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New Mexico

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Albany Office, Leo W. O'Brien Federal Building, N. Pearl Street and Clinton Avenue, Albany, New York 12207–2395

Buffalo Office, Mezzanine, Statler Building, 107 Delaware Avenue, Buffalo, New York 14202–2986

North Carolina

Greensboro Office, 415 North Edgeworth Street, Greensboro, North Carolina 27401–2107

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Fargo Office, Federal Building, P.O. Box 2483, 653 2nd Avenue North, Fargo, North Dakota 58108–2483

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Cincinnati Office, Federal Office Building, Room 9002, 550 Main Street, Cincinnati, Ohio 45202–3253

Cleveland Office, One Playhouse Square, 1375 Euclid Avenue, Room 420, Cleveland, Ohio 44115–1832

Columbus Office, 200 North High Street, Columbus, Ohio 43215–2499

Oklahoma

Oklahoma City Office, Murrah Federal Building, 200 NW 5th Street, Oklahoma City, Oklahoma 73102–3202

Tulsa Office, Robert S. Kerr Building, 440 S. Houston Avenue, Room 200, Tulsa, Oklahoma 74127–8923

Oregon

Portland Office, 520 Southwest Sixth Avenue, Portland, Oregon 97204–1596

Pennsylvania

Pittsburgh Office, 412 Old Post Office Courthouse Building, 7th Avenue and Grant Street, Pittsburgh, Pennsylvania 15219–1906

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Providence Office, 330 John O. Pastore Federal Building and U.S. Post Office—Kennedy Plaza, Providence, Rhode Island 02903–1785

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Sioux Falls Office, 300 Building, 300 N. Dakota Ave., Suite 116, Sioux Falls, South Dakota 57102–0311

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Memphis Office, One Memphis Place, 200 Jefferson Avenue, Suite 1200, Memphis, Tennessee 38103–2335

Nashville Office, One Commerce Place, Suite 1600, Nashville, Tennessee 37239–1600

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Dallas Office, 525 Griffin Street, Room 106, Dallas, Texas 75202–5007

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Milwaukee Office, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Suite 1380, Milwaukee, Wisconsin 53203–2289

Wyoming

Casper Office, 4225 Federal Office Building, P.O. Box 580, 100 East B Street, Casper, Wyoming 82602–1918

PART 115—RECOGNITION OF JURISDICTIONS WITH SUBSTANTIALLY EQUIVALENT LAWS

2. The authority citation for Part 115 continues to read as follows:

Authority: Secs. 810(c), 816, Civil Rights Act of 1968, 42 U.S.C. 3610(c), 3616; sec. 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

3. Paragraph (a) of § 115.10 is revised to read as follows:

§ 115.10 Consequences of recognition.

(a) Where all alleged violations of the Act contained in a complaint received by the Assistant Secretary appear to constitute violations of a State or local fair housing law within a jurisdiction that has been recognized as having a substantially equivalent fair housing law, the complaint shall be referred promptly to the appropriate State or local agency, and no further action shall be taken by the Assistant Secretary with respect to such complaint, except as provided for by the Act and by §§ 105.20–105.22 of this chapter.

* * * * *

Dated: May 20, 1988.

Judith Y. Brachman,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 88–14285 Filed 6–24–88; 8:45 am]

BILLING CODE 4210–28–M

Federal Register

Monday
June 27, 1988

Part V

Environmental Protection Agency

40 CFR Part 761

Polychlorinated Biphenyls; Exclusions, Exemptions and Use Authorizations; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 761

[OPTS-62053A; FLR 3369-2]

Polychlorinated Biphenyls; Exclusions, Exemptions and Use Authorizations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule amends existing rules controlling the processing, distribution in commerce, and use of PCBs by excluding additional materials containing less than 50 parts per million (ppm) polychlorinated biphenyls (PCBs) from regulation under section 6(e) of the Toxic Substances Control Act (TSCA) which generally prohibits the manufacturing, processing, distribution in commerce, and use of PCBs. EPA has found that activities allowed under this rule will not present unreasonable risks of injury to public health or the environment.

EFFECTIVE DATE: This rule shall be effective July 27, 1988.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Acting Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. EB-44, 401 M St., SW., Washington, DC 20460, (202-554-1404), TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: EPA is issuing this regulation to:

(1) Eliminate the Viton elastomer glove requirement for workers servicing heat transfer and hydraulic systems.

(2) Allow certain equipment and materials that have been adequately decontaminated to be used and distributed in commerce.

(3) Maintain the 3 parts per billion (ppb) effluent limit for releases from pulp and paper mills.

(4) Allow the use of waste oil containing <50 ppm PCBs as a fuel in certain combustion units.

(5) Exclude from the ban on processing, distribution in commerce, and use, certain products containing <50 ppm PCBs that were "legally" manufactured, processed, distributed in commerce or used prior to October 1, 1984.

