4. What are the locations, emission rates and current control equipment for ethylene oxide sources?

5. What is the quantity of ethylene oxide being emitted from each ethylene oxide source category, including automobile exhaust and POTWs.

People with information to submit should either provide this information by December 2, 1985 or notify the Agency by December 2, 1985 that they will be providing this information. Information should be submitted in duplicate to the Central Docket Section (A–130), Environmental Protection Agency, ATTN: Docket No. A–85–10, 401 M Street, SW, Washington, DC 20460.

Miscellaneous

On January 2, 1985 (50 FR 64) the Occupational Safety and Health Administration (OSHA) published a final occupational standard for ethylene oxide that established a permissible exposure limit of 1 ppm determined as an 8-hour time-weighted average concentration. Employers must initiate certain compliance procedures when an "action level" of 0.5 ppm for an 8-hour time-weighted average is reached. The basis for this action was human and animal data indicating to OSHA that ethylene oxide presents a carcinogenic, mutagenic, genotoxic, reproductive, neurologic and sensitization hazard to workers.

Ethylene oxide is also regulated as a hazardous material by the Department of Transportation and is required to have approved labeling under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). In 1978, a Notice of Rebuttable Presumption Against Registration (RPAR) was issued under FIFRA. The FIFRA reveiw process is still underway, but could lead to restriction of the use of ethylene oxide as a fumigant.

Ethylene oxide is subject to reporting requirements under the Toxic Substances Control Act, is regulated as a hazardous waste under the Resource Conservation and Recovery Act (RCRA) and is listed as a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act. Under RCRA, the Agency is investigating the hazard of wastes resulting from the manufacture of ethylene oxide and ethylene glycol. Although no final decision on whether to list under RCRA has been made, engineering analyses and industry questionnaries to identify toxicants and concentrations in waste streams have been completed.

Ethylene oxide is listed as a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 101(14). The statutory reportable quantity (RQ) for ethylene oxide is one pound and was established when CERCLA was signed into law on December 11, 1980. The RQ, which was proposed on May 25, 1983 (see 48 FR 23584), was 100 pounds. However, ethylene oxide is being assessed for potential carcinogenicity and/or chronic toxicity. Until this assessment is complete, the statutory one pound RQ applies.

Pursuant to CERCLA section 103(a), any person in charge of a vessel or an offshore or onshore facility shall, as soon as he has knowledge of any release (other than a Federally-permitted release or normal application of a pesticide) of a hazardous substance from such vessel or facility in a quantity equal to or exceeding the RQ determined as a quantity released in any 24-hour period or less, immediately notify the National Response Center (NRC) ((800) 424–8802; in the Washington, DC metropolitan area at (202) 426–2675).

Since ethylene oxide is already listed specifically be CERCLA authority as a hazardous substance which requires reporting of any release equaling or exceeding an RQ to all media, this notice under authority of the CAA section 112 poses no additional reporting burden on the regulated community, the government or the public. However, all parties are given notice in this rulemaking that such a requirement for reporting exists under the authority of CERCLA. For additional information on CERCLA hazardous substance reporting, refer to 48 FR, No. 102, P. 23552 (May 25, 1983).

Under Executive Order 12291, EPA must judge whether this action is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This action is not major because it imposes no additional regulatory requirements on States or sources. This proposal was submitted to the Office of Management and Budget (OMB) for review. Any written comments from OMB and any EPA responses are available in the docket. Pursuant to 5 U.S.C. 605(6), I hereby certify that this action will not have a significant economic impact on a substantial number of small entities because it imposes no new requirements. This action does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980

Dated: September 17, 1985.

Lee M. Thomas,

Administrator.

[FR Doc. 85–23492 Filed 10–2–85; 8:45 am]

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federal register

Wednesday
October 2, 1985

Part VII

Environmental Protection Agency

40 CFR Part 261
Mining Waste Exclusion; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SWH-FRL 2871-7]

Mining Waste Exclusion

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: On October 21, 1980, Congress enacted Pub. L. 96-482 which included various amendments to the Resource Conservation and Recovery Act (RCRA). Section 7 of these revisions (the "Bevill Amendment") excluded "solid waste from the extraction, beneficiation, and processing of ores and minerals" from regulation under Subtitle C of RCRA pending completion of studies called for in Sections 8002 (f) and (p) of RCRA. On November 19, 1980, EPA amended its regulations to reflect this exclusion (45 FR 76618). In the preamble to that rulemaking, EPA tentatively interpreted the exclusion to encompass "solid waste from the exploration, mining, milling, smelting, and refining of ores and minerals" (45 FR 76619). Today's proposed rulemaking, if promulgated as a final rule, would eliminate from the mining waste exclusion many wastes from processing ores and minerals (other than phosphogypsum, bauxite refining muds, primary metal smelting slags, and slag from elemental phosphorus reduction) and would relist six smelting wastes previously listed as hazardous. EPA believes that this revised interpretation more accurately represents the intent of Congress when it enacted the mining waste exclusion and best serves the policy objectives of RCRA.

DATE: EPA will accept public comments on this proposal until December 2, 1985.

The Agency will hold a public hearing on November 14, 1985; see **"SUPPLEMENTARY INFORMATION"** section for details.

ADDRESSES: Comments should be sent to the Docket Clerk, Office of Solid Waste (WH-565A), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The public docket for this proposal is available in Room S212 at the above address for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays. The public hearing is in Washington, DC at the Department of Health and Human Services, North Auditorium, 330 Independence Avenue SW. Attendees should use the "C" Street entrance.

FOR FURTHER INFORMATION CONTACT: RCRA/Superfund Hotline at (800) 424-9346 or 382-3000. For technical information contact Dr. Dexter Hinckley, U.S. Environmental Protection Agency, Office of Solid Waste (WH-565), 401 M St. SW., Washington, DC 20460. (202) 382-2791.

SUPPLEMENTARY INFORMATION:

Preamble Outline

I. History of Mining Waste Exclusion
II. Analysis of Options Available
III. Proposed Relisting of Smelting Wastes
  A. General
  B. Wastewater Treatment Sludges
  C. Wastes That Are Recycled
IV. Analysis of Economic Effects of the Proposed Reinterpretation
  A. Scope and Coverage of Economic Analysis
  B. Methodology and Data Gathering for the Ten-Sector Study
  C. Costs of Compliance for Ten Major Sectors
  D. Economic Impacts for the Ten Major Sectors
  E. Screening Study Conclusions for 21 Other Metal Sectors
V. Public Participation
VI. Regulatory Flexibility Analysis
VII. Effect on State Authorizations
VII. Compliance with Executive Order 12291
IX. Paperwork Reduction Act
X. List of Subjects in 40 CFR Part 261

I. History of Mining Waste Exclusion

In Section 8002(f) of the Resource Conservation and Recovery Act (ACRA) of October 21, 1976, Congress instructed the Administrator to conduct, in consultation with the Secretary of the Interior, "a detailed and comprehensive study on the adverse effects of solid wastes from active and abandoned surface and underground mines on the environment, including, but not limited to, the effects of such wastes on humans, water, air, health, welfare, and natural resources."

On December 18, 1978 (43 FR 58,946), EPA proposed regulations for hazardous waste management under Subtitle C of RCRA. These proposed regulations, among other things, had fewer requirements for a universe of so-called "special waste" that are generated in large volumes, were thought to pose less of a hazard than other hazardous wastes, and were not thought to be amenable to the control techniques proposed for hazardous waste treatment, storage and disposal facilities. EPA identified waste materials from the "extraction, beneficiation, and processing of ores and minerals" as special wastes under the proposed regulations.

On May 19, 1980 and July 16, 1980, EPA listed as hazardous eight waste streams from primary metal smelters. Also on May 19, 1980, when it promulgated the final hazardous waste management regulations, EPA stated that a "special waste" category was unnecessary because: (1) the EP toxicity and corrosivity characteristics of hazardous waste had been narrowed, thus excluding most "special wastes" from control, and (2) the Agency intended to promulgate tailored standards for land disposal, as needed, in future regulations.

On October 21, 1980, Congress enacted Pub. L. 96-482 which included various amendments to RCRA. Section 8002 was amended to include subsection (p), which requires the Administrator to study the adverse effects on human health and the environment, if any, of the disposal and utilization of "solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore." Section 7 of these amendments (the "Bevill Amendment") amended Section 3001 of RCRA to exclude these wastes from regulation under Subtitle C of RCRA pending completion of the studies called for in Sections 8002(f) and (p).

On November 19, 1980, EPA published an interim final amendment to its hazardous waste regulations to reflect the mining waste exclusion. The regulatory language incorporating the exclusion is identical to the statutory language (except the phrase "including coal" was added). In the preamble to the amended regulation, however, EPA tentatively interpreted the exclusion to include "solid waste from the exploration, mining, milling, *smelting*, and *refining* of ores and minerals" (emphasis added). (45 FR 76118, 76619).

For consistency with this interpretation in the November 19, 1980 amendment, the Agency also amended 40 CFR Part 261 to suspend the listings of specific waste streams associated with smelting as hazardous wastes (46 FR 4614, January 16, 1981 and 46 FR 27473, May 20, 1981). These waste streams are associated with the primary copper, lead, zinc, aluminum, and ferroalloy industries (see Table 1).

In the November 19, 1980 notice, EPA made it clear that it intended to reconsider ("over the next 90 days") its interpretation of the exclusion:

> The Agency fully intends to consider the appropriate scope of the statutory exclusion and may well take rulemaking action to lessen the scope of the exclusion. . . . In particular, EPA questions whether Congress actually intended to exclude . . . wastes generated in the smelting, refining, and other processing of ores and minerals that are further removed from the mining and beneficiation of such ores and minerals.

TABLE 1.—SMELTER WASTES LISTED AS HAZARDOUS

Industry	EPA hazardous waste No.	Hazardous waste	Hazard code
Primary copper	K064	Acid plant blowdown slurry/sludge resulting from the thickening of blowdown slurry from primary copper production.	(T)
Primary lead	K065	Surface impoundment solids contained in and dredged from surface impoundments at primary lead smelting facilities.	(T)
Primary zinc	K066	Sludge from treatment of process wastewater and/or acid plant blowdown from primary zinc production.	(T)
	K067	Electrolytic anode slimes/sludges from primary zinc production.	(T)
	K068	Cadmium plant leach residue (iron oxide) from primary zinc production.	(T)
Primary aluminum	K088	Spent potliners from primary aluminum reduction.	(T)
Ferroalloys	K090	Emission control dust or sludge from ferrochromium-silicon production.	(T)
	K091	Emission control dust or sludge from ferrochromium production.	(T)

In the November 19, 1990 notice, EPA indicated that any subsequent action to narrow the scope of the exclusion would be a formal rulemaking: ". . . the Agency, in subsequent rulemaking action, may further narrow the exclusion. If EPA narrows the scope of the exclusion . . . in future rulemaking, those who generate, transport, store, treat or dispose of wastes affected by such a change will have six months to prepare for compliance with the regulations."

Each of the commenters representing the mining industry who addressed EPA's interpretation of the exclusion agreed that all smelting and refining wastes were covered by the Bevill Amendment. The commenters relied primarily on Rep. William's remarks during floor debate in which he quoted a National Academy of Sciences report stating that slag wastes generated by the smelting of copper are "basically inert and weather slowly." However, in its comments, the Bureau of Mines in the Department of the Interior stated that it believed the exclusion was meant to cover "the overburden, waste rock, and mill tailings from mining or milling," but not "solid wastes from refining or further beneficiation carried out as a discrete process."

Since Congress enacted the mining waste exclusion and EPA published its interpretation of the exclusion in 1980, EPA and State regulatory agencies have had to make dozens of individual determinations as to whether a given waste is a mining waste and therefore excluded from Subtitle C requirements. It has been particularly difficult to determine what operations constitute "processing of ores and minerals." As a general rule, EPA has interpreted this phrase to include any operation which further refines or purifies the product being mined (often a metal). Combining the product with another material (e.g., alloying) and fabrication (any sort of shaping that does not cause a change in chemical composition) is not considered "processing of ores and minerals." However, applying this approach, it is still often unclear whether a waste qualifies for the exclusion. For instance, EPA has said that wastes produced by refining copper from 98 to 99 percent purity are excluded. Yet, copper with 98 percent purity can be marketed as a finished product for certain purposes; it does not conform to the usual definitions of "ore" or "mineral."

These determinations of exclusionary status have created a number of inequities among industry segments. For instance, wastes from primary lead smelters are excluded from regulation by EPA's current interpretation of the mining waste exclusion, but similar wastes from secondary lead smelters are subject to full hazardous waste regulation because the smelter input is scrap, not an ore or mineral. In another example, sulfuric acid which is derived from naturally occurring sulfur in certain ores and is removed by acid plants at copper, lead, and zinc smelters is currently excluded. However, spent acids from other industries are regulated as hazardous.

Because of the uncertainties associated with determining the scope of the mining waste exclusion, EPA and State regulatory agencies have had to expend considerable time and resources on lengthy investigations to determine the exact sources of wastes, whether the input to an operation is an ore/mineral or scrap metal (or some combination of both), and the extent to which waste is recycled to production processes. Rather than continue to make these detailed determinations on a case-by-case basis, it has long been thought that some general clarification of the scope of the mining waste exclusion was necessary. More importantly, as explained in more detail below, it has become increasingly clear that EPA current interpretation does not best serve the Congress's objective in enacting the Bevill Amendment. Instead it has had the effect of excluding a broad range of wastes, many of which are hazardous, and are often generated many steps beyond the initial extraction and beneficiation of ores and minerals.

II. Analysis of Options Available

EPA evaluated three options before preparing this proposal:

(1) Retain the current interpretation and conduct a Section 8002 study on processing wastes that are currently excluded, but are not part of the current Section 8002 study of mining waste.

(2) Narrow the exclusion to include only large volume wastes from processing ores.

(3) Narrow the exclusion to include only large volume wastes from processing *metallic* ores.

