply, section 6(i)(2) of the Act provides that the court shall extend the review period until there has been substantial compliance.

§ 572.608 Confidentiality of submitted material.

(a) Except for an agreement filed under section 5 of the Act, all information submitted to the Commission by the filing party will be exempt from disclosure under 5 U.S.C. 552. Included in this disclosure exemption is information provided in the Information Form, voluntary submission of additional information, reasons for noncompliance, and replies to requests for additional information.

(b) Information which is confidential pursuant to paragraph (a) of this section may be disclosed, however, to the extent:

(1) It is relevant to an administrative or judicial action or proceeding; or

(2) It is in response to a request from either body of Congress or to a duly authorized committee or subcommittee of Congress.

(c) Parties may voluntarily disclose or make information publicly available. If parties elect to disclose information they shall promptly inform the Commission.

§ 572.609 Negotiations.

At any time after the filing of an agreement and prior to the conclusion of judicial injunctive proceedings, the filing party or an authorized representative may submit additional factual or legal support for an agreement or may propose modifications of an agreement. Such negotiations between Commission personnel and filing parties may continue during the pendency of injunctive proceedings. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

Subpart G—Reporting and record retention requirements

§ 572.701 General requirements.

(a) *Address.* All reports required by this subpart should be addressed to the Commission as follows:

Director, Bureau of Agreements and Trade Monitoring, Federal Maritime Commission, Washington, D.C. 20573

The lower, left-hand corner of the envelope in which each report is forwarded should indicate the subject of the report and the related agreement number. For example: "Minutes, Agreement 5000."

(b) *Serial numbers of reports.* (1) Each report filed with the Commission should be assigned a number for each subject. For example, a conference filing minutes of its first meeting upon the effective date of this rule should assign "Meeting No. 1" to its Minutes, the next meeting will be assigned "Meeting No. 2," and so on. The first Shippers' Request and Complaint report should be designated "Shippers' Request and Complaint Report No. 1," the next report would be "Shippers' Request and Complaint Report No. 2," and so on.

(2) Any conference or rate agreement which, for its own internal purposes, has a system for assigning sequential numbers to its reports in a manner which differs from that set forth in paragraph (b)(1) of this section may continue to utilize its own system in lieu thereof.

(c) *Retention of records.* Each agreement required to file an index of documents pursuant to this subpart shall retain a copy of each document listed for a minimum period of 3 years after the date the document is distributed to the members and shall make it available to the Commission upon written request.

(d) *Request for documents.* Documents may be requested by the Director, Bureau of Agreements and Trade Monitoring, in writing by reference to a specific minute or index, and shall indicate that the documents will be received in confidence. Requested documents shall be furnished by the parties within the time specified.

(e) *Time for filing.* Documents filed on an annual (calendar) year basis shall be filed by February 15 of the following year. Other documents shall be filed within 30 days of the end of a quarter-year, a meeting, or the receipt of a request for documents.

(f) *Confidentiality.* All information submitted to the Commission under this subpart shall be accorded confidential treatment to the fullest extent permitted by law.

§ 572.702 Filing of reports related to shippers' requests and complaints and consultations.

(a) *Shippers' requests and complaints.*

(1) Each conference shall file with the Commission an annual report setting forth under established shippers' request and complaint procedures and for each calendar year, a statistical summary separately showing: (i) The total number of shippers' and shippers' associations

requests and complaints received; (ii) the total number which were fully granted; (iii) the total number which were partially granted; and (iv) the total number which were denied.

(2) Each report shall also show the total number of requests or complaints which were pending disposition at the start and at the end of the report period.

(3) Each of the totals which are reported to the Commission shall be divided into three categories: (i) those involving rates or charges; (ii) those involving transportation services; and (iii) those involving other matters.

(b) *Consultations.* Each conference shall file with the Commission an annual report setting forth a statistical summary showing separately the total number of shipper and shippers' associations requests for consultations and the total number of consultations during each calendar year under the established consultation procedures. Each of the totals which are reported to the Commission shall be divided into two categories: (1) Consultations involving commercial disputes; and (2) consultations involving cooperation with shippers in preventing and eliminating malpractices.