I. Background

Section 6(e) of TSCA generally prohibits the manufacture, processing, distribution in commerce, and use of PCBs. Under section 6(e)(2), the Agency may authorize non-totally enclosed uses of PCBs upon a determination that such uses will not present an unreasonable risk of injury to health or the environment. Also, under section 6(e)(3), EPA may by rule grant 1-year exemptions from the general manufacture, processing, and distribution in commerce prohibitions. Such exemptions may be granted where the petitioner can demonstrate:

(1) That the activity to be exempted will not present an unreasonable risk of injury to health or the environment.

(2) That good faith efforts have been made to develop a substitute for PCBs which does not present an unreasonable risk.

In the **Federal Register** of May 31, 1979 (44 FR 31514), EPA issued its first regulation implementing the TSCA section 6(e)(2) and section 6(e)(3) prohibitions. That first rule (the PCB Ban Rule) included among its provisions a general exclusion from regulation for those activities involving PCBs at levels less than 50 parts per million (ppm). The only exception to the general exclusion for activities involving less than 50 ppm materials was a prohibition on the use of waste oil as a dust suppressant, sealant, or coating. This prohibition applied to waste oils with any detectable levels of PCBs.

The Environmental Defense Fund (EDF) successfully challenged this general 50 ppm regulatory cutoff, and on October 30, 1980, the U.S. Court of Appeals for the District of Columbia Circuit remanded the Ban Rule to EPA for further action consistent with its opinion. The Court determined that there was not substantial evidence in the record which would support the decision to exclude generally from regulation all materials containing PCBs at concentrations less than 50 ppm. The Court stated that a proper exclusion would need to be more finely tailored to the purposes of excluding ambient sources of PCBs, or, be premised upon a finding that the designated cutoff does not present an unreasonable risk of injury to health or the environment. The rulemaking history of the PCB Ban Rule is described in detail in the proposed "Exclusions, Exemptions and Use Authorizations" Rule published July 8, 1987 (52 FR 25838).

On February 20, 1981, the Chemical Manufacturers Association (CMA), EDF, and other industry intervenors in the *EDF* v. *EPA* litigation, filed a joint motion with EPA seeking a stay of the court's mandate. The Court granted the joint motion on April 13, 1981, thereby staying the issuance of its mandate pending the development by EPA of additional regulations concerning PCBs with concentrations less than 50 ppm.

EPA undertook the regulation of PCBs in concentrations less than 50 ppm in two phases. On October 21, 1982, the Agency issued the Closed and Controlled Waste Manufacturing Process Rule (47 FR 46980) which excluded from the general prohibitions a limited number of chemical manufacturing processes defined as "closed" or "controlled waste" processes. These processes either resulted in no PCB releases or releases only in controlled waste streams. In essence, the Closed and Controlled Rule allowed limited new manufacture of PCBs, but only when the PCBs were controlled and not released to the environment.

On July 10, 1984, EPA completed the second phase of rulemaking concerning low concentration PCBs. The "Uncontrolled Rule" (49 FR 28154) was issued regulating manufacturing processes generating low concentration PCBs in other than "closed" and "controlled waste" processes as well as other activities involving previously generated low concentration PCBs. This second Rule excluded from regulation additional manufacturing processes that generated PCBs as byproducts and impurities and allowed the limited recycling of PCBs in the manufacture of asphalt roofing materials and paper products. EPA found that these additional activities could be excluded from the general prohibition on the manufacture, processing, distribution in commerce, and use of PCBs because these other activities do not present an unreasonable risk of injury to public health or the environment.

On October 1, 1984, the date that the Uncontrolled Rule became effective, the court lifted its stay and any activity involving any quantifiable level of PCBs was banned unless EPA had specifically excluded, exempted, or authorized the activity by regulation (49 FR 28173, July 10, 1984).

The practical effect of this action was to make illegal many activities involving previously generated PCBs which were neither anticipated nor specifically evaluated during the development of the Uncontrolled Rule. Many activities involving low concentrations of previously generated PCBs were now prohibited, regardless of the fact that they may have presented no greater risk than certain activities specifically allowed in the July 10, 1984 rule.

Petitions seeking judicial review of the July 10, 1984 rule were filed on September 24, 1984, in the U.S. Court of Appeals for the District of Columbia Circuit by the American Paper Institute (API), the Fort Howard Paper Company (Ft. Howard), the Outboard Marine Corporation (OMC), and the American

Die Casting Institute (ADCI). The challenges were consolidated for resolution, and the Chemical Manufacturers Association (CMA) entered the litigation as an intervenor and respondent. EPA recognized the concerns of the petitioners, and on August 7, 1986, EPA entered into a settlement agreement. EPA agreed to propose specific amendments to the July 10, 1984 regulation to address the concerns of the petitioners.

EPA proposed, in the **Federal Register** of July 8, 1987 (52 FR 25838), to amend the July 10, 1984 PCB Rule (the "Uncontrolled Rule") by excluding additional materials from regulation based on EPA's determination that activities involving these materials do not present an unreasonable risk of injury to health or to the environment. In the July 8, 1987 proposed rule, EPA proposed the following amendments to the regulations governing the processing, distribution in commerce, and use of PCBs.