In consulting various sources, we have found no standard, accepted defintions, i.e., "plain meanings," for the terms of the exclusion, particularly "processing." Therefore, we reviewed the legislative history of the mining waste exclusion for guidance. In evaluating the options, we relied on the following indications of Congressional intent:

- During the discussion of the mining waste exclusion on the House floor, Rep. Williams of Montana quoted a National Academy of Sciences report stating that slag wastes generated by the smelting of copper are "basically inert and weather slowly. The slag produced 2,500 years ago at King Solomon's mines north of Eliat, Israel has not changed perceptibly over time." 126 *Cong. Rec.* H. 1104 (daily ed. February 20, 1980). Rep. Williams went on to say that such wastes should not be subject to RCRA. His statements were unchallenged in subsequent debate on the amendment. In addition, in his "Extension of Remarks" in the Congressional Record, Rep. Bevill, the amendment's sponsor, stated that "the list of waste materials in the amendment * * * (should) be read broadly, to incorporate the waste products generated in the real world." 126 *Cong. Rec.* E 4957 (daily ed. November 17, 1980).
- The legislative history of the Bevill Amendment indicates that EPA's regulatory concept of a "special waste" should be used as a guide in discerning Congressional intent. The Conference Committee Report states that the 1980 RCRA amendments suspend regulation of "a category designated as special

wastes" in regulations proposed by the Agency under Subtitle C on December 18, 1978. S. Rep. No. 96–1010, 96th Cong. 2d Sess. 32 (1980) (Conference Committee Report). In addition, Rep. Santini stated that he believed the amendment would "defer regulation of 'special waste' until after EPA studies the need to do so." 126 *Cong. Rec.* H 1089 (daily ed. February 20, 1980).

- In the preamble to the 1978 regulations, EPA explained that it intended to treat special wastes differently because they were generally thought to be high volume, low toxicity materials, and not amenable to management under the proposed standards for hazardous waste treatment, storage, and disposal facilities. While EPA listed several smelting wastes as hazardous wastes, only a few listed smelting wastes were included in the "special waste" category. Section 250.46–3 of the 1978 proposal, which was titled "Phosphate rock mining, beneficiation, and processing waste," listed "slag . . . from elemental phosphorus production" as one of the wastes subject to special waste regulations.[1]

- In the legislative history accompanying the 1984 amendments to RCRA, the Senate Committee on Environment and Public works stated:

> Solid wastes from mining and mineral beneficiation and processing are primarily waste rock from the extraction process and crushed rock, commonly called tailings, produced from concentrating steps such as grinding, crushing, sorting, sizing, classification, washing, dewatering, amalgamation, gravity treatment, flotation, agglomeration and cyanidation. The 1980 amendments covered wastes from the initial stages of mineral processing, where concentrations of minerals of value are greatly increased through physical means, before applying secondary processes. Smelter slag might also be included. Massive volumes of this waste ore are produced annually by mining and mineral processing facilities—roughly estimated by the American Mining Congress (AMC) to be approximately 1.75 billion tons in a typical year, which is clearly significantly greater in volume than the solid waste generated by all other industries combined. These wastes were considered "special wastes" under the 1978 proposed regulations as being of large volume and relatively low hazard.

Each of the options is evaluated below in light of these indications of Congressional intent:

Option 1—Retain current interpretation and conduct a Section 8002 study on wastes that are currently excluded, but are not part of the current Section 8002 mining waste study.

EPA believes that this option does not reflect either the special waste concept or the intent of Congress as described above. This option would entail studying many low volume wastes, some of them hazardous, generated by facilities processing ores. It would dilute resources available for studies on large volume wastes of interest to Congress.

Option 2—Narrow the exclusion to include only large volume wastes from processing ores.

This interpretation is most consistent with Congressional intent because it leaves large volume processing wastes (i.e., phosphogypsum from phosphoric acid plants, slag from primary smelting of metallic ores or phosphorous reduction, and muds from bauxite refining) within the exclusion, deferring their possible regulation under Subtitle C until completion of studies required for the Report to Congress on mining waste. Annual phosphogypsum disposal is approximately 47 million metric tons; slag disposal from primary metal smelters is over 4 million metric tons; slag from phosphorous reduction is over 3 million metric tons; and mud from bauxite refining is about 2 million metric tons. By limiting the mining waste exclusion to these high volume wastes, this option takes into account the references in the legislative history to high volume, relatively low toxicity wastes, *i.e.*, "special wastes." In fact, this approach constitutes the most rigorous application of the special waste concept.

Option 3—Narrow exclusion to include only large volume wastes from processing *metallic* ores.

This option represents the narrowest possible reinterpretation of the mining waste exclusion, but it reflects only Rep. Williams's specific remarks about slag from copper smelting in Israel. It would maintain the excluded status of red and brown muds (2 million metric tons/year) produced by refining bauxite ore. However, a very large volume processing waste, the 47 million metric tons of phosphogypsum produced each year by phosphoric acid plants, would no longer be within the exclusion. This option also would remove another large volume waste from the exclusion: slag produced by the facilities extracting elemental phosphorus from phosphate ore, because phosphorus is not a metal.

Based on the above analysis of Congressional intent, EPA believes that it was incorrect in interpreting the mining waste exclusion as encompassing all wastes from primary smelting and refining. Therefore, EPA is proposing to reinterpret the mining waste exclusion so that red and brown muds, phosphogypsum, and primary processing slags are the only processing wastes that remain excluded from regulation under Subtitle C of RCRA. All other wastes from processing ores and minerals would be subject to Subtitle C regulation if the wastes are hazardous.

EPA is aware that there are a large number of wastes that could arguably be viewed as wastes from the "processing" of minerals or ores. However, we believe the term "processing" must be interpreted in light of the criteria outlined above. Based on these criteria, we conclude that not all such wastes are properly excluded from regulation under the mining waste exclusion primarily because they do not meet the "special waste" criteria, i.e., high volume, relatively low toxicity. For instance, as mentioned earlier, the listings of certain smelting wastes as hazardous waste were suspended after the Bevill Amendment was enacted even though the rulemaking records for these listings show they are hazardous and these listings were not challenged.

In addition, many of the wastes excluded by EPA's 1980 interpretation of the mining waste exclusion are not high volume wastes.[2] The processing wastes we are proposing for retention within the exclusion range in volume from 2 to 47 million metric tons per year. These volumes are comparable to the other special waste categories proposed December 18, 1978. See 43 FR 58992. For example, utility waste was estimated at 66 million metric tons per year and cement kiln dust at 12 million metric tons per year. The volumes of wastes that would be removed from the exclusion as a consequence of the reinterpretation are substantially smaller in volume than the wastes that would remain within the exclusion. In fact, these waste volumes are generally smaller than the volumes already subject to Subtitle C regulation in other (non-mining) industrial sectors.

EPA requests public comment on the proposed reinterpretation of the mining waste exclusion. Commenters should

[1] Although the process for obtaining elemental phosphorus from phosphate is called phosphorus reduction, rather than smelting, both processes have the same purpose (i.e., separating the desired element from the ore) and comparable wastes (e.g., slag).

[2] Based on the various indications of Congressional intent described in the text, EPA believes it is reasonable to rely primarily on volumes of waste generated to determine which wastes should have been excluded by the Bevill Amendment. However, it may well be appropriate to consider additional factors in making regulatory decisions regarding waste with hazard characteristics similar to those of the high volume wastes covered by the Bevill Amendment.

identify any other processing wastes that meet the "special waste" criteria and therefore should remain within the mining waste exclusion.

III. Proposed Relisting of Smelting Wastes

A. General

EPA proposes to relist as hazardous six wastes (Table 2) associated with smelting operations that were removed from the listing regulations after the Bevill Amendment was enacted.[3] As explained previously, EPA believes this proposed interpretation more accurately represents the intent of Congress when it enacted the mining waste exclusion; therefore, we also believe it is appropriate to propose to relist those wastes that were suspended because they fell under our 1980 interpretation of the wastes subject to the exclusion. While we are requesting comment on the revised interpretation, we are not requesting comment (except as specified below) on the specific basis for the proposed relisting of these wastes as hazardous. (See Preambles to May 19, 1980 (45 FR 33113–115) and July 16, 1980 (45 FR 47834) Federal Register notices and background documents to these specific listings for EPA's basis in listing these wastes as hazardous.) Since it was EPA's interpretation of the Bevill Amendment, not a reevaluation of their hazard, that provided the sole basis for removing them from the regulations, it is the interpretation of that provision that should determine whether these wastes should again be listed. In fact, when these wastes were removed from the hazardous waste list, we specifically indicated that if our interpretation was modified to no longer include the smelting and refining wastes, we would add these wastes to the hazardous waste list without reproposal. See 40 FR 4614, January 16, 1981 and 46 FR 27473, May 20, 1981. If any person disagrees with the listing of these wastes based on additional information about their hazard, i.e., information which does not appear in the rulemaking record for the 1980 listings, they should explain the specific basis for their objections and provide additional information.

TABLE 2.—SMELTER WASTES PROPOSED FOR RELISTING

Industry	EPA hazardous waste No.	Hazardous waste	Hazard code
Primary copper	K064	Acid plant blowdown slurry/sludge resulting from the thickening of blowdown slurry from primary copper production.	(T)
Primary lead	K065	Surface impoundment solids contained in and dredged from surface impoundments at primary lead smelting facilities.	(T)
Primary zinc	K066	Sludge from treatment of process wastewater and/or acid plant blowdown from primary zinc production.	(T)
Primary aluminum	K088	Spent potliners from primary aluminum reduction.	(T)
Ferroalloys	K090	Emission control dust or sludge from ferrochromium-silicon production.	(T)
	K091	Emission control dust or sludge from ferrochromium production.	(T)

B. Wastewater Treatment Sludges

EPA recently promulgated effluent limitations guidelines and standards for the nonferrous metals manufacturing sector. See 40 CFR Part 421. This regulation, among other things, identifies precipitation and sedimentation using excess lime as one technology to be used as part of the Best Available Technology (BAT) for removing metals from nonferrous smelting and refining wastewaters (in some cases a second precipitation step could be conducted using sulfide as the precipitant). See 49 FR 8742, March 8, 1984. The Agency assumed (for costing purposes) that sludges generated as a result of lime precipitation would not be hazardous under Subtitle C of RCRA if an excess of 10 percent additional lime is used; the basis for this conclusion was that these wastes are not likely to exhibit any of the characteristics of hazardous waste, including the extraction procedure (EP) toxicity characteristic.

In this proposed rule, EPA is proposing to restore the listing of three specific wastewater treatment sludges—namely, EPA Hazardous Waste Nos. KO64, KO65, KO66—which are not likely to exhibit any of the characteristics of hazardous waste if they are generated as the result of excess lime addition (10 percent) to wastewater. See 49 FR 8742. Although chemical precipitation of wastewater with excess lime may well immobilize the metals so that they do not exhibit EP toxicity (as well as any of the other characteristics), EPA is proposing to restore the listing of these three wastes for a number of reasons.

First, these wastes are not being proposed for relisting because they exhibit any of the hazardous waste characteristics; rather, these wastes are being proposed for relisting after considering the listing criteria in 40 CFR 261.11(a)(3) (i.e., concentration of toxic constituents in the wastes, ability of the toxicants to migrate from the waste, degree to which the toxic constituents bioaccumulate in ecosystems, plausible types of improper management, volumes of wastes generated, etc.). These criteria were the basis for the original listing. We therefore, believe it inappropriate to now designate these wastes as non-hazardous based solely on the EP toxicity characteristic. Second, EPA does not have information documenting the extent to which the nonferrous plants use excess lime to treat these wastewaters so some of these wastes may exhibit EP toxicity. Further, plants wishing to recycle (resmelt) wastewater treatment sludges may choose to use different chemical precipitants (or not to use excess lime) because use of excess lime may cause metal precipitants to become contaminated with calcium compounds and thus may not be readily extractable; on this last point, the Agency solicits comment and data on the extent that the chemical precipitation technology using 10 percent excess lime would discourage the recycling of any of these wastes.

The Agency, therefore, proposes to restore the listing of these three wastes. Nevertheless, the Agency specifically solicits comment and data on these wastes to determine whether or not they should continue to be listed (based on the original listing criteria) if the wastes are generated through the use of chemical precipitation and sedimentation using excess lime. In particular, we request the following information for each of the wastestreams:

- Total concentration of the listed constituents (*i.e.*, cadmium and lead) on a representative number of samples;
- EP toxicity test results of the listed constituents on a representative number of samples;
- Total concentration and EP toxicity test results for the EP toxic metals (i.e., arsenic, chromium, and silver) and nickel on a representative number of samples;

[3] Two of the residues listed previously are not being relisted based on our reevaluation of these materials. See Section III. C. for more detailed discussion.

- Multiple extraction testing for all of the EP toxic metals and nickel on a representative number of samples;[4]
- Techniques used in managing these wastes (i.e., unlined piles, lined surface impoundments); in providing this information, commenters should be as specific as possible;
- Volume of waste generated;
- Ground-water monitoring data (if available);
- Percentage of wastewaters treated with 10 percent excess lime which is the basis for BAT guidelines for nonferrous smelting and refining wastewaters;
- Percentage of wastestreams treated using other precipitants;
- The amount of excess lime as a percentage of dry sludge.

Based on this information, we may conclude that the wastewater treatment sludges generated using 10 percent excess lime are in fact non-hazardous and therefore may narrow the scope of the listing accordingly.