§ 572.703 Filing of minutes.

(a) *Meetings.* For purposes of this subpart, the term "meeting" shall include any meeting of the parties to the agreement, including meetings of their agents, principals, owners, committees, or subcommittees of the parties authorized to take final action on behalf of the parties. Where the agreement so authorizes, this includes final action by telephonic or personal pools of the membership.

(b) *Content of minutes.* Except as provided in paragraph (c) of this section, conferences, interconference agreements, agreements between a conference and one or more ocean common carriers, pooling agreements, equal access agreements, discussion agreements, marine terminal conferences, and marine terminal rate fixing agreements shall, through a designated official, file with the Commission a report of each meeting defined in paragraph (a) of this section describing all matters within the scope of the agreement which are discussed or considered at any such meeting, and shall indicate the action taken. These reports need not disclose the identity of parties that participated in discussions or the votes taken.

(c) *Exemption.* No minutes need be filed under paragraph (b) of this section with respect to any discussion of or action taken with regard to:

(1) Rates that, if adopted, would be required to be published in the Commodity Rate Section, Class Rate Section, or Open Rate Section of the pertinent tariff on file with the Commission except that this exemption does not apply to discussions limited to general rate policy, general rate changes, the opening or closing of rates, or service or time/volume contracts; or

(2) Purely administrative matters.

§ 572.704 Index of documents.

(a) Each agreement required to file minutes pursuant to § 572.703 shall maintain an index of all reports, circulars, notices, statistics, analytical studies, or other documents, not otherwise filed with the Commission pursuant to this subpart, which are distributed to the member lines and are used to reach a final decision on any of the following matters.

(1) Revenue projections and plans. (This would exclude individual rate adjustments but would include general rate adjustments, surcharges and other items affecting shipper costs.)

(2) Studies regarding proposed changes to the conference agreement or its membership.

(3) Non-conference competition.

(4) Changes in the nature and type of transportation service generally and specifically at individual ports or points.

(5) Trade tonnage requirements, vessel utilization and vessel replacement plans.

(6) Conference participation in trade (market share).

(7) The exercise of the right of independent action.

(8) Development of transportation technology and intermodal services.

(9) Malpractices.

(10) Use of service contracts, time volume rate schemes and loyalty contracts.

(11) Conference relationship with shippers and shipper groups.

(12) Governmental and other foreign requirements affecting the conference.

(b)(1) Each index required to be maintained by paragraph (a) of this section shall be filed with the Commission on a calendar-year quarterly basis.

(2) Each index must be certified by an official of the agreement as true and correct.

§ 572.705 Waiver of reporting and record retention.

Upon a showing of good cause, the Commission may waive any of the provisions of this subpart.

Subpart H—[Reserved]

Subpart I—Penalties

§ 572.901 Failure to file.

Any person operating under an agreement involving activities subject to the Act pursuant to sections 4 and 5(a) of the Act and this part and not exempted pursuant to section 16 of the Act or excluded from filing by the Act, which has not been filed and has not become effective pursuant to the Act and this part is in violation of the Act and of this part and is subject to the civil penalties set forth in section 13(a) of the Act.

§ 572.902 Falsification of reports.

Knowing falsification of any report required by the Act or this part, including knowing falsification of any item or the Information Form, is a violation of the rules of this part and is subject to the civil penalties set forth in section 13(a) of the Act and may be subject to the criminal penalties provided for in 18 U.S.C. 1001.

Subpart J—Paperwork Reduction

§ 572.991 OMB Control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control number assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96-511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB control No.
572.101 through 572.902.....	3072-0045

Appendix A to Part 572—Information Form and Instructions

Explanation and Instructions for Information Form

The following explanation and instructions accompany the Information Form (Form) and are intended to facilitate the completion of the Form. The explanations and instructions should be read in conjunction with the Shipping Act of 1984 (Act) and with 46 CFR Part 572.

All agreements by or among ocean common carriers referenced in 46 CFR

572.201(a) (excluding assessment agreements, marine terminal agreements and those agreements exempted from the filing of the Information Form pursuant to Subpart C of Part 572) and significant modifications to agreements referenced in § 572.403 filed with the Commission must be accompanied by a completed Information Form, which in all cases necessitates the completion of Parts I, II, VI, and IX.