1. To generally authorize the processing, distribution in commerce, and use of products containing less than 50 ppm PCBs provided that the PCBs present in the products were legally manufactured, processed, distributed in commerce, and/or used prior to October 1, 1984. The only exception that EPA proposed to this generic exclusion of activities involving less than 50 ppm PCBs, was to place limitations on the use of oil containing less than 50 ppm PCBs as a fuel. EPA proposed to restrict the burning of oil containing less than 50 ppm PCBs to industrial boilers and furnaces, which EPA believes, as a class, will provide for more efficient combustion than nonindustrial boilers and furnaces.

2. To authorize the distribution in commerce of equipment and other materials contaminated with PCBs from a spill, provided that such materials are decontaminated in accordance with EPA's applicable PCB spill cleanup policies.

3. To eliminate the water discharge limit of less than 3 micrograms per liter (3 ug/L), roughly 3 parts per billion (ppb), for total Aroclors leaving a paper processing site.

4. To eliminate the requirement that owners of hydraulic and heat transfer systems provide Viton elastomer gloves for workers servicing this equipment, and that workers wear these gloves when servicing heat transfer and hydraulic systems.

Of the proposed amendments, the proposal to generally authorize the processing, distribution in commerce, and use of products containing less than 50 ppm PCBs (with a restriction on the use of oil containing less than 50 ppm as a fuel in nonindustrial boilers) was the most significant of the July 8, 1987 proposals and drew the most comment. The Agency invited comments on various aspects of its proposal regarding products containing less than 50 ppm PCBs, including the exposure assessment that supports the Agency's decision to prohibit the burning of low-concentration PCB waste oil in nonindustrial boilers and furnaces. In the proposed rule, EPA indicated that it would use any new information submitted to the Agency to reconsider the appropriateness of its approach concerning the burning of oil containing less than 50 ppm PCBs as a fuel, with the option of excluding all used oil products (with less than 50 ppm PCBs) from regulation, without any restrictions on burning or other recycling activities.

EPA received over 40 comments during the public comment period which closed on September 8, 1987. EPA received comments from a number of different sources, including electrical utilities, chemical manufacturers, heavy equipment manufacturers, pulp and paper mills, members of trade associations, the electrical equipment service industry, and an environmental group.

The comments are summarized in "Response to Comments on the NPR for Amendments to the Uncontrolled PCBs Rule," June 1988. Several comments were also received following the close of the comment period, which EPA accepted and considered as they contained information not available earlier. On September 21, 1987, EPA held an informal hearing in Washington, DC at the request of the Electrical Apparatus Service Association (EASA). EASA addressed the issues of the buying and selling of used transformers, salvaging and rebuilding operations, and the effect of the Proposed Rule on this service industry. Six EASA members provided testimony on various provisions of the Proposed Rule, and a transcript of the hearing appears in the Docket.

EPA has considered all comments received in response to the Proposed Rule (as well as comments received after the close of the comment period) and has modified the rule where appropriate. A more detailed explanation of regulatory development history is presented in the Preamble to the Exclusions, Exemptions and Use Authorizations Proposed Rule of July 8, 1987. A brief overview of the final rule follows.

II. Overview of the Amendments

A. General Exclusion for Products Containing Less than 50 PPM PCBS

On October 1, 1984 (the effective date of the Uncontrolled Rule), the Court of Appeals for the District of Columbia Circuit lifted the stay of mandate that had been in place since the Court's decision to remand to EPA the general 50 ppm regulatory cutoff for PCBs. The effect of this action was to ban all PCB-related activities that were not specifically excluded, authorized, or exempted by EPA under TSCA regulations (40 CFR Part 761). The rule made illegal many activities involving previously generated PCBs at concentrations of less than 50 ppm. EPA had not anticipated the many activities that would be banned when the general 50 ppm cutoff was removed, and many of these activities were not evaluated during the development of the 1984 Uncontrolled Rule.

CMA and others raised specific concerns about the effect of this ban on the distribution in commerce, further processing, and use of products containing less than 50 ppm PCBs that were produced legally before October 1, 1984, but which were in storage for use or distribution in commerce when the Uncontrolled Rule became effective. These products, they argued, should be allowed to be further processed, distributed in commerce, and used, but EPA did not specifically authorize or exempt these products by the terms of the Uncontrolled Rule. EPA agreed with the principle that materials containing less than 50 ppm PCBs that were legally in existence before October 1, 1984 should be allowed to be further processed, distributed in commerce, and used. Accordingly, EPA agreed to address these concerns in a proposed rule.

In the July 8, 1987 proposed rule, the Agency proposed to amend the existing regulations by generally excluding from the TSCA section 6(e) prohibitions the processing, distribution in commerce, and use of products containing less than 50 ppm PCBs, provided these products were legally manufactured, processed, distributed in commerce, or used prior to October 1, 1984. The term "legally," as used in this exclusion, includes products created from PCB activities allowed by EPA by regulation, by exemption petition, by settlement agreement, or pursuant to other Agency-approved programs. The only exception that EPA proposed to this generic 50 ppm cutoff for processing, distribution in commerce, and use of PCBs was a restriction on the use of oil containing less than 50 ppm as

a fuel in nonindustrial boilers and furnaces. Materials containing less than 50 ppm PCBs as a result of a spill of 50 ppm or greater material after the effective date of the disposal regulations (July 2, 1979) are not excluded from regulation by the terms of this provision.