C. Wastes That Are Recycled

1. Introduction

EPA recently promulgated a rule which, among other things, specifies which materials are solid and hazardous wastes when they are recycled. See 50 FR 614, January 4, 1985. (This rulemaking also specified general and specific management standards for most types of hazardous waste recycling activities.) A large percentage of the wastes that would be relisted under this proposal are land disposed. These include 69 percent of the acid plant blowdown from primary copper production, 97 percent of the sludge from treatment of wastewaters and/or acid plant blowdown from primary zinc production, 72 percent of the spent potliners from primary aluminum production, and 100 percent of the emission control dust/sludges from ferrochromium-silicon and ferrochromium production. However, three of the wastes are primarily recycled by being reclaimed. These include 100 percent of the surface impoundment solids from primary lead production; 100 percent of the electrolytic anode slimes/sludges from primary zinc production; and 100 percent of the cadmium leach residue treatment sludge from primary zinc production, (see Table 3).

TABLE 3.—GENERATION OF HAZARDOUS WASTES IN THE PRIMARY NONFERROUS SMELTING AND REFINING INDUSTRIES

EPA Number (when listed) and hazardous waste	Tons/yr 1984	Immediately recycled (percent)	Recycle after storage (percent)	Land disposal (percent)
Primary copper—K064:Acid plant blowdown slurry/sludge	32,864	0	31	69
Primary lead—K065:				
Surface impoundment solids	46,193	50	50	
Air pollution control dusts	82,350	100		
Total	128,541			
Primary zinc and ZnO_3:				
K066: Wastewater treatment sludge	32,380	3	0	97
K067: Electrolytic anode slimes	N/A	57	43	
K068:				
Cadmium plant lesch residue	N/A	12	[1] 88	
Saleable leach residue	2,400	87	13	0
Non-saleable leach residue	31,400	53	0	47
Clinker	54,000	0	17	83
Furnace residue	180,000	0	13	87
Total	297,780			
Primary aluminum—K088:				
Spent potliners	130,000	3	25	72
Wet sludges	92,750	1	7	92
Pot skims	11,911	19	0	81
Shot blast dusts	11,300	1	0	99
Total	245,966			
Primary titanium and TiO_3:				
Chloride process sludges [2]	350,000		[3] 10	90
Sulfate process sludges	100,000		100	0
Metal sludges	5,000			100
Total	455,000			
Ferroalloys:				
K090: FeCrSi emission control dust	3,300			100
K091:				
FeCr emission control dust	6,500			100
Other dusts, sludges, and residues	180,200			
Total	190,000			
Magnesium, zirconium/hafnium—Dusts, sludges and other residues	22,000			

[1] 72 percent sold.
[2] Another 2,000,000 tons/year of chloride process acids are disposed of by deep-well injection.
[3] Sold as product.

Source: "Hazardous Waste Management Costs in Selected Primary Smelting and Refining Industries" (June 1985) and "Overview of Solid Waste Generation, Management, and Chemical Characteristics" for aluminum, copper, zinc, ferroalloys, titanium dioxide, zinc oxide, and zirconium/hafnium sectors. (Published as draft reports by PEI and Radian in 1984.)

In the January 4, 1985 rulemaking, we indicated that certain materials being reclaimed [5] are solid wastes only when they are listed as hazardous waste. We also indicated that materials being reclaimed can be listed as solid wastes; however, in doing so, a number of factors must be considered which would demonstrate whether the material is handled as a commodity or a waste. In evaluating these three residues, we believe that the surface impoundment solids from primary lead production are solid wastes and therefore should be relisted, while the electrolytic anode slimes/sludge and cadmium plant leach residue from primary zinc production are not solid wastes and should not be relisted.

2. EPA's Basis for Listing/Not Listing Surface Impoundment Solids from Primary Lead Production, and Electrolytic Anode Slimes/Sludges, and Cadmium Plant Leach Residue from Primary Zinc Production

As described above, the January 4 rules define which materials are solid and hazardous wastes when they are recycled. Among other things, the rules indicate that all spent materials [6] (whether they are listed or exhibit one or more of the hazardous waste characteristics) are defined as solid wastes when they are reclaimed.[7]

[4] The Agency has developed and is using the multiple extraction procedure (MEP) in evaluating certain delisting petitions to evaluate the long-term stability of wastes. The Agency believes it appropriate to also use it in evaluating listing decisions. See the public docket for this proposed rule which describes the methodology.

[5] A material is reclaimed if it is processed to recover a usable product or if it is regenerated. See 40 CFR 261.1(c)(4); see also preamble discussion in 50 FR at 633, January 4, 1985.

[6] A spent material is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing. See 40 CFR 261.1(c)(1); see also preamble discussion in 50 FR at 624, January 4, 1985.

[7] Based on our initial survey, 28 percent of the spent potliners are recycled by being reclaimed. It could be argued that this percentage is significant and, thus, these materials are more product-like than waste-like and should not be listed. However,

Continued

Sludges and by-products, however, are only defined as solid wastes when they are reclaimed if they are specifically listed.[8] [9] We limited the definition to listed sludges and by-products to avoid including sludges and by-products that are routinely processed to recover usable products as part of on-going production operations. Nevertheless, sludges and by-products that are routinely reclaimed can be listed and thus be solid wastes if they are more waste-like than product-like. EPA will make this determination on a material-by-material basis considering: (1) How frequently the material is recycled on an industry-wide basis, (2) whether the material is replacing a raw material and the degree to which it is similar in composition to the raw material, (3) the relation of the recovery practice to the principal activity of the facility, and (4) whether the secondary material is managed in a way designed to minimize loss. See 50 FR at 641. In addition, the length of time materials are accumulated before being reclaimed is relevant since prolonged storage without recycling suggests that materials will not in fact be recycled, or are only of marginal recycling potential. See 50 FR at 635.

EPA has evaluated the three materials that are routinely reclaimed and, based on the information gathered, we believe the surface impoundment solids from primary lead production should be considered solid wastes and thus regulated as hazardous wastes, whereas the electrolytic anode slimes/sludges and cadmium plant leach residue from primary zinc production should not be considered solid and hazardous wastes. These conclusions are explained below.

since spent potliners are defined as a spent material and since all spent materials are defined as wastes when they are reclaimed, these materials (whether or not they are listed) would be defined as solid wastes. In addition, it should be noted that the Agency has found that the principal purpose of recycling spent potliners is hazardous waste treatment, not cryolite recovery. Thus spent potliners are not considered to be recycled for regulatory purposes. 49 FR 8746, March 8, 1984 and 50 FR at 639641, January 4, 1985.

[8] Under the recycling rules, the surface impoundment solids at lead smelting facilities would be defined as a sludge while the electrolytic anode slimes/sludges and cadmium plant leach residue from zinc production would be defined as by-products.

[9] Non-listed sludges and by-products would be defined as solid wastes if they are accumulated speculatively. A material is accumulated speculatively if it is accumulating before being recycled unless a person can demonstrate that the material has recycling potential and can feasibly be recycled, and during a one-year calendar period, the amount of material recycled or transferred to a different site for recycling is at least 75 percent of the amount accumulated at the beginning of the year.

3. Surface Impoundment Solids Contained in and Dredged From Surface Impoundments at Primary Lead Smelting Facilities

This waste is generated by primary lead smelting plants when the solid particulates from wastewater/slurries (that are generated at various steps in the smelting process) are allowed to settle in surface impoundments. Based upon EPA's survey of approximately 50 percent of the industry, all of this material is recycled by being reclaimed. However, at least half of this material is recycled only after it is stored for long periods of time, up to several years. In addition, and more importantly, these sludges are not stored in a way commensurate with designation as products; rather, they are stored in an insecure fashion without any significant attempt to minimize loss. These sludges are stored in surface impoundments; surface impoundments containing secondary materials (as well as hazardous wastes) pose a particular threat to ground water and have always been one of the chief concerns of the hazardous waste management program. Further, the materials are constantly in the presence of liquids, creating the situation most conducive to forming leachate. Since most impoundments are unlined, and many are underlain by permeable soils, the potential for downward seepage of contaminated fluids into ground water is high.[10] In addition, due to declining lead demands, there is a strong potential that these sludges may not be recycled.

Furthermore, in granting variances from classification as a solid waste, one of the factors the Agency will consider is the extent to which handling of the material (before being reclaimed) is designed to minimize loss. See 40 CFR 260.31(a)(4); 260.31(b)(3); and 260.31(c)(5). Where the materials are stored in open unlined piles, unlined impoundments, or leaking tanks and drums, it is less likely a variance will be granted (*i.e.*, the more carefully a material is handled, the more it is commodity-like. (See 50 FR at 654–655.) We, therefore, believe that although most, if not all, of this material may eventually be reclaimed, it is managed in a waste-like manner and therefore should be listed as a solid waste.

[10] See U.S. EPA. Report to Congress, Surface Impoundments and Their Effect on Ground Water Quality in the United States—A Preliminary Survey, EPA § 7919–78–004 (1978), and U.S. EPA, The Prevalence of Subsurface Migration of Hazardous Chemical Substances at Selected Industrial Waste Disposal Sites, EPA/5301 SE 6341 (October 1977). See also substantial portions of the legislative history of the 1984 Amendments to RCRA.

4. Electrolytic Anode Slimes/Sludges and Cadmium Plant Leach Residue (Iron Oxide) From Primary Zinc Production

The electrolytic anode slimes/sludges are generated from the cleaning of electrolytic cells (*i.e.*, they consist of gangue material that is passed through earlier process steps, but is not plated out or electrolyzed in the electrolysis step), while the cadmium plant leach residue is generated from leaching of process dusts with a high cadmium content. Like the surface impoundment solids discussed previously, all of these residues are recycled by being reclaimed. However, these materials are handled much more carefully than the surface impoundment solids. In particular, based on data recently submitted by the American Mining Congress (AMC),[11] these facilities (based on a survey of 100 percent of the production facilities) recycle 100 percent of these residues, and a large percentage are recycled immediately without storage. If the material is stored prior to recycling, it is stored for a maximum of 30 days; where there is storage, it occurs in devices that minimize loss of those residues (i.e., in metal hoppers, concrete basins, etc.) Furthermore most of these materials are recycled on-site, thus minimizing any loss during transportation. Therefore, we believe these materials are more commodity-like than waste-like and, therefore, are not proposing to relist them as solid and hazardous wastes. (It should be noted that these materials may still be solid and hazardous wastes if they are accumulated speculatively.)

IV. Analysis of Economic Effects of the Proposed Reinterpretation

The Agency conducted cost and economic impact studies to analyze the potential impact of this reinterpretation and to determine whether the proposed regulation is a major rulemaking (under Executive Order 12291) or would cause significant impacts on small business (pursuant to the Regulatory Flexibility Act). Although EPA determined that the proposal is not a "major" rule, detailed impact studies were performed for a substantial portion of the potentially affected industry sectors.

This section of the preamble is a summary of the cost and impact analyses documented in U.S. EPA, *Hazardous Waste Management Costs in Selected Primary Smelting and Refining Industries* (hereafter referred to as the Cost Document), *Economic Impact*

[11] See letter from James R. Walpole to Matthew A. Straus dated August 5, 1985, in the public docket for this rulemaking.

Analysis of Proposed Reinterpretation of Solid Waste Exemption for the Primary Smelting and Refining Industry (two volumes, hereafter referred to as the Economic Impact Report), and *Overview of Solid Waste Generation, Management, and Chemical Characteristics* (hereafter referred to as the Technical Studies). These documents are available in the public docket for this rulemaking.

A. Scope and Coverage of Economic Analysis

The Agency's economic impact analysis was conducted in two parts. The first part consisted of a detailed compliance cost and economic impact analysis covering ten major primary metal smelting and refining sectors containing a total of 110 operating facilities producing 97 percent of total U.S. nonferrous and ferroally product tonnage in 1983. These ten sectors include all of the large volume sectors with previously listed smelting wastes (aluminum, copper, lead, zinc, and ferroalloys) as well as a broad sampling of five additional nonferrous metal industries shown by previous studies to generate potentially hazardous wastes (magnesium, titanium metal, titanium dioxide, zinc oxide, and zirconium/hafnium). According to U.S. Bureau of Mines and EPA survey data, the remaining three percent of nonferrous production is contributed by 21 metals sectors (400 facilities) not covered in the detailed impact assessment.

The second part of EPA's impact analysis involved a much less detailed screening study of these 21 sectors to isolate those sectors most likely to be significantly affected. Based on this screening, EPA believes that the major part of the total national cost impacts are accounted for by the 97 percent of the total production covered in our detailed analysis, and that the impact patterns in the covered sectors will generally be similar in the additional sectors.

B. Methodology and Data Gathering for the Ten-Sector Study

EPA first conducted a series of technical survey and sampling studies covering ten major ore-processing industries to determine the volume of wastes generated, identify those wastes which could be hazardous because they exhibit one of the characteristics defined in 40 CFR 261.2, estimate the volume of these hazardous wastes, and delineate the practices currently used to manage these wastes. The major findings are summarized in Table 3 above. Based on the technical survey and sampling results, a plant-by-plant waste management assessment was then made for all 110 facilities in the sectors studied, utilizing plant survey data from over 80 individual facilities and waste sampling results from 50 facilities.

Where data were incomplete for surveyed plants or absent entirely for non-surveyed facilities, the types and quantities of hazardous and non-hazardous waste, current waste management practices, and production relationships were estimated from survey data at similar processing facilities. In the absence of site-specific information, EPA erred on the conservative side by assuming that all non-surveyed facilities did produce hazardous waste streams comparable in quantity and type to those found in the sample survey for other facilities with similar products.

EPA then estimated waste management costs for both current baseline practices (observed or assumed) and RCRA Subtitle C requirements at each of the 110 individual facilities. The difference between current baseline costs and total RCRA compliance costs is the incremental compliance cost for this regulation, providing the basis for evaluating economic impacts.

In selecting RCRA Subtitle C compliance practices for facilities, EPA assumed that companies would adopt a least-cost, conventional waste management option consistent with technical considerations relating to the facility's current practices and waste characteristics. All RCRA compliance options involving surface impoundments or landfills were based on a double synthetic liner technology consistent with the requirements of the Hazardous and Solid Waste Amendments of 1984. The analysis did not consider in-plant process changes, innovative recycling activities, or by-product options that might reduce compliance costs or turn net compliance costs into net savings.