Part V, which requests information on proposed service and any proposed reduction or elimination of service, is required to be completed only by parties filing agreements with service authority.

Completion of Part VII is optional.

Because of their potential substantial anticompetitive implications, parties filing certain types of agreements, namely rate-fixing (including, for example, agreements authorizing conferences, interconference agreements, and agreements between a conference and one or more ocean common carriers), pooling, and joint-service and consortium agreements are required to complete Parts III, IV and VIII of the Form in addition to the above specified parts required to be completed by all filing parties.

Certain parts of the Form request information that may not be readily available to the filing party. Where precise information is not available, best estimates may be supplied. Where estimates are made, they should be identified by the use of the notation "est." Except for Parts III and IV, furnishing an estimate requires a clear explanation of why the precise information is not available. Where such an explanation is provided, the use of estimates will not ordinarily be regarded as a failure to supply a complete response as specified in 46 CFR 572.601, and does not require a separate statement of reasons for noncompliance.

In all parts of the Form where data are requested, the filing party is required to indicate all sources used to obtain such data. Sources should also be specified where estimates have been made by the filing party.

Part by Part Explanation

Part I

Part I requires the filing party to state the full name of the agreement as also provided under 46 CFR 572.501.

Part II(A)

Part II(A) requires the filing party to indicate whether or not the agreement authorizes the parties to collectively fix rates or significantly modifies an agreement with such authority. Rate-fixing may be authorized by a conference agreement, an interconference agreement, or an agreement between a conference and one or more ocean common carriers.

Part II(B)

Part II(B) requires the filing party to indicate whether or not the agreement authorizes the parties to pool cargoes or revenues, or significantly modifies an agreement with such authority.

Part II(C)

Part II(C) requires the filing party to indicate whether or not the agreement authorizes the parties to establish a new joint-service or consortium, or significantly modifies an agreement with such authority.

Background Information to Parts III and IV

If any question in Part II is answered "YES", the filing party is required to complete Parts III, IV and VIII (in addition to completing Parts I, II, VI and IX, which are required to be completed by all filing parties).

The amount of cargo is to be measured in appropriate units as determined by the parties (such as revenue tons, weight tons, measurement tons or TEUs). Specify the unit of measurement used.

The relevant trade(s) for the purpose of Parts III and IV is to be determined by the parties. The relevant trade(s) may encompass the entire geographic scope of the agreement, or any combination of U.S. and foreign ports or port ranges or sub-trades within the scope of the agreement as deemed appropriate by the parties. The filing party should clearly identify the relevant trade(s) used for the purposes of completing the Information Form.

Sub-trade is defined as the scope of all liner movements between each foreign country and each U.S. port range within the scope of the agreement. Each foreign country/U.S. port range pair should be shown separately. Where the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound liner movements should be shown separately.

U.S. port ranges are defined by using the Bureau of Census classification of U.S. Coastal Districts. Thus, the U.S. port ranges are defined as follows:

North Atlantic—Includes ports along the eastern seaboard from the northern boundary of Maine to the southern boundary of Virginia.

South Atlantic—includes ports along the eastern seaboard from the northern boundary of North Carolina to, but not including Key West, Florida. Also included are all ports in Puerto Rico and the U.S. Virgin Islands.

Gulf—Includes all ports along the Gulf of Mexico from Key West, Florida to Brownsville, Texas, inclusive.

South Pacific—Includes all ports in the States of California and Hawaii.

North Pacific—Includes all ports in the States of Oregon, Washington, and Alaska.

Great Lakes—Includes all ports bordering upon the Great Lakes and their connecting waterways as well as all ports in the State of New York on the St. Lawrence River.

Liner service refers to a definite, advertised schedule, giving relatively frequent sailings at regular intervals between specific U.S. ports or port ranges and designated foreign ports or port ranges. *Liner vessels* are defined as those vessels used in a liner service. *Liner cargoes* are cargoes carried on liner vessels in a liner service. A *liner operator* is a vessel operating ocean common carrier engaged in liner service. *Liner movement* is the carriage of liner cargo by liner operators. The above liner terms, definitions and descriptions are only to be used for the purpose of the Information Form.