In this final rule, EPA has adopted this generic exclusion based upon its determination that activities involving products containing less than 50 ppm PCB generally do not present an unreasonable risk of injury to human health or the environment. EPA's analyses demonstrate that the incremental risks associated with the processing, distribution in commerce, and use of products with PCB levels up to 50 ppm are outweighed by the tremendous costs that would be incurred by banning the further processing, distribution in commerce, and use of PCBs at these levels.

While EPA has included used oil products containing less than 50 ppm PCBs within the class of "excluded PCB products," the Agency is restricting the use of PCB containing oil as a fuel. EPA has also determined that the burning of PCB containing oil in concentrations below 50 ppm in industrial boilers and furnaces does not present an unreasonable risk to public health or the environment under normal operating conditions. However, the finding of no unreasonable risk for the use of PCB-containing oil as a fuel does not include the burning of PCB containing oil under combustion conditions which are likely to promote the formation of polychlorinated dibenzofurans (PCDFs). EPA believes that among known classes of boilers and furnaces, nonindustrial boilers and furnaces are most likely to create combustion conditions conducive to the formation of PCDFs and that the burning of PCB containing oil as fuel during startup and shutdown operations in industrial boilers and furnaces are also likely to create combustion conditions conducive to incomplete combustion. Further, PCDFs are considered to be more toxic than PCBs and their formation and release during the burning of oil under certain combustion conditions in nonindustrial boilers and furnaces could present a significant risk to public health and the environment. Thus, EPA is restricting the burning of oil containing less than 50 ppm PCBs as a fuel to industrial boilers and furnaces except during startup and shutdown operations.

B. Land Application of Sewage Sludges

Land application practices involving PCBs at levels less than 50 ppm are governed by provisions of non-TSCA regulatory programs. Therefore, EPA is not addressing the land application of sewage sludges under this rule because any risks from these activities can be eliminated or reduced by action taken under other laws administered by EPA. EPA has the authority to manage sewage sludge and other wastes containing less than 50 ppm PCBs (43 FR 24803, June 7, 1978), under the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA) programs. Further discussion of this issue can be found in the Proposed Rule at 52 FR 25855.

C. Use Authorization for Hydraulic and Heat Transfer Systems—Requirement for Use of Viton Gloves

In the 1979 Ban Rule (44 FR 31514), EPA authorized the non-totally-enclosed use of PCBs at concentrations of 50 ppm or greater in hydraulic systems and in heat transfer systems (40 CFR 761.30 (d) and (e)). The 1979 use authorizations contained conditions relating to testing and retrofitting which were designed to reduce the concentrations of PCBs in these systems to levels less than 50 ppm by July 1, 1984.

In the July 10, 1984 Uncontrolled Rule, EPA authorized the use of PCBs in hydraulic and heat transfer systems at concentrations less than 50 ppm for the remainder of their useful lives. EPA found that the continued use of these systems did not present an unreasonable risk of injury to public health or the environment. The 1984 use authorization, however, imposed a condition on the continued use of this equipment which required owners of systems to provide workers with Viton elastomer gloves for protection against dermal exposure to PCBs. Outboard Marine Corp. (OMC) and the American Die Casting Institute (ADCI) raised concerns about the Viton glove requirements in a settlement discussion with EPA. They believed this requirement unnecessary to prevent unreasonable risk.

After reviewing the record for its original decision to require the use of Viton gloves, EPA found that the cost associated with requiring the use of gloves was significantly higher than originally estimated. Further, EPA also found that the risks posed by servicing heat transfer and hydraulic equipment containing less than 50 ppm PCBs did not outweigh the large costs associated with requiring the use of Viton gloves, or any other effective glove that is commercially available.

Accordingly, EPA is amending the authorization for hydraulic and heat transfer systems containing less than 50 ppm PCBs by eliminating the conditions requiring owners to provide, and maintenance workers to wear, gloves formulated from Viton elastomer. After evaluating economic information not examined during the 1984 rulemaking, and updating EPA's estimate of the concentration of PCBs in these systems as of 1987, EPA has determined that the servicing of heat transfer and hydraulic systems without gloves does not present an unreasonable risk of injury to public health or the environment.

The Agency wishes to emphasize that the use of impermeable gloves to prevent dermal contact with PCB-containing fluids may be warranted but the choice of such protection will be dependent on factors such as the duration of occupational exposure, concentration of PCB-containing fluid, and the costs and permeability of the glove material.

D. Water Discharge Limit of 3 PPB Total Aroclors for Pulp and Paper Processes

The July 10, 1984 rule permitted PCB recycling activities among two manufacturing industries—asphalt roofing materials manufacturers and manufacturers of pulp and paper products. Five conditions were set forth in the definition of "recycled PCBs," including a limitation on the level of PCBs allowed in water effluents. The effluent limit in the Uncontrolled Rule limited the amount of Aroclor PCBs in water discharged from these PCB processing sites to less than 3 micrograms per liter (μg/L) for total Aroclors (roughly 3 parts per billion (3 ppb)).