The Agency estimated incremental compliance costs for storing, treating, transporting, and disposing of a waste stream. Costs include initial capital investment, annual operation and maintenance (O&M), capital investment for waste facility closure, and annual O&M costs for postclosure maintenance for a period of 30 years. Compliance costs were converted to an annualized cost form to provide the uniform annual cost that would be equivalent to the incurred cost stream. Initial investment costs were amortized over a 20-year lifetime, using the companies' weighted average cost of capital.

As part of the economic analysis, EPA also assembled extensive historical information on plant capacity and production levels, investment, prices, and financial conditions in order to base the impacts on more accurate projections. Where possible, EPA collected financial information for individual metals (for example, primary aluminum and primary copper). In some cases, lack of data forced consolidation of the financial characteristics of several metal subcategories (for example, lead with zinc and zirconium/hafnium with titanium).

Historical data from 1978 to 1983 were then used to estimate projected metal prices. In estimating rates of return, investment levels, production, and operating income, EPA used data from the three-year span of 1979 to 1981, on the assumption that this period provided the best indication of the performance of these plants under expected future conditions, and that 1982 and 1983 data reflected an atypically severe period of economic recession.

The plant closure methodology focuses only on specific plants having annualized compliance costs greater than one percent of sales. Previous Agency studies in support of effluent guidelines regulations under the Clean Water Act have shown few impacts with compliance costs below this level, but show occasional impacts when costs are more than one percent of sales. For plants with costs above this level, EPA then employed two plant closure tests: a net present value test and a liquidity test. The net present value test focuses on long-term profitability, with the viability of the plant being judged by a comparison of the net present value of its cash flow to its liquidation value. The liquidity test addresses short-term viability and focuses on affordability during the first few years of compliance. The closure analysis also assumes zero pass-through of compliance costs; that is, to avoid overlooking potential closures, plants are assumed to absorb all of the compliance costs as a direct increase in production costs (decrease in profit).

C. Costs of Compliance for Ten Major Sectors

EPA identified 67 manufacturing facilities (out of 110) in the ten sectors that will likely incur increased costs to comply with this regulation. Based on its industry survey, EPA concluded that certain facilities were not generating hazardous wastes, while others were either utilizing immediate recycling or were probably already in compliance with current RCRA management

requirements. Table 4 summarizes EPA's compliance cost estimates for each sector. For the ten sectors studied, we estimate total investment costs for compliance at about $57 million, and total annualized costs to be about $20 million.

TABLE 4.—SUMMARY OF ANNUALIZED COMPLIANCE COSTS

Subcategory	Number of plants			Annualized compliance costs ($000's dollars)		
	Total	Incurring costs	Range	Median	Average	Total
Primary aluminum	29	19	8–718	78	158	3,002
Primary copper	20	11	2–83	43	37	402
Primary lead	6	4	2–82	50	46	185
Primary zinc	5	4	15–1,270	44	343	1,372
Primary zinc oxide	3	2	13–1,711	862	862	1,724
Ferroalloys	29	13	1–444	126	184	2,398
Primary magnesium and primary zirconium/hafnium [1]	5	4	31–656	173	258	1,033
Primary titanium	6	5	16–311	35	97	484
Primary titanium dioxide	9	8	327–2,454	1,145	1,211	9,687
Industry total	[2] 110	[2] 67	1–2,454		303	20,287

[1] The Primary magnesium and primary zirconium/hafnium subcategories are merged to preserve confidentiality.
[2] Some plants produce more than one type of metal; therefore, the total is not the sum of all the numbers listed.
Source: "Waste Management Costs in Selected Primary Smelting and Refining Industries" (June, 1985), and "Economic Impact Analysis of Proposed Reinterpretation of Solid Waste Exemption for the Primary Smelting and Refining Industry" (June 1985).

Annualized compliance costs vary considerably, both among sectors and among individual facilities within each sector. The most extremely affected sector, titanium dioxide, faces expected total annual compliance costs of over $9 million (almost half of the total costs for all ten sectors), with an average per facility cost of $1.2 million per year. This contrasts, for example, with total compliance costs for the primary lead sector of $185,000 per year ($46,000 per year per facility).

Within individual industries, there are typically one or several plants with no projected compliance costs, either because of the non-hazardous character of the wastes or because of recycling or other management programs already in place. For plants incurring cost within a given sector, it is typical for some to face only a few thousand dollars per year and others in the same sector to face several hundred thousand dollars or more per year in incremental compliance costs.

D. Economic Impacts for the Ten Major Sectors

Based on the compliance cost estimates and other economic variables for individual facilities in each of the ten sectors, EPA assessed several categories of possible economic impacts, including effects on production costs and prices, international trade, total investment requirements, profit (return on investment), and potential for plant closures and job losses. General effects are summarized in Table 5, while plant closures and employment losses are discussed below in relation to Table 6.

TABLE 5.—Summary of Economic Impacts

Industry subcategory	Total number of plants	Number of plants incurring costs	Average percent change in return on investment	Average percent increase in production cost	Average percent price change	Average investment cost as a percent of capital expenditures
Primary aluminum	29	19	−1.47	0.10	0.09	1.26
Primary copper	20	11	−1.35	0.03	0.03	1.36
Primary lead	6	4	−0.60	0.08	0.07	4.14
Primary zinc	5	4	−10.25	1.48	1.20	74.75
Primary zinc oxide	3	2	−30.79	6.02	4.89	116.50
Ferroalloys	29	13	−20.91	0.67	0.65	21.61
Primary magnesium and primary zirconium/hafnium [1]	5	4	−2.07	0.37	0.31	2.90
Primary titanium	6	5	−1.65	0.41	0.32	2.44
Primary titanium dioxide	9	8	−29.30	1.79	1.68	34.53
Industry	[2] 110	[2] 67	−4.80	0.35	0.33	5.54

[1] The primary magnesium and primary zirconium/hafnium subcategories are merged to preserve confidentiality.
[2] Some plants produce more than one type of metal; therefore, the total is not the sum of all the numbers listed.
Source: "Economic Impact Analysis of Proposed Reinterpretation of Solid Waste Exemption for the Primary Smelting and Refining Industry" (June, 1985).

Production Costs and Prices

As indicated in Table 5, we estimate that the average increases in production costs and prices would be small to moderate (less than two percent) in all subcategories except primary zinc oxide (where we would expect a six percent increase in cost of production and almost five percent increase in prices). On average, however, the annualized cost of this rule amounts to less than 0.4 percent of current production costs or current prices.

Because of these generally low effects on prices (even the maximum effects), the study did not explore any further the possible effects on international trade. However, price pressures for basic commodities of the size indicated here are not likely to affect international market positions.

These results assess both the maximum impact on production costs and the maximum impact on prices. To assess production costs, we assumed zero pass-through of compliance costs to market prices, whereas to assess price changes we assumed a 100 percent passthrough of compliance costs. Therefore, these effects should be regarded as mutually exclusive estimates for purposes of presenting extreme possibilities.

Capital Investment and Rates of Return

The Agency projects the average investment cost as a percent of normal capital expenditures to range from nominal (one to four percent) in about half the sectors to very large (75 to 118 percent) in the zinc and zinc oxide sectors. This result may be partly due to the abnormally depressed state of capital expenditures in the 1979–81 base period for some of these sectors. Non-growth or declining sectors generally can be expected to show very high ratios in this column due to low base capital investment figures. These estimates were also based on the extreme assumption of zero pass-through of costs to prices, a worst-case assumption that also tends to increase these ratios.

Similar reasoning may in part explain the estimates regarding rates of return on investment. In general, results here fall into two categories: five sectors with maximum impacts on profit of about two percent or less, and four groups with compliance costs in the range of 10 to 31 percent of profits. In part, these high percentages are due to higher than average RCRA compliance costs (because of relatively large hazardous waste volumes compared to other sectors) and in part they are due to

lower than average baseline rates of return.

Plant Closures and Employment Losses

Based on its analysis, EPA concluded that one plant in the ferroalloy subcategory may close as a result of this reinterpretation (Table 6). If realized, this closure would involve a loss of about 80 jobs at the closed facility. The potential production loss associated with closure represents approximately three percent of the total ferroalloy capacity.

TABLE 6.—SUMMARY OF PLANT CLOSURE ANALYSIS

Sector	Number of plants				Potential employment loss
	Total	Incurring costs	Failing screen	Potential closures	
Primary aluminum	29	19	0	0	0
Primary copper	20	11	0	0	0
Primary lead	6	4	0	0	0
Primary zinc	5	4	1	0	0
Primary zinc oxide	3	2	1	0	0
Ferroalloys	29	13	3	1	80
Primary magnesium and zirconium/hafnium	5	4	0	0	0
Primary titanium	6	5	0	0	0
Primary titanium dioxide	9	8	4	0	0
Industrial total	110	67	9	1	80

Source: "Economic Impact Analysis of Proposed Reinterpretation of Solid Waste Exemption for the Primary Smelting and Refining Industry" (June, 1985).

E. Screening Study Conclusions for 21 Other Metal Sectors

In addition to the ten sectors surveyed in detail for this rulemaking, EPA also conducted a more general screening study of the 21 remaining primary metal processing sectors. These 21 sectors include about 400 facilities that together produce just under 200,000 metric tons of metal per year. Of these 400 facilities, 309 (over three-fourths) are primary refiners of gold and/or silver. Few of these 400 facilities produce more than 5,000 tons of metal production per year, and the majority produce under 100 tons each.

The Agency's methodology for evaluating these sectors included a literature review, evaluation of EPA file data from previous EPA nonferrous industry surveys, and a general comparative cost analysis for average facilities in each sector based on current product cost. Where necessary, conservative waste generation parameters derived from our ten-sector survey analysis were employed to estimate a maximum RCRA impact for specific sectors. These extreme case assumptions included a proxy waste generation rate of one ton of hazardous waste per ton of metal production and an incremental waste management (compliance) cost of $200 per ton of hazardous waste.

Results of this screening analysis suggest that, at most, five out of the 21 sectors could potentially incur moderate-to-significant impacts from this regulation. These five sectors—tungsten, vanadium, rare-earth metals, columbium, and mercury—could incur incremental RCRA compliance costs in the range of one to six percent of total production costs under the extreme costing assumptions used for this analysis. Even at these maximum cost levels, EPA's plant closure analysis projects that plant closures would be highly unlikely for tungston, rare-earth metals or mercury. For columbium and vanadium, it is not possible to rule out possible closures on the basis of the Agency's screening analysis; however, no closures can be projected from this analysis.

More definitive impact conclusions for any of these five sectors would require more detailed survey data for individual facilities on waste generation, waste characteristics (especially EP toxicity), and waste management practices (including current or potential recycling and by-product recovery opportunities).

EPA would appreciate further comment regarding the technical operation and possible RCRA impacts for facilities in any of the 31 sectors identified in the primary nonferrous metals industry. In particular, current data on total waste generation, physical and chemical properties of significant wastestreams, current management practices, and recycling or other by-product use of process residuals is requested for facilities producing primary tungsten, vanadium, rare-earth metals, columbium, and mercury.

V. Public Participation

Requests to participate in the public hearings should be directed on or before November 7, 1985 to Ms. Geraldine Wyer, Public Participation Officer, Office of Solid Waste, (WH-562), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. The hearing will begin at 9:00 a.m. with registration beginning at 8:30 a.m. The hearings will end at 4:30 p.m., unless concluded earlier. Oral and written statements may be submitted at the public hearings. Persons who wish to make oral presentations must restrict these to 20 minutes, and are requested to provide written copies of their complete comments for inclusion in the official record.

VI. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) of 1980 (Pub. L. 96-354), which amends the Administrative Procedures Act, requires Federal regulatory agencies to consider "small entities" throughout the regulatory process. The RFA requires an initial screening analysis to be performed to determine whether a substantial number of small entities will be significantly affected by a regulation. If so, regulatory alternatives that eliminate or mitigate the impacts must be considered.

This section presents the results of the Agency's small business screening analysis, based on a review of industry plant ownership patterns and estimated compliance costs. Based on this analysis, EPA has determined that there will not be a significant impact on a substantial number of small businesses.

In the nonferrous metals smelting and refining industry, the Small Business Administration (SBA) defines small entities based on employment levels. For most primary metal sectors, the employment criterion is fewer than 750; however, a higher threshold of 1,000 is used for some sectors. Based on the appropriate definition, for each sector, the Agency screened all 110 facilities in the ten sectors that were studied in detail and determined that, among these, only the ferroalloy sector contained facilities owned by small business enterprises. However, none of the ferroalloy facilities owned by small businesses were among those projected to incur costs due to this reinterpretation.

The remaining 400 nonferrous facilities not covered in our detailed impact analysis were also subjected to this detailed small business ownership screening. It appears that there are small business facilities in the primary silver and gold refining sectors; however, this sector is not expected to incur significant cost effects. Facilities in all of the remaining sectors all appear to be owned by large businesses or conglomerates and therefore would not be subject to the Regulatory Flexibility Act.

VII. Effect on State Authorizations

This proposal, if promulgated, will not be automatically effective in authorized States since the requirements will not be imposed pursuant to the Hazardous and Solid Waste Amendments of 1984. Thus, this reinterpretation will be applicable only in those few States that do not have interim or final authorization to operate their own hazardous waste programs in lieu of the Federal program. In authorized States, the reinterpretation will not be applicable until the State revises its program to adopt equivalent requirements under State law.

40 CFR 261.21(e)(2) requires States that have final authorization to revise their programs to adopt equivalent standards within a year of promulgation of these standards if only regulatory changes are necessary, or within two years of promulgation if statutory changes are necessary. These deadlines can be extended in exceptional cases (40 CFR 271.21(e)(3)). Once EPA approves the revision, the State requirements become Subtitle C RCRA requirements in that State.