Market share information should be provided using data for the most recent

twelve (12) month period for which data are available. State the period used. Identify all units of measurement and all sources of the data. Data may be estimated. Indicate where estimates are made and describe the basis of their derivation.

Alternative liner routing is defined as liner service between the foreign country specified in the sub-trade and any North American port(s) other than those located within the port range covered by the sub-trade. The alternative liner routing may serve the sub-trade's port(s) and interior point(s) by way of feeder service, transshipment, surface carriage (such as mini-landbridge), or some other form of substituted transport. Alternative liner routing includes only those liner services which compete for cargoes carried in the sub-trade.

Part III(A)

Part III(A) requires the filing party to provide the total amount of cargo carried on all parties' liner vessels in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

Part III(B)

Part III(B) requires the filing party to provide the total amount of cargo carried on all liner vessels (i.e., both party and non-party carriers) operating in each trade identified in (A) within the scope of the agreement for the most recent twelve (12) month period for which data are available.

Part III(C)

Part III(C) requires the filing party to provide the combined market share of all parties operating in each relevant trade within the scope of the agreement. The market share provided in Part III(C) is the quotient (multiplied by 100) of the total derived in Part III(A) divided by the total derived in Part III(B). The formula for calculating market share is as follows:

The total amount of cargo carried on all parties' liner vessels in each relevant trade within the scope of the agreement over the most recent twelve-month period for which data are available divided by the total amount of cargo carried on all liner vessels in each relevant trade within the scope of the agreement over the same twelve-month period; which quotient is multiplied by 100.

The relevant trade(s) identified in III(A) should be clearly identified. Each market share calculation should be based on cargo data for identical relevant trades. The most recent twelve-month period for which data are available is to be the same period of time used both in the calculation of the parties' total liner cargo movements [Part III(A)] and in the calculation of the total sub-trade liner cargo movements for all liner operations [Part III(B)].

Part IV(A)

Part IV(A)(1) requires the filing party to provide, for each relevant trade within the scope of the agreement, the names of all liner operators who are not parties to the agreement, and who were offering liner service in that trade at the time the agreement was filed with the Commission.

Part IV(A)(2) requires the filing party to provide, for each relevant trade, the names of all liner operators serving alternative liner routings who compete for the cargoes carried by the parties.

Part IV(A)(3) requires the filing party to describe the extent of the competition offered by all non-party liner operators, including liner operators directly serving the relevant trade(s) and liner operators serving alternative liner routings. A description of the extent of competition should include estimates (or precise information where available) of non-party liner operator market share (shown either for each individual operator or for all operators collectively). Any evidence of underutilized capacity in the alternative liner routings may also be provided. Explain how the non-party market share was derived. Specify the units of measurement used in the calculations. Indicate the source(s) used to provide data or estimates.

Part IV(B)

Part IV(B)(1) requires the filing party to identify to the extent known all significant non-liner competitive substitutes that are available to shippers of commodities historically transported by liner service within the scope of the agreement. Non-liner competitive substitutes may include carriage on a charter or contract basis or on an infrequent, irregular basis by bulk, mix container/bulk, breakbulk or other vessel-type operators. Such substitutes may also include carriage by air freight operators or air passenger operators with available "belly space" for air freight. Such substitutes may provide service to a trade through some form of substituted service (e.g., minilandbridge, transshipment or feeder service) by way of ports within an alternative North American port range(s).

Part IV(B)(2) requires the filing party to estimate the percentage of the total amount of cargo, historically carried in the trade on liner vessels, that has been carried by non-liner competitive substitutes over the most recent twelve (12) month period for which data are available. The intent of Part IV(B)(2) is to determine the amount of liner cargo historically carried in the trade that has been "lost" to non-liner operators. Identify all units of measurement and describe how the percentage was derived. Identify the sources used.