Petitioners, Fort Howard and the American Paper Institute, filed a joint petition challenging the 3 ppb total Aroclors discharge limit for pulp and paper mills. The major concerns were that the regulation did not allow for excursions above 3 ppb due to higher PCB levels in recycled paper entering the process and that the TSCA concentration-based standard unfairly penalized those mills who conserved water and had a decreased volume flow in their effluent discharges.

EPA proposed to eliminate the 3 ppb water effluent standard for PCBs leaving pulp and paper mills for several reasons, including: (1) EPA's belief that PCB discharges from pulp and paper mills are being adequately regulated by state permitting authorities, and (2) EPA's recognition that under the recently enacted CWA, Congress now requires that all states adopt water quality criteria within 2 years for chemicals which have been evaluated by EPA. Since water quality criteria exist for PCBs, EPA believed that it had additional assurance that all PCB

effluents from recycling processes would be controlled, eliminating the need for section 6 action under TSCA.

EPA has considered the comments and data submitted on the adequacy of state permitting programs and concluded that it is necessary, at this time, to retain the water discharge limit in the definition of "Recycled PCBs" given the present status of some state NPDES permits and the foreseeable delays in implementing state revisions of water quality standards.

In addition, in light of comments received, that indicated a concentration-based standard unfairly penalized those mills who conserved water, the final rule requires manufacturers who process raw materials contaminated with Aroclor PCBs to comply with either a concentration or a mass-based limit. Allowing for a mass-based limitation (i.e., discharge requirements may be met by limiting the volume flow) is consistent with the Clean Water Act's approach to restricting discharges as well as the approach followed by states under their discharge-permitting authorities. EPA believes it prudent to be consistent with approaches already used by the Agency and state authorities and permit writers for controlling the PCB discharge limit into water. Allowing for a mass-based limitation will continue to regulate the absolute amount of PCBs added to the environment from a point source. EPA has not changed the 3 ppb standard for discharges from asphalt roofing material manufacturing because those manufacturers have not indicated a problem in meeting that standard.

E. Materials Decontaminated Pursuant To Spill Cleanup Policies

The PCB Spill Cleanup Policy (40 CFR Part 761, Subpart G) became effective on May 4, 1987. The policy establishes uniform cleanup levels for specified spill types and locations. The policy prescribes cleanup levels for different types of "spills" according to the PCB concentrations involved in the spill, the type of material contaminated, and the spill location. The Spill Cleanup Policy reaffirms a longstanding Agency policy of allowing the continued processing, distribution in commerce, and use of materials that have been cleaned to Agency standards.

In the July 8, 1987 proposal, EPA proposed to authorize the distribution in commerce and use of materials, equipment, and structures that had been decontaminated in accordance with applicable spill cleanup policies in effect at the time of decontamination, or if not previously decontaminated, then decontaminated at the time of distribution in commerce. Although these materials will be contaminated with low levels of PCBs, EPA proposed to authorize these activities because EPA has already determined that this residual level of contamination will not present unreasonable risks of injury to public health or the environment.

This final rule addresses materials contaminated with low level PCBs that resulted from a spill of controlled material (PCBs in concentrations of 50 ppm or greater). EPA is excluding from the TSCA section 6(e) prohibitions on the distribution in commerce and use of any equipment, structures, and other materials contaminated with PCBs, that are not otherwise authorized by 40 CFR Part 761, provided that these "materials" were decontaminated in accordance with applicable PCB cleanup policies in effect at the time of decontamination, or, if not previously decontaminated, then decontaminated at the time of distribution in commerce in accordance with the current cleanup policy.

III. Discussion of Amendments

Forty-two comments were received during the comment period. The majority of the comments received in this rulemaking generally agree with the amendments proposed in the July 8, 1987 Federal Register notice. However, several modifications to the rule were suggested by the commentors. This Unit of the Preamble discusses the major comments made in response to the proposed rule, EPA's responses to these comments, EPA's findings, and the rationale for any additional regulatory requirements. Refer to the support document "Response to Comments received on the NPR for Amendments to the Uncontrolled PCBs Rule," which appears in the Rulemaking Record for EPA's responses to comments not addressed here.

A. 50 PPM Regulatory Cutoff

1. *Excluded PCB Products.* EPA's July 8, 1987 proposed rule generally excluded from the TSCA section 6(e) prohibitions, the processing, distribution in commerce, and use of products containing less than 50 ppm PCB concentration provided these PCB-containing products were legally manufactured, processed, distributed in commerce, or used prior to October 1, 1984. The term "legally" as used in this exclusion includes activities and products created by these activities EPA allowed by regulation, by exemption petition, by settlement agreement, or pursuant to other Agency approved programs. EPA requested comments on its case studies of the costs and benefits of regulating PCBs in concentrations below 50 ppm in: Investment casting waxes and products contaminated with inadvertently generated PCBs prior to the effective date of the Uncontrolled Rule. The following addresses those comments and identifies other examples of products that are included in this generic exclusion.

There was strong general support from all commentors on the proposal to generally exclude from further regulation products that were legally contaminated with previously generated PCBs at levels under 50 ppm prior to October 1, 1984. The proposal was supported by chemical manufacturers, other industries, and by utilities concerned with TSCA prohibitions on the repair and rebuilding of electrical equipment. EPA received no comments on this proposal from environmental groups.