States that submit official applications for final authorization less than 12 months after promulgation of this reinterpretation may be approved without including an equivalent provision in the application. However, once authorized, a State must revise its program to include an equivalent provision within the time period discussed above. The process and schedule for revision of State programs is described in amendments to 40 CFR 271.21 published on May 22, 1984. (See 49 *FR* 21678)

VIII. Compliance With Executive Order 12291

Sections 2 and 3 of Executive Order 12291 (46 FR 13193; February 9, 1981) require that a regulatory agency detemine whether a new regulation will be "major" and, if so, that a Regulatory Impact Analysis be conducted. A major rule is defined as a regulation which is likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, and local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Today's proposal will have none of the above effects. Therefore, the Agency is not conducting a Regulatory Impact Analysis. The proposal has been submitted to the Office of Management and Budget (OMB) for review as required by Section 6 of Executive Order 12291. Any comments from OMB to EPA and any response to those comments are available for viewing at the Office of Solid Waste Docket, Room S212, U.S.E.P.A., 401 M Street, SW., Washington, DC 20460.

IX. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* Submit comments on these requirements to the Office of Information and Regulatory Affairs; OMB; 726 Jackson Place, NW.; Washington, DC 20503 marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements.

X. List of Subjects in 40 CFR Part 261

Hazardous waste, Waste treatment and disposal, Recycling, Reporting and recordkeeping requirements.

Dated: September 27, 1985.

Lee M. Thomas,

Administrator.

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTES

For the reasons set out in the preamble, it is proposed to amend 40 CFR Part 261 as follows:

1. The authority citation for Part 261 continues to read as follows:

Authority: Sections 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6921, and 6922).

2. Section 261.4, paragraph (b)(7), is revised as follows:

 # 261.4 Exclusions.

* * * * *

(b) * * *

(7) Solid waste from the extraction, beneficiation and processing of ores and minerals (including coal), including phosphate rock and overburden from the mining of uranium ore. For purposes of this paragraph, solid waste from the processing of ores and minerals only includes muds from facilities refining bauxite, phosphogypsum from phosphoric acid plants, and slag from primary metal smelters and phosphorus reduction facilities.

* * * * *

3. In § 261.32, add after entries for "Iron and steel" and before entries for "Secondary lead," the following waste streams:

§ 261.32 Hazardous waste from specified sources.

Industry and EPA hazardous waste No.	Hazardous waste	Hazardous code
* * * * * * *		
Primary copper:		
K064	Acid plant blowdown slurry/sludge resulting from the thickening of blowdown slurry from primary copper production.	(T)
Primary lead:		
K065	Surface impoundment solids contained in and dredged from surface impoundments at primary lead smelting facilities.	(T)
Primary zinc:		
K066	Sludge from treatment of process wastewater and/or acid plant blowdown from primary zinc production.	(T)
Primary aluminum:		
K088	Spent potliners from primary aluminum reduction	(T)
Ferroalloys:		
K090	Emission control dust or sludge from ferrochromiumsilicon production	(T)
K091	Emission control dust or sluge from ferrochromium production	(T)

4. In Appendix VII—Basis for Listing Hazardous Waste, add the following in the appropriate alphabetical and numerical sequence:

Appendix VII—Basis for Listing Hazardous Waste

EPA hazardous waste number	Hazardous constituents for which listed
* * * * *	
K064	Lead, Cadmium.
K065	Lead, Cadmium.
K066	Lead, Cadmium.
K088	Cyanide (Complexes).
K090	Chromium.
K091	Chromium, Lead.
* * * * *	

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Part VIII

Department of Transportation

Federal Highway Administration

49 CFR Part 386

Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 386

Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is revising the rules of practice and procedure for motor carrier safety and hazardous materials proceedings. The revision is necessary due to statutory and administrative changes and agency experience with Part 386. The statutory changes since the last rewrite of these regulations in 1977 are the Motor Carrier Safety Act of 1984, the Bus Regulatory Reform Act of 1982, the Motor Carrier Act of 1980 and the recodification of Title 49, United States Code, Transportation, in 1983. Further changes were required by the 1985 restructuring of the Bureau of Motor Carrier Safety (BMCS), which is now supervised by an Associate Administrator for Motor Carriers. The revision of the rules of practice and procedure incorporates these changes and offers a more flexible, efficient and better organized handling of motor carrier safety and hazardous materials proceedings.

EFFECTIVE DATE: October 1, 1985.

FOR FURTHER INFORMATION CONTACT: Mr. James J. Stapleton, Assistant Chief Counsel, Motor Carrier and Highway Safety Law Division, (202) 426-0834, Federal Highway Administration, Room 4224, 400 7th Street, SW., Washington DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. ET, Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION:

Background

In accord with its program to keep its regulations current, the FHWA has determined that the statutory changes resulting from the Motor Carrier Safety Act of 1984, the Bus Regulatory Reform Act of 1982, the Motor Carrier Act of 1980, and the recodification of Title 49, United States Code,Transportation, in 1983, the 1985 administrative restructuring of the BMCS and the agency's practical experience in dealing with the rules of practice and procedure since the last major rewrite of these regulations in 1977, require conforming amendments and other changes to the rules of practice and procedure in Part 386. A discussion of the affected sections of regulations and the necessary changes follow.

Discussion of Changes

Subpart A—Scope of Rules: Definitions

Except for new statutory authority citations, substitution of the term "administrative law judge" for the term "hearing office," updated definition of "motor carrier," and redefinition of "Associate Administrator," there are no changes to the sections in this subpart.

Subpart B—Commencement of Proceedings, Pleadings

Paragraph (a) of 386.11, Commencement of proceedings, on driver qualification proceedings, remains unchanged. Paragraph (b), on civil forfeiture proceedings, is revised to conform to the Motor Carrier Safety Act of 1984, Pub. L. 98-554, 98 Stat. 2832. Under section 213 of that Act, the respondent has 15 days, after service, to notify the claimant of intent to contest the notice and request a hearing. This is added at 386.11(b)(1)(v). For purposes of consistency and fairness, this provision is applicable to claims for hazardous materials violations as well as violations of the motor carrier safety regulations. Section 213(b)(3) of the Act permits the Department to require any violator to post a copy of the notice in such place or places and for such duration as the claimant determines appropriate to aid in enforcement. This is added at 386.11(b)(3). Paragraph (c) of 386.11 is renamed "Notice of investigation proceedings" instead of "All other proceedings," since it is the only other type of agency proceeding. Section 213(b)(1) of the Act requires that the claim letter fix a reasonable time for abatement of violations and specify actions to be taken in order to abate violations. This is added at 386.11(c)(1)(iv). The agency practice of sometimes combining civil forfeiture and notice of investigation proceedings is added at 386.11(c)(3).

Paragraphs (c), (d), and (e) are added to Section 386.12, Complaint, to implement section 212 of the Motor Carrier Safety Act of 1984. That section requires the Department to investigate complaints of a substantial violation that is occurring or has occurred within the preceding 60 days. The complainant is to be timely notified of the findings of the investigation. Also, the Department is not to disclose the names of complainants, unless necessary to prosecute a violation, and if so, then the Associate Administrator is to take every practical means within his authority to protect the complainant from retaliatory action.

In order to achieve greater clarity and ease of reference, former § 386.13, Petitions to review, replies, is divided into three new sections: 386.13, Petitions to review and request for hearing: Driver qualification proceedings; 386.14, Replies and request for hearing: Civil forfeiture proceedings; and 386.15, Replies and request for hearing: Notice of investigation proceedings. Driver qualification petitions to review and request for hearing (386.13) remains unchanged. Civil forfeiture replies and request for hearing (386.14) basically remains unchanged, except for two differences. Under section 213(b)(1) of the Motor Carrier Safety Act of 1984, the respondent must reply within 15 days after the claim letter is served. This is added at 386.14(a). The same time limit is made applicable to claims for violations of the hazardous materials regulations for purposes of consistency and fairness. Also, if the respondent fails to reply, then the claim letter becomes the final agency order in the proceeding 25 days after it is served. The 25-day period is prescribed in order to add to the 15-day answer period 5 days each for delivery by mail of the claim letter and the reply. Under the former § 386.13(d), if no reply was filed, the Associate Administrator could, on motion of any party, find the facts to be as alleged and issue a final order in the case. It is expected that this change will simplify and expedite proceedings without sacrificing fairness and due process. Notice of investigation replies and request for hearing (386.15) remains unchanged, being taken from former 386.13(c), "All other proceedings." Note that respondents still have 30 days in which to file a reply after service under this section. A basis for granting petitions to intervene is added to the section on interventions (386.17).

The remaining sections in subpart B remain essentially unchanged other than for redesignation.

Subpart C—Consent Order Procedure

Except for new statutory authority citations, there are no changes to the sections in this subpart.

Subpart D—General Rules and Hearings

Former § 386.38, Service, is redesignated 386.31 and revised to be consistent with the service requirements under the Federal Rules of Civil Procedure. Service is now allowed by personal delivery or by mail. Formerly, service by registered or certified mail, first class, postage prepaid, were the only required methods. Paragraph (b) requires a certificate of service to accompany all pleadings, motions and

documents, when they are tendered for filing, executed by the person making the delivery or mailing. The responsibilities in proceedings, formerly 386.38(g), are removed since they are already mentioned in FHWA delegation of authority regulations at 49 CFR 1.45, and Part 301.

Former §386.31 is redesignated 386.32, and is expanded by adding paragraphs concerning date of entry of orders and compilation of time for delivery by mail.

Former §386.36, Deposition and interrogatories, is removed and replaced with several new sections. Former §386.49, Request for admissions, is redesignated § 386.44. The result is that § 386.37 through 386.47 contain substantially expanded rules of discovery patterned after the Federal Rules of Civil Procedure.

Former §386.39, Appearances and rights of witnesses is redesignated § 386.50, and paragraph (a) is clarified by providing that a regular employee of a party who appears on behalf of the party may be required by the administrative law judge to show his or her authority to so appear.

Paragraph (c) of former § 386.44, Hearing officer (now redesignated as § 386.54), regarding powers reserved to the Associate Administrator, has proven to be unnecessary in actual practice. Therefore, this paragraph is deleted.

The other sections in subpart D remain unchanged in substance, but are renumbered.

Subpart E—Decision

Former § 386.55, publication of orders, is deleted because it was agency experience that publication did not achieve its intended purpose of warning carriers of disqualified drivers who might apply for positions for which they were disqualified. In its place is added new § 386.65, Failure to comply with final order, which states agency practice when a respondent does not comply with a final agency order directing compliance, or, where appropriate, pay a civil penalty. In these instances, the case may be referred to the Attorney General with a request that an action be brought in the appropriate United States District Court to enforce the terms of the compliance order or to collect the civil penalty.

New § 386.67, Appeal, is added to implement section 213(b)(8) of the Motor Carrier Safety Act of 1984. The Act permits any party adversely affected by a final order issued under 49 U.S.C. 521, to, within 30 days, petition for review of the order in the appropriate United States Court of Appeals. Review of the order is based on a determination of whether the Associate Administrator's findings and conclusions were supported by substantial evidence, or were otherwise not in accordance with law. No objection that has not been urged before the Associate Administrator shall be considered by the court, unless reasonable grounds existed for failure or neglect to do so. The commencement of proceedings under this section shall not, unless ordered by the court, operate as a stay of the order of the Associate Administrator.

The other sections in Subpart E remain unchanged, but are renumbered.

Subpart F—Injunctions and Imminent Hazards

This subpart is new and is added to implement injunctive and imminent hazard provisions of the Hazardous Materials Transportation Act and the Motor Carrier Safety Act of 1984.

Section 386.71, Injunctions, implements section 111(a) of the Hazardous Materials Transportation Act and section 213(a) of the Motor Carrier Safety Act of 1984 which allow the Department to request the Attorney General to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages to prevent or stop violations of the hazardous materials regulations, or motor carrier safety regulations.

Section 386.72, Imminent hazard also implements statutory provisions. Imminent hazard orders are provided for in section 111(b) of the Hazardous Materials Transportation Act and section 213(b) of the Motor Carrier Safety Act of 1984. Paragraph (a) of § 386.72 implements the procedure as to hazardous materials. When a substantial likelihood of death, serious illness or severe personal injury will or may result from hazardous materials transportation by motor vehicle, the Department may bring, or request the Attorney General to bring, an action in the appropriate United States District Court for an order to eliminate or ameliorate the imminent hazard. Paragraph (b) of § 386.72 implements the procedure as to motor carrier safety imminent hazards other than hazardous materials transportation. This section gives the Director, Bureau of Motor Carrier Safety, or his or her delegate, authority to order a vehicle or employee out of service or order an employer to cease all or part of the employer's commercial motor vehicle operations. The order is to be tailored so that no restrictions shall be imposed beyond that required to abate the hazard. Subsequent to the issuance of an imminent hazard order, opportunity for review is provided for not later than 10 days after the issuance of the order.

Regulatory Impact

The FHWA has determined that this document does not contain a major rule under Executive Order 12291 or a significant regulation under the regulatory policies and procedures of the Department of Transportation. Since the changes being adopted in this document are procedural in nature and relate to the internal organization of the FHWA, the FHWA finds good cause to make the amendment final without prior notice and opportunity for comment and without a 30-day delay in effective date required by the Administration Procedures Act. Notice and opportunity for comment are not required under the regulatory policies and procedures of the Department of Transportation because it is not anticipated that such action would result in the receipt of useful information. Accordingly, the amendments are effective upon issuance.

It is anticipated that the economic impact of this rulemaking, if any, will be minimal since the amendments concern motor carrier safety and hazardous materials rules of internal practice and procedure. Accordingly, a full regulatory evaluation is not required. For the foregoing reasons and under the criteria of the Regulatory Flexibility Act, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

Publication

Because these changes are numerous and issuance of them on a piecemeal basis would create confusion, 49 CFR Part 386 is being republished in its entirety.

For the reasons set out in the preamble, the Federal Highway Administration hereby amends Chapter III, Part 386 of Title 49, Code of Federal Regulations, as set forth below.

(Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety.)