Part V

Part V is required to be completed only by filing parties whose agreements contain service authority, which is defined as including either or both of the following authorities allowing parties to agree between or among themselves: to allocate (or otherwise provide) tonnage or capacity between or among carriers in the relevant trade(s); to establish a schedule of ports which each carrier will serve and/or the frequency of each carrier's calls at those ports. For the singular purpose of the Information Form, "port" means the place with a harbor that an ocean carrier serves either directly by oceangoing vessel or indirectly by feeder service. Port calls are direct or indirect calls at a port by vessels

under the direct operational control of one or more parties to the agreement.

Part V(A)

Part V(A) requires the filing party to identify all U.S. ports expected to be served under this agreement. Include all U.S. ports expected to receive direct liner service (port calls by a party) and indirect liner service (port calls by way of some form of substituted service such as feeder service) where those vessels are under the direct operational control of one or more of the parties to the agreement. The identification of other forms of indirect service under the agreement, such as intermodal service (e.g., interior point or minilandbridge) or transshipment may be provided if the parties believe that such information will assist and expedite the Commission's analysis of the agreement's impact on service.

Part V(B)

Part V(B)(1) requires the filing party to specify any party's reduction in frequency of service to any U.S. port within the scope of the agreement where the reduction of service to that port occurs as a result of the implementation of the agreement. Reductions in frequency are determined as follows: (1) for each party and for each U.S. port within the scope of the agreement served by that party, determine total number of port calls over the most recent twelve (12) month period for which data are available (historical port call calculation); (2) for each party and for each U.S. port within the scope of the agreement served by that party, estimate the total number of port calls for the twelve (12) month period immediately following implementation of the agreement (expected port call calculation); (3) calculate the difference between the "historical port call calculation" and the "expected port call calculation." Provide, for each party and for each U.S. port, the following calculations: the "historical port call calculation"; the "expected port call calculation"; and the difference between those calculations.

Part V(B)(2) requires the filing party to specify any elimination of service to any U.S. port within the scope of the agreement that is currently (at the time the agreement is filed) receiving liner service from any party to the agreement, where the elimination of that port occurs as a result of the implementation of the agreement. The term "service to any U.S. port" includes direct service by the parties and indirect service by way of feeder service.

Part VI(A)

Part VI(A) requires the filing party to indicate whether or not the agreement was entered into as a direct or indirect response to any law, decree, rule, regulation or any other governmental action promulgated or otherwise implemented by a foreign government. The agreement may, for example, operate in a context where a foreign government has promulgated or implemented certain cargo reservation, cargo preference or other cargo sharing schemes that favor national flag lines and that require these national lines to be members of a conference. A direct response to such governmental action would be the creation of a conference agreement. An indirect response to such

governmental action would be the creation of a pool that facilitates cargo sharing within a conference even though the pool was not *per se* required by such governmental action. Moreover, a commercial agreement that is in response to a governmental action that was itself in response to the concerted actions of other governments (for example, the UNCTAD Code of Liner Conduct) would be in direct response to a governmental action and so require the completion of Part VI. In addition, an equal access agreement necessarily entails the involvement of a foreign government in liner shipping, thus requiring the completion of Part VI.

Part VI(B)

Part VI(B) requires the filing party to identify all such laws, decrees, rules, regulations or any other foreign governmental actions that have led to the agreement. All such governmental actions should be identified by the type of governmental action (e.g., a law, decree, memorandum order, etc.), the full legal title of the governmental action, the date that the governmental action became (or will become) effective, and the date (if specified) the governmental action will terminate. Part VI(B) also requires a detailed description of the purpose and the nature of the governmental action, including all requirements imposed on the parties by the governmental action, and the specification of each provision in the agreement that is a direct or indirect response to each such governmental action.

Part VI(C)

Part VI(C) requires the filing party to indicate whether or not any law, decree, rule, regulation or any other foreign governmental action identified in Part II(B) limits access to the carriage of liner cargoes within the scope of the agreement. Limited access to the carriage of liner cargoes may be effected by excluding certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality) from the trade entirely, or by reserving certain cargoes for carriage by certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality), or by limiting the ports at which liner operators may call, or by restricting the frequency of scheduled port calls, or by other such measures that restrict the open competition for liner cargoes within the scope of the agreement by liner operators.