The major criticism expressed about the general exclusion for products contaminated at less than 50 ppm was EPA's lack of clarity in defining what activities and "products" were excluded from regulation by the 50 ppm cutoff. Particularly, these commentors support EPA in its decision to exclude a broader class of products than was described by the precise terms of the definition set forth in the Settlement Agreement, but ask that EPA clarify the regulatory language to better express this intent.

The precise terms of the Settlement Agreement call for the Agency to propose to authorize the processing, distribution in commerce, and use of existing stocks of products contaminated with PCBs at concentrations less than 50 ppm, in cases where these products were legally manufactured, processed, or distributed in commerce before October 1, 1984. As noted in comments by Southern California Gas Company (SoCalGas), strictly limiting the definition of what is excluded would have the effect of placing any products contaminated by "ambient" PCBs after the 1984 date within a class of products still subject to the ban on processing, distribution in commerce, and use. The result is seen by SoCalGas to be at odds with the Agency's expressed intent not to regulate "old" or ambient" PCBs at levels of less than 50 ppm (52 FR 25843, July 8, 1987). SoCalGas is concerned that by a strict reading of the rule, many of the products contaminated with low levels of PCBs from historic PCB uses or during recycling activities would still be regulated.

The Agency acknowledges the validity of these comments. It is the Agency's intent to allow the processing, distribution in commerce, and use of

PCBs in concentrations below 50 ppm provided that:

a. The PCBs were legally manufactured before October 1, 1984.

b. If the PCBs were processed, distributed in commerce, or used before October 1, 1984, they were legally processed, distributed in commerce or used.

c. The resulting PCB concentration (i.e., below 50 ppm) is not a result of dilution, or leaks and spills of PCBs in concentrations over 50 ppm after the effective date of the disposal regulations.

The only exceptions to the general 50 ppm cutoff for the use of previously generated PCBs are EPA prohibitions on the use of PCBs at any detectable concentration as a sealant, coating, or dust control agent, and the use of PCBs at ≥2 ppm as a fuel in nonindustrial boilers and furnaces. Since EPA received many comments on its proposal to restrict the use of less than 50 ppm material as a fuel in nonindustrial boilers and furnaces, EPA has summarized these comments separately in Unit III.B of this document.

In response to an information request in the July 8, 1987 proposal, the Outboard Marine Corporation (OMC) submitted data on the concentration of PCBs in investment casting waxes. At the time of the Proposed Rule, the Agency supported the inclusion of investment casting waxes among the class of excluded products based upon mathematical modeling which estimated average PCB contamination in these waxes to be 10 ppm. The Outboard Marine Corporation survey data, collected over the last 2 years, indicated that only 18 percent of the approximately 70 samples tested contained detectable levels of PCBs. The average PCB concentration for those samples was 14 ppm. This information confirms the Agency's earlier estimates and supports the inclusion of investment casting waxes among the general PCB products exclusion.

The comments also expressed strong and uniform support for the proposed products exclusion and its effect on the further use, processing, and distribution in commerce of components derived from non-PCB electrical equipment (PCB electrical equipment containing less than 50 ppm PCBs in dielectric fluids).

Several commentors requested that the rule make express reference to heat transfer and hydraulic equipment, and other miscellaneous equipment in use, or in storage for reuse, which has been in contact with material less than 50 ppm PCBs, rather than leaving this class of equipment inferentially covered by the broad products language. The Agency has included these items and their fluids as examples of products covered by the exclusion. Hydraulic and heat transfer equipment which has been retrofilled and "reclassified" according to TSCA procedures and regulations falls within this class of excluded products. General Motors Corporation submitted cost data on the effects of removing the prohibition of distribution in commerce and processing of this equipment. Two General Motors facilities would experience an approximate $3 million savings when the TSCA prohibitions against distribution in commerce of non-PCB heat transfer and hydraulic equipment in use or in storage are lifted.

EPA also notes that component parts derived from the rebuilding or salvaging of electrical equipment containing PCBs at levels less than 50 ppm qualify as "excluded PCB products". In addition to component parts, the exclusion also includes such activities as buying, selling, and servicing of used non-totally enclosed transformers that contain fluids with concentrations of less than 50 ppm PCBs. As noted in the Proposed Rule, 52 FR 25854, the Agency believes that recycling activities involving these components do not present any significantly greater risks than other activities connected with the unrestricted use of non-PCB electrical equipment.

Two commentors requested that the exclusion for non PCB equipment recycling activities be extended to PCB-contaminated electrical equipment (containing concentrations of 50 to 500 ppm PCB). The Electrical Apparatus Service Association (EASA) and Utility Solid Waste Activities Group (USWAG) joined in seeking the extension of the exemption to components from PCB-contaminated electrical equipment, or in the development of a new decontamination method which would allow electrical utility operating companies to continue their activities. Concern was raised about current inventories of used components which would be used in the repair of PCB-contaminated transformers. In most cases, these components are no longer manufactured, and the entire transformer may be rendered useless without the necessary used replacement parts.