List of Subjects in 49 CFR Part 386

Administrative practice and procedure, Civil forfeiture, Driver qualification, Hazardous materials transportation, Hearings, Highways and roads, Motor carriers, Motor carrier safety.

Issued on: September 30, 1985.

R.A. Barnhart,

Federal Highway Administrator, Federal Highway Administration.

Part 386 of Title 49, Code of Federal Regulations, is revised to read as follows:

PART 386—RULES OF PRACTICE FOR MOTOR CARRIER SAFETY AND HAZARDOUS MATERIALS PROCEEDINGS

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Authority: The Motor Carrier Safety Act of 1984, Pub. L. 98–554, 98 Stat. 2829 (49 U.S.C. 2501 *et seq.*); the recodification of Title 49, United States Code, Transportation, Pub. L. 97–449, 96 Stat. 2413 (49 U.S.C. 104(c)(2), 501 *et seq.*, 3101 *et seq.*); the Hazardous Materials Transportation Act, Pub. L. 93–633, 88 Stat. 2156 (49 U.S.C. 1801 *et seq.*); the Bus Regulatory Reform Act of 1982, Pub. L. 97–261, 96 Stat. 1121 (49 U.S.C. 10927, note) and the Motor Carrier Act of 1980, Pub. L. 97–424, 96 Stat. 2158 (49 U.S.C. 10927, note); 49 CFR 1.45, 1.48, Part 301.

Subpart A—Scope of Rules; Definitions

§ 386.1 Scope of rules in this part.

The rules in this part govern procedures in proceedings before the Associate Administrator authorized by the Motor Carrier Safety Act of 1984, Pub. L. 98–554, 98 Stat. 2829 (49 U.S.C. 2501 *et seq.*); the recodification of Title 49, United States Code, Transportation, Pub. L. 97–449, 96 Stat. 2413 (49 U.S.C. 104(c)(2), 501 *set seq.*, 3101 *et seq.*); the Hazardous Materials Transportation Act, Pub. L. 93–633, 88 STat. 2156 (49 U.S.C. 1801 *et seq.*); the Bus Regulatory Reform Act of 1982, Pub. L. 97–261, 96 Stat. 1121 (49 U.S.C. 10927, note) and the Motor Carrier Act of 1980, Pub. L. 96–296, 94 Stat. 820, as amended by Pub. L. 97–424, 96 Stat. 2158 (49 U.S.C. 10927, note). The purpose of the proceedings is to enable the Associate Administrator to determine whether any motor carrier, its agent, employee or other person subject to the jurisdiction of the FHWA under any of the above-mentioned Acts has failed to comply with any provision or requirement of those statutes or regulations issued under them and, if such a violation is found, to issue an appropriate order to compel compliance with the statute or regulation, assess a civil penalty, or both.

§ 386.2 Definitions.

"Administration" means the Federal Highway Administration.

"Administrative law judge" means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105.

"Associate Administrator" means the Associate Administrator for Motor Carriers of the Federal Highway Administration or his delegate. Delegations are contained in Part 301 of this chapter.

"Civil forfeiture proceedings" means proceedings to collect civil penalties for violations under the Hazardous Materials Transportation Act, 49 U.S.C. 1809; 49 U.S.C. 3102; the Motor Carrier Safety Act of 1984, 49 U.S.C. 2501 *et seq.*; section 30 of the Motor Carrier Act of 1980, 49 U.S.C. 10927, note; or section 18 of the Bus Regulatory Reform Act of 1982, 49 U.S.C. 10927, note.

"Claimant" means the representative of the Federal Highway Administration authorized to make claims.

"Driver qualification proceeding" means a proceeding commenced under 49 CFR 391.47 or by issuance of a letter of disqualification.

"Motor carrier" means a motor carrier, motor contract carrier, motor private carrier, or motor carrier of migrant workers as defined in 49 U.S.C. 3101 and 10102.

"Petitioner" means a party petitioning to overturn a determination in a driver qualification proceeding.

"Respondent" means a party against whom relief is sought or claim is made.

Subpart B—Commencement of Proceedings, Pleadings

§ 386.11 Commencement of proceedings.

(a) *Driver qualification proceedings.* These proceedings are commenced by the issuance of a determination by the Director, Bureau of Motor Carrier Safety, in a case arising under § 391.47 of this chapter or by the issuance of a letter of disqualification.

(1) Such determination and letters must be accompanied by the following:

(i) A citation of the regulation under which the action is being taken;

(ii) A copy of all documentary evidence relied on or considered in taking such action, or in the case of voluminous evidence a summary of such evidence;

(iii) Notice to the driver and motor carrier involved in the case that they may petition for review of the action;

(iv) Notice that a hearing will be granted if the Associate Administrator determines there are material factual issues in dispute;

(v) Notice that failure to petition for review will constitute a waiver of the right to contest the action; and

(vi) Notice that the burden or proof will be on the petitioner in cases arising under § 391.47 of this chapter.

(2) At any time before the close of hearing, upon application of a party, the letter or determination may be amended at the discretion of the administrative

law judge upon such terms as he approves.

(b) *Civil forfeitures.* These proceedings are commenced by the issuance of a claim letter.

(1) Each claim letter must contain the following:

(i) A statement of the provisions of law alleged to have been violated;

(ii) A brief statement of the facts constituting each violation;

(iii) Notice of the amount being claimed, and notice of the maximum amount authorized to be claimed under the statute;

(iv) The form in which and the place where the respondent may pay the claim; and

(v) Notice that the respondent may, within 15 days of service, notify the claimant that the respondent intends to contest the notice, and that if the notice is contested the respondent will be afforded an opportunity for a hearing.

(2) In addition to the information required by paragraph (b)(1) of this section, the letter may contain such other matters as the claimant deems appropriate.

(3) In proceedings for collection of civil penalties for violations of the motor carrier safety regulations under the Motor Carrier Safety Act of 1984, the claimant may require the respondent to post a copy of the claim letter in such place or places and for such duration as the claimant may determine appropriate to aid in the enforcement of the law and regulations.

(c) *Notice of investigation proceedings.* All other proceedings are commenced by issuance of a notice of investigation. The Associate Administrator may issue a notice of investigation on his own motion or upon a complaint filed pursuant to § 386.12.

(1) Each notice of investigation must include the following:

(i) A statement of the legal authority and jurisdiction for the institution of the proceedings;

(ii) The name and address of each motor carrier against whom relief is sought;

(iii) One or more clear, concise, and separately numbered paragraphs stating the facts alleged to constitute a violation of the law;

(iv) The relief demanded which, where practical, should be in the form of an order for the Associate Administrator's signature, and which shall fix a reasonable time for abatement of the violations and may specify actions to be taken in order to abate the violations;

(v) A statement that the rules in this part require a reply to be filed within 30 days of service of the notice of investigation, and

(vi) A certificate that the notice of investigation was served in accordance with § 386.31.

(2) At any time before the close of hearing or upon application of a party, the notice of investigation may be amended at the discretion of the administrative law judge upon such terms as he deems appropriate.

(3) A civil forfeiture proceeding may be combined with a notice of investigation in a single proceeding. In a combined civil forfeiture and notice of investigation proceeding the 30-day time limit for filing a reply as specified in paragraph (c)(1)(v) shall apply.

§ 386.12 Complaint.

(a) *Filing of a complaint.* Except as otherwise provided in paragraph (c) of this section, any person, State board, organization, or body politic may file a written complaint with the Associate Administrator, requesting the issuance of a notice of investigation under § 386.11(c). Each complaint must contain:

(1) The name and address of the party who files it, and a statement specifying the authority for a party (other than a natural person) to file the complaint;

(2) A statement of the interest of the party in the proceedings;

(3) The name and address of each motor carrier against who relief is sought;

(4) The reasons why the party believes that a notice of investigation should be issued;

(5) A statement of any prior action which the party has taken to redress the violations of law alleged in the complaint and the results of that action; and

(6) The relief which the party believes the Administration should seek.

(b) *Action on paragraph (a) complaint.* Upon the filing of a complaint under paragraph (a) of this section, the Associate Administrator shall determine whether it states reasonable grounds for investigation and action by the Administration. If he determines that the complaint states such grounds, the Associate Administrator shall issue, or authorize the issuance of, a notice of investigation under § 386.11(c). If he determines that the complaint does not state reasonable grounds for investigation and action by the Administration, the Associate Administrator shall dismiss it.

(c) *Complaint of substantial violation.* Any person may file a written complaint with the Associate Administrator alleging that a substantial violation of any regulation issued under the Motor Carrier Safety Act of 1984 is occurring or has occurred within the preceding 60 days. A substantial violation is one which could reasonably lead to, or has resulted in, serious personal injury or death. Each complaint must be signed by the complainant and must contain:

(1) The name, address, and telephone number of the person who files it;

(2) The name and address of the alleged violator and, with respect to each alleged violator, the specific provisions of the regulations that the complainant believes were violated; and

(3) A concise but complete statement of the facts relied upon to substantiate each allegation, including the date of each alleged violation.

(d) *Action on complaint of substantial violation.* Upon the filing of a complaint of a substantial violation under paragraph (c) of this section, the Associate Administrator shall determine whether it is nonfrivolous and meets the requirements of paragraph (c) of this section. If the Associate Administrator determines that the complaint is nonfrivolous and meets the requirements of paragraph (c), he/she shall investigate the complaint. The complainant shall be timely notified of findings resulting from such investigation. The Associate Administrator shall not be required to conduct separate investigations of duplicative complaints. If the Associate Administrator determines that the complaint is frivalous or does not meet the requirements of paragraph (c), he/she shall dismiss the complaint and notify the complainant in writing of the reasons for such dismissal.

(e) Notwithstanding the provisions of section 552 of title 5, United States Code, the Associate Administrator shall not disclose the identity of complainants unless it is determined that such disclosure is necessary to prosecute a violation. If disclosure becomes necessary, the Associate Administrator shall take every practical means within the Associate Administrator's authority to assure that the complainant is not subject to harassment, intimidation, disciplinary action, discrimination, or financial loss as a result of such disclosure.

§ 386.13 Petitions to review and request for hearing: Driver qualification proceedings.

(a) Within 60 days after service of the determination under § 391.47 of this chapter or the letter of disqualification, the driver or carrier may petition to review such action. Such petitions must be submitted to the Associate

Administrator and must contain the following:

(1) Identification of what action the petitioner wants overturned;

(2) Copies of all evidence upon which petitioner relies in the form set out in § 386.49;

(3) All legal and other arguments which the petitioner wishes to make in support of his position;

(4) A request for oral hearing, if one is desired, which must set forth material factual issues believed to be in dispute;

(5) Certification that the reply has been filed in accordance with § 386.31; and

(6) Any other pertinent material.

(b) Failure to submit a petition as specified in paragraph (a) of this section shall constitute a waiver of the right to petition for review of the determination or letter of disqualification. In these cases, the determination or disqualification issued automatically becomes the final decision of the Associate Administrator 30 days after the time to submit the reply or petition to review has expired, unless the Associate Administrator orders otherwise.

(c) If the petition does not request a hearing, the Associate Administrator may issue a final decision and order based on the evidence and arguments submitted.

§ 386.14 Replies and request for hearing: Civil forfeiture proceedings.

(a) *Time for reply.* The respondent must reply within 15 days after the claim letter is served, except as otherwise provided in § 386.11(c)(3).

(b) *Contents of reply.* The reply must contain the following:

(1) An admission or denial or each allegation of the claim and a concise statement of facts constituting each defense;

(2) If the respondent contests the claim, a request for a formal, trial-type administrative hearing or notice of intent to submit evidence without a formal hearing. A request for a hearing must contain a listing of all material factual issues believed to be in dispute. Failure to request a hearing within 15 days after the claim letter is served, except as otherwise provided in § 386.11(c)(3), shall constitute a waiver of any right to a hearing;

(3) A statement of whether the respondent wishes to discuss the terms of payment or settlement of the amount claimed; and

(4) Certification that the reply has been served in accordance with § 386.31.

(c) *Submission of evidence.* If a notice of intent to submit evidence without formal hearing is filed or if no hearing is requested under paragraph (b)(2) of this section and the respondent contests the claim, all evidence must be served in written form no later than the 40th day following the service of the claim letter. Evidence must be submitted in the form specified in § 386.49.

(d) *Complainant's request for a hearing.* If the respondent files a notice of intent to submit evidence without formal hearing, the complainant may, within 15 days after that reply is filed, submit a request for a formal hearing. The request must include a listing of all factual issues believed to be in dispute.

(e) *Failure to reply.* If the respondent does not reply within the time provided in this section, the claim letter becomes the final agency order in the proceeding 25 days after it is served.

§ 386.15 Replies and request for hearing: Notice of investigation proceedings.

(a) Within 30 days after the notice of investigation is served, the respondent must file a reply. The reply must contain the following information:

(1) In cases where an allegation of the notice of investigation is contested:

(i) A concise statement of facts constituting each defense and a specific admission, denial or explanation of each allegation; and

(ii) A request for an oral hearing, if one is desired, which must set forth material factual issues believed to be in dispute, or, if one is not requested, any evidence and arguments in support of the respondent's position in the form specified in § 386.49.

(2) In cases where the respondent elects not to contest the allegations, the reply must so state. The respondent may also propose an appropriate order disposing of the proceedings or propose that the matter be terminated by entry of a consent order under Subpart C. A statement of election not to contest waives a hearing on the facts alleged in the notice of investigation and provides a record basis for a decision in the case.

(3) In all cases commenced by notice of investigation, the reply must contain a certification that it was served in accordance with § 386.31.

(b) When no reply is received to the notice of investigation, or respondent replies but does not request a hearing, the Associate Administrator may, on motion of any party, find the facts to be as alleged and issue a final order in the proceeding.

§ 386.16 Action on petitions or replies.

(a) *Replies not requesting an oral hearing.* If the reply submitted does not request an oral hearing, the Associate Administrator may issue a final decision and order based on the evidence and arguments submitted.