Part VI(D)

Part VI(D) requires the filing party to explain how access to cargoes carried by liner operators is limited by the actions of a foreign government as identified in Part VI(B). See Part VI(C) for examples of how access to cargoes can be limited by the actions of a government.

Part VI(E)

Part VI(E) requires the filing party to provide the percentage of the total amount of cargo carried on all liner vessels in the trade to which access is limited by a foreign government. The percentage is derived by dividing the amount of cargo in the trade to which access is limited by a foreign government, by the total amount of cargo carried on all liner vessels in the trade and

multiplying the quotient by 100. The *trade* is defined as the scope of the agreement, that is, all foreign and domestic ports or port ranges served under the agreement. The amount of cargo can be measured in revenue tons, weight tons, measurement tons or TEU's. Specify which unit of measurement is used. The amount of cargo should be provided on the basis of the most recent twelve (12) month period for which data are available. Where precise information is not available, best estimates may be supplied. Identify estimates by the use of the notation "est." Indicate the sources of such estimates.

Part VII

The completion of Part VII (A) and (B) is optional.

Part VII(A)

Part VII(A) permits the filing party to indicate all benefits resulting from the agreement that will accrue principally to the parties as a result of the operation of the agreement. Such benefits may include increased operational efficiencies or other reductions in costs that result from the implementation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VII(B)

Part VII(B) permits the filing party to indicate all benefits resulting from the agreement that will accrue to shippers and to U.S. commerce generally. Such benefits may include reduced rate levels or improved quality or frequency of service that result from the operation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VIII

Part VIII requires a filing party that has answered "yes" to Part II (A), (B) or (C) to identify any reports, studies or other research that were prepared by or for any or all of the parties for the purpose of analyzing, formulating or assessing the competitive conditions in the relevant trade(s) affected by the agreement or the competitive impact of the agreement on the relevant trade(s) affected by the agreement.

Part IX(A)

Part IX(A) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding the Information Form and any information provided therein.

Part IX(B)

Part IX(B) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding a request for additional information or documents.

Part IX(C)

Part IX(C) requires generally that the filing party sign and certify that the information in the Form and all attachments and appendices are, to the best of the filing party's knowledge, true, correct and complete. The filing party is also required to indicate his or

her relationship with the parties to the agreement.

Federal Maritime Commission

Information Form For Certain Agreements By or Among Ocean Common Carriers

Agreement Number _____

(Assigned by FMC)

Part I Agreement Name: _____

Part II Agreement Type

(A) Rate-Fixing Agreements

Does the agreement authorize the parties to collectively fix rates or significantly modify an agreement with such authority?

Yes ☐ No ☐

(B) Pooling Agreements

Does the agreement authorize the parties to pool cargoes or revenues or significantly modify an agreement with such authority?

Yes ☐ No ☐

(C) Joint Service or Consortium Agreements

Does the agreement authorize a joint service/consortium arrangement or significantly modify an agreement with such authority?

Yes ☐ No ☐

If any question in PART II is answered "YES", complete PARTS III, IV, and VIII (in addition to PARTS I, II, VI, and IX that are required to be completed by all filing parties.)

Part III Market Share Information

(A) Provide the total amount of cargo carried on all parties' liner vessels in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(B) Provide the total amount of cargo carried on all liner vessels in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(C) Provide the market share of all parties in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

Part IV Market Competition

(A) Liner Competition

(1) For each relevant trade within the scope of the agreement, provide the names of all liner operators *not* parties to the agreement, currently offering service in that trade.

(2) Provide the names of all liner operators serving alternative liner routings where those operators compete for cargoes carried by the parties in the relevant trade.

(3) Describe the nature and extent of the competition from the liner operators listed in (A)(1) and (A)(2) above.

(B) Non-Liner Competition

(1) Identify all competitive substitute forms of transport, other than liner service, that are available to shippers of commodities historically transported by liner service in each relevant trade (including, for example, bulk carriers, charter operators, or air freight carriers).