EPA notes that the regulations presently authorize a utility that owns used components removed from electrical equipment owned by the same utility company to use these component parts in the repair of other equipment under its ownership. However, if a component part from PCB-contaminated electrical equipment is used to repair non-PCB equipment, the equipment must be considered to be PCB-contaminated after repair.

In responses to EASA's comments EPA also notes that the existing PCB regulations already provide a mechanism for "decontaminating" PCB-contaminated electrical equipment so that it may be treated in the same manner as non PCB electrical equipment. The PCB regulations allow the reclassification of PCB-contaminated electrical equipment. Once reclassified, a piece of equipment may be salvaged for parts without restriction.

Finally, TSCA section 6(e) provides EPA with the authority to grant exemptions from the prohibition on distribution in commerce. This mechanism is available for those who demonstrate to EPA that their activity will not present an unreasonable risk of injury to public health and the environment and that good faith efforts have been made to develop a substitute for PCBs in the activity. For example, in 1984 the Agency granted the members of EASA a 1-year exemption to process and distribute in commerce PCB-contaminated transformers and component parts. The 1-year exemption would allow EASA time to inform its members how to comply with the PCB regulations, thereby allowing EASA members time to phase out their PCB related activities that required exemptions.

EPA is adopting the generic 50 ppm exclusion for processing, distribution in commerce, and use, based on the Agency's determination that the use, processing, and distribution in commerce of products with less than 50 ppm PCB concentration will not generally present an unreasonable risk of injury to health or the environment. EPA could not possibly identify and assess the potential exposures from all the products which may be contaminated with PCBs at less than 50 ppm. However, EPA concluded that the majority of the hypothetical exposures developed in support of the July 10, 1984 rule were not significant, and in incidents where higher exposures were calculated, further evaluation of the assumptions showed that the estimated exposures overestimated actual expected exposures from the products. EPA believes that the qualitative conclusions reached in 1984 with regard to products (with concentrations up to 50 ppm) from excluded manufacturing practices apply with equal force to the products excluded by this final rule. In addition, EPA has concluded that the costs associated with the strict prohibition on PCB activities are large

and outweigh the risks posed by these activities (see 49 FR 28179, July 10, 1984).

B. Use of PCBs Below 50 PPM as a Fuel

The July 8, 1987 proposed rule proposed to amend the PCB regulations to, in general, authorize used oil recycling activities (use, processing, and distribution in commerce) involving used oil containing less than 50 ppm PCBs. Specifically, EPA proposed to include used oil among products excluded from regulation under the definition of "excluded PCB products." However, EPA proposed to restrict used oil recycling activities by prohibiting the burning of used oil containing any quantifiable level of PCBs as a fuel in nonindustrial boilers.

The proposed rule also proposed to amend the definition of "qualified incinerator" codified at 40 CFR 761.3. EPA proposed to delete the reference to approved high efficiency boilers under 761.60(a)(3) and to replace that deleted language with a reference to the high efficiency boiler criteria and notification requirements set forth in § 761.60(a)(2). The proposal required the same combustion conditions as previously required but sought to replace the approval requirements with the simpler requirement of notification to the EPA Regional Administrator as stated in § 761.60(a)(2)(iii)(B).

The proposal also sought to make another class of combustion facilities eligible for burning used oils with less than 50 ppm PCBs. EPA proposed to include combustion facilities recognized as acceptable for burning off specification "used oil fuels" under 40 CFR Part 266, Subpart E. This second class consists of the industrial "furnaces" and "boilers" which are identified in 40 CFR 266.41(b) and whose owners have notified EPA of their used oil burning activities. The criteria for these boilers and furnaces are identified in 40 CFR 260.10.

Today's rule allows the burning of oil containing between 2 and 49 ppm PCBs as a fuel in RCRA-approved industrial boilers and furnaces. The rule requires that RCRA approved units used to burn PCB oil between 2 and 49 ppm must be operating at normal operating temperatures (this requirement prohibits burning such fuels during either startup or shutdown operations). By prohibiting the use of oil as a fuel between 2 and 49 ppm PCBs during startup and shutdown operations for these units, EPA is effectively eliminating another source where conditions are conducive to the incomplete combustion of PCBs and the formation of PCDFs. The prohibition on the use of this oil during startup and shutdown operations is consistent with the Agency's current regulations for disposing mineral oil dielectric fluid (50–499 ppm PCBs) in high efficiency boilers set forth in 40 CFR 761.60(a)(2)(iii)(A)(5). Similar to the requirements in todays rule, the existing rules regarding high efficiency boilers limit the fuel feed rate for PCBs. Section 761.60(a)(2)(iii)(A)(4) states that mineral oil dielectric fluid cannot compose more than 10 percent, 5–49.9 ppm PCBs, (on a volume basis) of the total fuel feed rate. EPA believes that the requirements for burning PCB fluid between 2 and 49 ppm PCBs during startup and shutdown operations in industrial boilers and furnaces should be consistent with the existing disposal rules set forth in 40 CFR 761.60.