(b) *Request for oral hearing.* If a request for an oral hearing has been filed, the Associate Administrator shall determine whether there are any material factual issues in dispute. If there are, he/she shall call the matter for a hearing. If there are none, he/she shall issue an order to that effect and set a time for submission of argument by the parties. Upon the submission of argument he/she shall decide the case.

(c) *Settlement of civil forfeitures.* (1) When the reply to a claim letter indicates that the respondent wishes to discuss payment, and negotiations produce an agreement, a settlement agreement shall be drawn and signed by the respondent and the Associate Administrator. Such settlement agreement must contain the following:

(i) The statutory basis of the claim;

(ii) A brief statement of the violations;

(iii) The amount claimed and the amount paid;

(iv) The date, time, and place and form of payment; and

(v) A statement that the agreement is not binding upon the Associate Administrator until executed by him/her. (2) Any settlement agreement may contain a consent order.

(3) An executed settlement agreement is binding on the respondent and the claimant according to its terms. The respondent's consent to a settlement agreement that has not been executed by the Associate Administrator may not be withdrawn for a period of 30 days after it is executed by the respondent.

§ 386.17 Intervention.

After the matter is called for hearing and before the date set for the hearing to begin, any person may petition for leave to intervene. The petition is to be served on the administrative law judge. The petition must set forth the reasons why the petitioner alleges he/she is entitled to intervene. The petition must be served on all parties in accordance with § 386.31. Any party may file a response within 10 days of service of the petition. The administrative law judge shall then determine whether to permit or deny the petition. The petition will be allowed if the administrative law judge determines that the final decision could directly and adversely affect the petitioner or the class he/she represents, and if the petitioner may contribute materially to the disposition of the proceedings and his/her interest is not adequately represented by existing parties. Once admitted, a petitioner is a party for the purpose of all subsequent proceedings.

Subpart C—Consent Order Procedure

§ 386.21 Consent order.

When a respondent has filed an election not to contest under § 386.15(a), or has agreed to settlement of a civil forfeiture, and at any time before the hearing is concluded, the parties may execute an appropriate agreement for disposing of the case by consent for the consideration of the Associate Administrator. The agreement is filed with the Associate Administrator who may (a) accept it, (b) reject it and direct that proceedings in the case continue, or (c) take such other action as he/she deems appropriate. If the Associate Administrator accepts the agreement, he/she shall enter an order in accordance with its terms.

§ 386.22 Content of consent order.

(a) Every agreement filed with the Associate Administrator under § 386.21 must contain:

(1) An order for the disposition of the case in a form suitable for the Associate Administrator's signature that has been signed by the respondent;

(2) An admission of all jurisdictional facts;

(3) A waiver of further procedural steps, of the requirement that the decision or order must contain findings of fact and conclusions of law, and of all right to seek judicial review or otherwise challenge or contest the validity of the order;

(4) Provisions that the notice of investigation or settlement agreement may be used to construe the terms of the order;

(5) Provisions that the order has the same force and effect, becomes final, and may be modified, altered, or set aside in the same manner as other orders issued under 49 U.S.C. 501 *et seq.*, 2501 *et seq.*, 3101 *et seq.*, and 10927, note; and

(6) Provisions that the agreement will not be part of the record in the proceeding unless and until the Associate Administrator executes it.

(b) An agreement filed with the Associate Administrator under § 386.21 may contain:

(1) A statement that it is executed for settlement purposes only and does not admit any violations of law alleged in the notice of investigation, and

(2) Provisions for the compromise of any claim for a civil forfeiture.

Subpart D—General Rules and Hearings

§ 386.31 Service.

(a) All service required by these rules shall be by mail or by personal delivery. Service by mail is complete upon mailing.

(b) A certificate of service shall accompany all pleadings, motions, and documents when they are tendered for filing, and shall consist of a certificate of personal delivery or a certificate of mailing, executed by the person making the personal delivery or mailing the document. The first pleading of the Government in a proceeding initiated under this part shall have attached to it a service list of persons to be served. This list shall be updated as necessary.

(c) Copies of all pleadings, motions, and documents must be served on the docket clerk and upon all parties to the proceedings by the person filing them, in the number of copies indicated on the Government's initial service list.

§ 386.32 Computation of time.

(a) Generally, in computing any time period set out in these rules or in an order issued hereunder, the time computation begins with the day following the act, event, or default. The last day of the period is included unless it is a Saturday, Sunday, or legal Federal holiday in which case the time period shall run to the end of the next day that is not a Saturday, Sunday, or legal Federal holiday. All Saturdays, Sundays, and legal Federal holidays except those falling on the last day of the period shall be computed.

(b) *Date of entry of orders.* In computing any period of time involving the date of the entry of an order, the date of entry shall be the date the order is served.

(c) *Computation of time for delivery by mail.* (1) Documents are not deemed filed until received by the docket clerk. However, when documents are filed by mail, 5 days shall be added to the prescribed period.

(2) Service of all documents is deemed effected at the time of mailing.

(3) Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice, or document is served upon said party by mail, 5 days shall be added to the prescribed period.

§ 386.33 Extension of time.

All requests for extensions of time shall be filed with the Associate Administrator or, if the matter has been called for a hearing, with the administrative law judge. All requests must state the reasons for the request. Only those requests showing good cause will be granted. No motion for continuance or postponement of a hearing date filed within 7 days of the date set for a hearing will be granted unless it is accompanied by an affidavit showing that extraordinary circumstances warrant a continuance.

§ 386.34 Official notice.

The Associate Administrator or administrative law judge may take official notice of any fact not appearing in evidence if he/she notifies all parties he/she intends to do so. Any party objecting to the official notice shall file an objection within 10 days after service of the notice.

§ 386.35 Motions.

(a) *General.* An application for an order or ruling not otherwise covered by these rules shall be by motion. All motions filed prior to the calling of the matter for a hearing shall be to the Associate Administrator. All motions filed after the matter is called for hearing shall be to the administrative law judge.

(b) *Form.* Unless made during hearing, motions shall be made in writing, shall state with particularity the grounds for relief sought, and shall be accompanied by affidavits or other evidence relied upon.

(c) *Answers.* Except when a motion is filed during a hearing, any party may file an answer in support or opposition to a motion, accompanied by affidavits or other evidence relied upon. Such answers shall be served within 7 days after the motion is served or within such other time as the Associate Administrator or administrative law judge may set.

(d) *Argument.* Oral argument or briefs on a motion may be ordered by the Associate Administrator or the administrative law judge.

(e) *Disposition.* Motions may be ruled on immediately or at any other time specified by the administrative law judge or the Associate Administrator.

(f) *Suspension of time.* The pendency of a motion shall not affect any time limits set in these rules unless expressly ordered by the Associate Administrator or administrative law judge.

§ 386.36 Motions to dismiss and Motions for a more definite statement.

(a) Motions to dismiss must be made within the time set for reply or petition to review, except motions to dismiss for lack of jurisdiction, which may be made at any time.

(b) Motions for a more definite statement may be made in lieu of a reply. The motion must point out the defects complained of and the details desired. If the motion is granted, the pleading complained of must be

remedied within 15 days of the granting of the motion or it will be stricken. If the motion is denied, the party who requested the more definite statement must file his pleading within 10 days after the denial.

§ 386.37 Discovery methods.

Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or other evidence for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the Associate Administrator or, in cases that have been called for a hearing, the administrative law judge orders otherwise, the fequency or sequence of these methods is not limited.

§ 386.38 Scope of discovery.

(a) Unless otherwise limited by order of the Associate Administrator or, in cases that have been called for a hearing, the administrative law judge, in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Associate Administrator or the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

§ 386.39 Protective orders.

Upon motion by a party or other person from whom discovery is sought, and for good cause shown, the Associate Administrator or the administrative law judge, if one has been appointed, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(a) The discovery not be had;

(b) The discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(d) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters;

(e) Discovery be conducted with no one present except persons designated by the Associate Administrator or the administrative law judge; or

(f) A trade secret or other confidential research, development, or commercial information may not be disclosed or be disclosed only in a designated way.

§ 386.40 Supplementation of responses.

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(a) A party is under a duty to supplement timely his/her response with respect to any question directly addressed to:

(1) The identity and location of persons having knowledge of discoverable matters; and

(2) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he or she is expected to testify and the substance of his or her testimony.

(b) A party is under a duty to amend timely a prior response if he or she later obtains information upon the basis of which:

(1) He or she knows the response was incorrect when made; or

(2) He or she knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the Associate Administrator or the administrative law judge or agreement of the parties.

§ 386.41 Stipulations regarding discovery.

Unless otherwise ordered, a written stipulation entered into by all the parties and filed with the Associate Administrator or the administrative law judge, if one has been appointed, may: (a) Provide that depositions be taken before any person, at any time or place, upon sufficient notice, and in any manner, and when so taken may be used like other depositions, and (b) modify the procedures provided by these rules for other methods of discovery.

§ 386.42 Written interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any authorized officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be served on the Associate Administrator or, in cases that have been called to a hearing, on the administrative law judge, and upon all parties to the proceeding.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers and objections shall be signed by the person making them. The party upon whom the interrogatories were served shall serve a copy of the answer and objections upon all parties to the proceeding within 30 days after service of the interrogatories, or within such shortened or longer period as the Associate Administrator or the administrative law judge may allow.

(c) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Associate Administrator or administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

§ 386.43 Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination.

(a) Any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting

on his or her behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, photographing, testing, or for other purposes as stated in paragraph (a)(1).

(3) Submit to a physical or mental examination by a physician.

(b) The request may be served on any party without leave of the Associate Administrator or administrative law judge.

(c) The request shall:

(1) Set forth the items to be inspected either by individual item or category;

(2) Describe each item or category with reasonable particularity;

(3) Specify a reasonable time, place, and manner of making the inspection and performing the related acts;

(4) Specify the time, place, manner, conditions, and scope of the physical or mental examination and the person or persons by whom it is to be made. A report of examining physician shall be made in accordance with Rule 35(b) of the Federal Rules of Civil Procedure, Title 28, U.S. Code, as amended.

(d) The party upon whom the request is served shall serve on the party submitting the request a written response within 30 days after service of the request.

(e) The response shall state, with respect to each item or category:

(1) That inspection and related activities will be permitted as requested; or

(2) That objection is made in whole or in part, in which case the reasons for objection shall be stated.

(f) A copy of each request for production and each written response shall be served on all parties and filed with the Associate Administrator or the administrative law judge, if one has been appointed.

§ 386.44 Request for admissions.

(a) *Request for admission.* (1) Any party may serve upon any other party a request for admission of any relevant matter or the authenticity of any relevant document. Copies of any document about which an admission is requested must accompany the request.

(2) Each matter for which an admission is requested shall be separately set forth and numbered. The matter is admitted unless within 15 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer signed by the party or his/her attorney.

(3) Each answer must specify whether the party admits or denies the matter. If the matter cannot be admitted or denied, the party shall set out in detail the reasons.

(4) A party may not issue a denial or fail to answer on the ground that he/she lacks knowledge unless he/she has made reasonable inquiry to ascertain information sufficient to allow him/her to admit or deny.

(5) A party may file an objection to a request for admission within 10 days after service. Such motion shall be filed with the administrative law judge if one has been appointed, otherwise it shall be filed with the Associate Administrator. An objection must explain in detail the reasons the party should not answer. A reply to the objection may be served by the party requesting the admission within 10 days after service of the objection. It is not sufficient ground for objection to claim that the matter about which an admission is requested presents an issue of fact for hearing.

(b) *Effect of admission.* Any matter admitted is conclusively established unless the Associate Administrator or administrative law judge permits withdrawal or amendment. Any admission under this rule is for the purpose of the pending action only and may not be used in any other proceeding.

(c) If a party refuses to admit a matter or the authenticity of a document which is later proved, the party requesting the admission may move for an award of expenses incurred in making the proof. Such a motion shall be granted unless there was a good reason for failure to admit.

§ 386.45 Motion to compel discovery.

(a) If a deponent fails to answer a question propounded or a party upon whom a request is made pursuant to §§ 386.42 through 386.44, or a party upon whom interrogatories are served fails to respond adequately or objects to the request, or any part thereof, or fails to permit inspection as requested, the discovering party may move the Associate Administrator or the administrative law judge, if one has been appointed, for an order compelling a response or inspection in accordance with the request.

(b) The motion shall set forth:

(1) The nature of the questions or request;

(2) The response or objections of the party upon whom the request was served; and

(3) Arguments in support of the motion.

(c) For purposes of this section, an evasive answer or incomplete answer or response shall be treated as a failure to answer or respond.

(d) In ruling on a motion made pursuant to this section, the Associate Administrator or the administrative law judge, if one has been appointed, may make and enter a protective order such as he or she is authorized to enter on a motion made pursuant to § 386.39(a).

§ 386.46 Depositions.

(a) *When, how, and by whom taken.* The deposition of any witness may be taken at any stage of the proceeding at reasonable times. Depositions may be taken by oral examination or upon written interrogatories before any person having power to administer oaths.

(b) *Application.* Any party desiring to take the deposition of a witness shall indicate to the witness and all other parties the time when, the place where, and the name and post office address of the person before whom the deposition is to be taken; the name and address of each witness; and the subject matter concerning which each such witness is expected to testify.

(c) *Notice.* Notice shall be given for the taking of a deposition, which shall be not less than 5 days written notice when the deposition is to be taken within the continental United States and not less than 20 days written notice when the deposition is to be taken elsewhere.

(d) *Taking and receiving in evidence.* Each witness testifying upon deposition shall be sworn, and any other party shall have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing; read by or to, and subscribed by the witness; and certified by the person administering the oath. Thereafter, such officer shall seal the deposition in an envelope and mail the same by certified mail to the Associate Administrator or the administrative law judge, if one has been appointed. Subject to such objections to the questions and answers as were noted at the time of taking the deposition and which would have been valid if the witness were personally present and testifying, such deposition may be read and offered in evidence by the party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof.