(2) Estimate the percentage of the total amount of liner cargoes in each relevant trade, traditionally carried on liner vessels, that has been carried by non-liner substitute

forms of transport over the most recent twelve (12) month period for which data are available.

Part V Service to the Shipping Public Under the Agreement

(To be completed only for those agreements which have service authority.)

(A) Proposed Service

Identify all U.S. ports expected to be served by the parties under this agreement.

(B) Reduced Sailings

(1) Estimate the parties' reductions in frequency of calls at each U.S. port within the scope of the agreement.

(2) Specify the parties' elimination of service to any U.S. port within the scope of the agreement currently served by any party.

Part VI Foreign Government Involvement in the Liner Market

(A) Was this agreement entered into as a direct or indirect response to any law, decree, rule, regulation, or other governmental action promulgated or implemented by a foreign government?

Yes ☐ No ☐

(B) If the answer to (A) is "YES", identify all such laws, decrees, rules regulations or other governmental actions and specify all provisions in the agreement that stem from these factors.

(C) If the answer to (A) is "YES", do any of the above identified governmental actions limit access to the carriage of liner cargoes within the scope of the agreement?

Yes ☐ No ☐

(D) If the answer to (C) is "YES", explain how access to liner cargoes is limited by the foreign government.

(E) If the answer to (C) is "YES", provide the percentage of the total liner cargo in the trade to which access is limited by a foreign government. Explain the method by which the percentage was derived.

Part VII Benefits of the Agreement (Optional)

(A) Indicate any benefits (such as improved efficiencies or other reductions in transportation costs) that will accrue principally to the parties as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

(B) Indicate any benefits (such as lower rate levels or improved service levels) that will accrue to shippers and to U.S. commerce generally as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

Part VIII Reports, Studies or Other Research

Identify any reports, studies or other research that were prepared by or for any or all of the parties for the purpose of analyzing, formulating or assessing the competitive conditions in the relevant trade(s) affected by the agreement, or the competitive impact of the agreement on the relevant trade(s) affected by the agreement.

Part IX Identification of Person(s) to Contact Regarding the Information Form and Certification of Authenticity

(A) Identification of Contact Person _____

(1) Name of Contact Person _____

(2) Title of Contact Person _____

(3) Firm Name and Business _____
(4) Business Telephone Number _____
(5) Cable Address _____

(B) Identification of an Individual Located in the United States Designated for the Limited Purpose of Receiving Notice of an Issuance of a Request for Additional Information or Documents (see 46 CFR 572.606).

(1) Name _____

(2) Title _____

(3) Address _____

(4) Telephone _____

(5) Cable Address _____

(C) Certification

This Information Form, together with any and all appendices and attachments thereto, was prepared and assembled in accordance with instructions issued by the Federal Maritime Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made, the information is, to the best of my knowledge, true, correct, and complete.

Name (please print or type) _____

Title _____

Relationship with parties to agreement _____

Signature _____

Date _____

[FR Doc. 84-29890 Filed 11-14-84; 8:45 am]

BILLING CODE 6730-01-M

46 CFR Parts 538 and 580

[Docket Nos. 84-21, 84-23 and 84-24]

Service Contracts, Loyalty Contracts, and Publishing and Filing of Tariffs by Common Carriers in the Foreign Commerce of the United States

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: This Final Rule implements those provisions of the Shipping Act of 1984 which relate to the areas of (1) service contracts, (2) loyalty contracts, and (3) general tariff filing requirements. It amends and supersedes three previously published Interim Rules in these subject areas and consolidates them into one Final Rule.

EFFECTIVE DATE: December 15, 1984.

FOR FURTHER INFORMATION CONTACT: Francis C. Hurney, Secretary, Federal Maritime Commission 1100 L Street, NW., Washington, D.C. 20573, (202) 523-5725.

SUPPLEMENTARY INFORMATION: The Shipping Act of 1984, Pub. L. 98-237, 98 Stat. 67, 46 U.S.C. app. 1701-1720 (the Act or the 1984 Act), was enacted on March 20, 1984 and became effective 90 days later, on June 18, 1984. It significantly alters the statutory scheme which previously governed the oceanborne foreign commerce of the