(e) *Motion to terminate or limit examination.* During the taking of a

deposition, a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, oppression of a deponent or party or improper questions propounded. The deposition will then be adjourned. However, the objecting party or deponent must immediately move the Associate Administrator or administrative law judge for a ruling on his or her objections to the deposition conduct or proceedings. The Associate Administrator or administrative law judge may then limit the scope or manner of the taking of the deposition.

§ 386.47 Use of deposition at hearings.

(a) *Generally.* At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of expert witnesses, particularly the deposition of physicians, may be used by any party for any purpose, unless the Associate Administrator or administrative law judge rules that such use would be unfair or a violation of due process.

(3) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or duly authorized agent of a public or private organization, partnership, or association which is a party, may be used by any other party for any purpose.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds: (i) That the witness is dead; or (ii) that the witness is out of the United States or more than 100 miles from the place of hearing unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend to testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(5) If only part of a deposition is offered in evidence by a party, any other party may require him or her to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

(b) *Objections to admissibility.* Except as provided in this paragraph, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(1) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form or written interrogatories are waived unless served in writing upon the party propounding them.

(c) *Effect of taking using depositions.* A party shall not be deemed to make a person his or her own witness for any purpose by taking his or her deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by any other party of a deposition as described in paragraph (a)(2) of this section. At the hearing, any party may rebut any relevant evidence contained in a deposition whether introduced by him or her or by any other party.

§ 386.48 Medical records and physicians' reports.

In cases involving the physical qualifications of drivers, copies of all physicians' reports, test results, and other medical records that a party intends to rely upon shall be served on all other parties at least 30 days prior to the date set for a hearing. Except as waived by the Director, Bureau of Motor Carrier Safety, reports, test results and medical records not served under this rule shall be excluded from evidence at any hearing.

§ 386.49 Form of written evidence.

All written evidence shall be submitted in the following forms:

(a) An affidavit of a person having personal knowledge of the facts alleged, or

(b) Documentary evidence in the form of exhibits attached to an affidavit identifying the exhibit and giving its source.

§ 386.50 Appearances and rights of witnesses.

(a) Any party to a proceeding may appear and be heard in person or by attorney. A regular employee of a party who appears on behalf of the party may be required by the administrative law judge to show his or her authority to so appear.

(b) Any person submits data or evidence in a proceeding governed by this part may, upon timely request and payment of costs, procure a copy of any document submitted by him/her or of any transcript. Original documents, data or evidence may be retained upon permission of the administrative law judge or Associate Administrator upon substitution of copy therefor.

§ 386.51 Amendment and withdrawal of pleadings.

(a) Except in instances covered by other rules, anytime more than 15 days prior to the hearing, a party may amend his/her pleadings by serving the amended pleading on the Associate Administrator or the administrative law judge, if one has been appointed, and on all parties. Within 15 days prior to the hearing, an amendment shall be allowed only at the discretion of the Administrative law judge. When an amended pleading is filed, other parties may file a response and objection within 10 days.

(b) A party may withdraw his/her pleading only on approval of the administrative law judge or Associate Administrator.

§ 386.52 Appeals from interlocutory rulings.

Rulings of the administrative law judge may not be appealed to the Associate Administrator prior to his/her consideration of the entire proceeding except under exceptional circumstances and with the consent of the administrative law judge. In deciding whether to allow appeals, the administrative law judge shall determine whether the appeal is necessary to prevent undue prejudice to a party or to prevent substantial detriment to the public interest.

§ 386.53 Subpoenas, witness fees.

(a) Applications for the issuance of subpoenas must be submitted to the Associate Administrator, or in cases

that have been called for a hearing, to the administrative law judge. The application must show the general relevance and reasonable scope of the evidence sought. Any person served with a subpoena may, within 7 days after service, file a motion to quash or modify. The motion must be filed with the official who approved the subpoena. The filing of a motion shall stay the effect of the subpoena until a decision is reached.

(b) Witnesses shall be entitled to the same fees and mileage as are paid witnesses in the courts of the United States. The fees shall be paid by the party at whose instance the witness is subpoenaed or appears.

(c) Paragraph (a) of this section shall not apply to the Administrator or employees of the FHWA or to the production of documents in their custody. Applications for the attendance of such persons or the production of such documents at a hearing shall be made to the Associate Administrator or administrative law judge, if one is appointed, and shall set forth the need for such evidence and its relevancy.

§ 386.54 Administrative law judge.

(a) *Appointment.* After the matter is called for hearing, the Associate Administrator shall appoint an administrative law judge.

(b) *Power and duties.* Except as provided in paragraph (c) of this section, the administrative law judge has power to take any action and to make all needful rules and regulations to govern the conduct of the proceedings to ensure a fair and impartial hearing, and to avoid delay in the disposition of the proceedings. His/her powers include the following:

(1) To administer oaths and affirmations;

(2) To issue orders permitting inspection and examination of lands, buildings, equipment, and any other physical thing and the copying of any document;

(3) To issue subpoenas for the attendance of witnesses and the production of evidence as authorized by law;

(4) To rule on offers of proof and receive evidence;

(5) To regulate the course of the hearing and the conduct of participants in it;

(6) To consider and rule upon all procedural and other motions, except motions which, under this part, are made directly to the Associate Administrator;

(7) To hold conferences for settlement, simplification of issues, or any other proper purpose;

(8) To make and file decisions; and

(9) To take any other action authorized by these rules and permitted by law.

§ 386.55 Prehearing conferences.

(a) *Convening.* At any time before the hearing begins, the administrative law judge, on his/her own motion or on motion by a party, may direct the parties or their counsel to participate with him/her in a prehearing conference to consider the following:

(1) Simplification and clarification of the issues;

(2) Necessity or desirability of amending pleadings;

(3) Stipulations as to the facts and the contents and authenticity of documents;

(4) Issuance of and responses to subpoenas;

(5) Taking of depositions and the use of depositions in the proceedings;

(6) Orders for discovery, inspection and examination of premises, production of documents and other physical objects, and responses to such orders;

(7) Disclosure of the names and addresses of witnesses and the exchange of documents intended to be offered in evidence; and

(8) Any other matter that will tend to simplify the issues or expedite the proceedings.

(b) *Order.* The administrative law judge shall issue an order which recites the matters discussed, the agreements reached, and the rulings made at the prehearing conference. The order shall be served on the parties and filed in the record of the proceedings.

§ 386.56 Hearings.

(a) As soon as practicable after his/her appointment, the administrative law judge shall issue an order setting the date, time, and place for the hearing. The order shall be served on the parties and become a part of the record of the proceedings. The order may be amended for good cause shown.

(b) *Conduct of hearing.* The administrative law judge presides over the hearing. Hearings are open to the public unless the administrative law judge orders otherwise.

(c) *Evidence.* Except as otherwise provided in these rules and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, the Federal Rules of Evidence shall be followed.

(d) *Information obtained by investigation.* Any document, physical exhibit, or other material obtained by the Administration in an investigation under its statutory authority may be disclosed by the Administration during the proceeding and may be offered in evidence by counsel for the Administration.

(e) *Record.* The hearing shall be stenographically transcribed and reported. The transcript, exhibits, and other documents filed in the proceedings shall constitute the official record of the proceedings. A copy of the transcript and exhibits will be made available to any person upon payment of prescribed costs.

§ 386.57 Proposed findings of fact, conclusions of law.

The administrative law judge shall afford the parties reasonable opportunity to submit proposed findings of fact, conclusions of law, and supportng reasons therefor. If the administrative law judge orders written proposals and arguments, each proposed finding must include a citation to the specific portion of the record relied on to support it. Written submissions, if any, must be served within the time period set by the administrative law judge.

§ 386.58 Burden of proof.

(a) *Enforcement cases.* The burden of proof shall be on the Administration in enforcement cases.

(b) *Conflict of medical opinion.* The burden of proof in cases arising under § 391.47 of this chapter shall be on the party petitioning for review under § 386.13(a).

Subpart E—Decision

§ 386.61 Decision.

After receiving the proposed findings of fact, conclusions of law, and arguments of the parties, the administrative law judge shall issue a decision. If the proposed findings of fact, conclusions of law, and arguments were oral, he/she may issue an oral decision. The decision of the administrative law judge becomes the final decision of the Associate Administrator 45 days after it is served unless a petition or motion for review is filed under § 386.62. The decision shall be served on all parties and on the Associate Administrator.

§ 386.62 Review of administrative law judge's decision.

(a) All petitions to review must be accompanied by exceptions and briefs. Each petition must set out in detail objections to the initial decision and shall state whether such objections are related to alleged errors of law or fact. It shall also state the relief requested. Failure to object to any error in the initial decision shall waive the right to allege such error in subsequent proceedings.

(b) Reply briefs may be filed within 30 days after service of the appeal brief.

(c) No other briefs shall be permitted except upon request of the Associate Administrator.

(d) Copies of all briefs must be served on all parties.

(e) No oral argument will be permitted except on order of the Associate Administrator.

§ 386.63 Decision on review.

Upon review of a decision, the Associate Administrator may adopt, modify, or set aside the administrative law judge's findings of fact and conclusions of law. He/she may also remand proceedings to the administrative law judge with instructions for such further proceedings as he/she deems appropriate. If not remanded, the Associate Administrator shall issue a final order disposing of the proceedings, and serve it on all parties.

§ 386.64 Reconsideration.

Within 20 days after the Associate Administrator's final order is issued, any party may petition the Associate Administrator for reconsideration of his/her findings of fact, conclusions of law, or final order. The filing of a petition for reconsideration does not stay the effectiveness of the final order unless the Associate Administrator so orders.

§ 386.65 Failure to comply with final order.

If, within 30 days of receipt of a final agency order issued under this part, the respondent does not submit in writing his/her acceptance of the terms of an order directing compliance, or, where appropriate, pay a civil penalty, or file an appeal under § 386.67, the case may be referred to the Attorney General with a request that an action be brought in the appropriate United States District Court to enforce the terms of a compliance order or collect the civil penalty.

§ 386.66 Motions for rehearing or for modification.

(a) No motion for rehearing or for modification of an order shall be entertained for 1 year following the date the Associate Administrator's order goes into effect. After 1 year, any party may file a motion with the Associate Administrator requesting a rehearing or modification of the order. The motion must contain the following:

(1) A copy of the order about which the change is requested;

(2) A statement of the changed circumstances justifying the request; and

(3) Copies of all evidence intended to be relied on by the party submitting the motion.

(b) Upon receipt of the motion, the Associate Administrator may make a decision denying the motion or modifying the order in whole or in part. He/she may also, prior to making his/her decision, order such other proceedings under these rules as he/she deems necessary and may request additional information from the party making the motion.

§ 386.67 Appeal.

Any aggrieved person, who, after a hearing, is adversely affected by a final order issued under 49 U.S.C. 521 may, within 30 days, petition for review of the order in the United States Court of Appeals in the circuit wherein the violation is alleged to have occurred or where the violator has his principal place of business or residence, or in the United States Court of Appeals for the District of Columbia Circuit. Review of the order shall be based on a determination of whether the Associate Administrator's findings and conclusions were supported by substantial evidence, or were otherwise not in accordance with law. No objection that has not been urged before the Associate Administrator shall be considered by the court, unless reasonable grounds existed for failure or neglect to do so. The commencement of proceedings under this section shall not, unless ordered by the court, operate as a stay of the order of the Associate Administrator.

Subpart F—Injunctions and Imminent Hazards

§ 386.71 Injunctions.

Whenever it is determined that a person has engaged, or is about to engage, in any act or practice constituting a violation of section 3102 of title 49, United States Code, or the Motor Carrier Safety Act of 1984, or the Hazardous Materials Transportation Act, or any regulation or order issued under that section or those Acts for which the Federal Highway Administrator exercises enforcement responsibility, the Chief Counsel or the Assistant Chief Counsel for Motor Carrier and Highway Safety Law may request the United States Attorney General to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages, as provided by section 213(c) of the Motor Carrier Safety Act of 1984 and section 111(a) of the Hazardous Materials Transportation Act (49 U.S.C. 507(c), 1810).

§ 386.72 Imminent hazard.

(a) Whenever it is determined that there is substantial likelihood that death, serious illness, or severe personal injury, will result from the transportation by motor vehicle of a particular hazardous material before a notice of investigation proceeding, or other administrative hearing or formal proceeding to abate the risk of harm can be completed, the Chief Counsel or the Assistant Chief Counsel for Motor Carrier and Highway Safety Law may bring, or request the United States Attorney General to bring, an action in the appropriate United States District Court for an order suspending or restricting the transportation by motor vehicle of the hazardous material or for such other order as is necessary to eliminate or ameliorate the imminent hazard, as provided by section 111(b) of the Hazardous Materials Transportation Act (49 U.S.C. 1810).

(b)(1) Whenever it is determined that a violation of 49 U.S.C. 3102 or the Motor Carrier Safety Act of 1984 or a regulation issued under such section or Act, or combination of such violations, poses an imminent hazard to safety, the Director, Bureau of Motor Carrier Safety, or his or her delegate, shall order a vehicle or employee operating such vehicle out of service, or order an employer to cease all or part of the employer's commercial motor vehicle operations as provided by section 213(b) of the Motor Carrier Safety Act of 1984 (49 U.S.C. 521(b)(5)). In making any such order, no restrictions shall be imposed on any employee or employer beyond that required to abate the hazard. In this paragraph, "imminent hazard" means any condition of vehicle, employee, or commercial motor vehicle operations which is likely to result in serious injury or death if not discontinued immediately.

(2) Subsequent to the issuance of an order under paragraph (b)(1) of this section, opportunity for review shall be provided in accordance with 5 U.S.C. 554, except that such review shall occur not later than 10 days after issuance of such order, as provided by section 213(b) of the Motor Carrier Safety Act of 1984 (49 U.S.C. 521(b)(5)).

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