Today's rule also prohibits the burning of oil containing detectable concentrations of PCBs in nonindustrial boilers and furnaces because these units, as a class, are more likely than RCRA-approved industrial boilers and furnaces to operate under combustion conditions that are conducive to the volatilization of PCBs and the formation of toxic products from the incomplete combustion of PCBs.

In the Proposed Rule, EPA concluded that nonindustrial boilers are typically small to medium size unmanned units that may not achieve optimum combustion conditions when burning fuel that the unit was not designed to burn. EPA believed that very few, if any, of these units are equipped with emissions control equipment, while many industrial boilers/furnaces are so equipped. Further, nonindustrial units are more likely to be located in an urban setting where sources are frequently clustered together, they generally have lower stack heights, and have a sporadic mode of operation. Emissions plumes from numerous sources can overlap and increase ambient air concentrations of PCBs and PCDFs while simultaneously exposing a larger population. In contrast, large boilers and industrial furnaces are more likely to be operated by trained operators and equipped with combustion controls to maintain combustion efficiency when burning fuels mixed with low concentration PCBs.

The Agency requested comments on its proposal to prohibit the burning of used oil containing less than 50 ppm PCBs in nonindustrial boilers. (See 52 FR 25854, July 8, 1987). Several commentors asserted that all used oil products under 50 ppm should be excluded from all TSCA regulations, including burner restrictions. Several commentors who opposed the burner restrictions focused their objections on the risk assessment that EPA developed in support of its proposal. Two commentors stated that the assessment overstated the potential of PCDF formation, and criticized the conservative assumptions in the risk assessment, including the frequency and duration of used oil burning in residential boilers. However, EPA did not receive substantive information to allow the Agency to reevaluate the risk of PCDF formation and make the required finding that such burning does not present unreasonable risks. Commentors did not provide information to support an adjustment to the assumptions underlying the assessment for the potential for PCDF formation such as combustion efficiency, residential combustion unit sizes and types, operating temperatures, formation of PCDF's under differing combustion conditions, etc.

In the risk assessment developed for the proposed rule, the Agency concluded that inhalation exposures associated with the volatilizing of PCBs during the burning of used oil (with PCBs at the 50 ppm level or lower) in small boilers were not significant. However, the Agency's quantitative oncogenic risk for the potential inhalation exposures associated with the formation and release of polychlorinated dibenzofurans (PCDFs) from small- and medium-sized nonindustrial boilers (which may operate under inefficient conditions) was considered significant because the risks fall into the 1×10^{-3} to 1×10^{-4} range. Moreover, only 23 percent of this oil is burned this way; a prohibition does not create great economic impact. Since EPA received no data which refutes the risk assessment, the final rule retains the prohibition on the use of waste oil containing less than 50 ppm PCB as a fuel in nonindustrial boilers. Nonindustrial boilers include but are not limited to those located in single or multifamily residences; commercial establishments (such as hotels, office buildings, laundries, service stations, greenhouses); and institutional establishments (colleges, hospitals, schools, prisons).

In this rule, EPA is designating within the class of "incinerators" qualified to burn oil containing between 2 ppm and 50 ppm PCBs those:

(1) Incinerators approved for PCB destruction under § 761.70.

(2) High efficiency boilers which operate under the conditions of § 761.60(a)(2)(iii)(A) and whose owners have notified EPA of their used oil burning activities under § 761.60 (a)(2)(iii)(B).

(3) Incinerators approved under the authority of RCRA section 3005(c).

(4) Industrial furnaces and boilers which are identified in 40 CFR 260.10

and 40 CFR 266.41(b), and whose owners have notified the Agency of their used oil burning activities. The list of industrial furnaces includes cement kilns, lime kilns, phosphate kilns, aggregate kilns (including asphalt kilns), coke ovens, blast furnaces; and smelting, melting, and refining furnaces. Furthermore, under these RCRA rules, the Regional Administrator may designate additional enclosed, controlled flame combustion devices as "boilers" on a case-by-case basis as stated under criteria set out in 40 CFR 260.32. Boilers designated under 40 CFR 260.32 by a Regional Administrator would also qualify as incinerators for the burning of oil containing 2 ppm to 49 ppm PCBs.

One commentor, Econ, Inc., criticized the lack of specificity in combustion criteria for boilers, suggesting that boiler operators could comply with a regulation that specified proper boiler operating parameters. This commentor asked that the final rule specify the combustion criteria (e.g. temperature, residence time, pressure, excess oxygen) that operators must attain. Another commentor took a contrary view, asserting that the rule should remain faithful to the RCRA approach of specifying only classes of eligible industrial boilers and furnaces, without restricting the specifics of operation.

EPA has determined not to include, within the scope of this rulemaking, a determination of combustion criteria for boilers, nor to set combustion goals that operators must attain, because, the Agency plans to propose, under RCRA, technical standards for burning off-specification used oil fuel in boilers and industrial furnaces. This rulemaking would take into account when and how these wastes can be burned safely in these devices. It would also include combustion criteria and most likely control emissions of toxic organics. While EPA will not develop such combustion criteria in the present rulemaking, the Agency will reexamine TSCA controls on the burning of less than 50 ppm PCB oils after the development of the RCRA standards and combustion criteria.

Several commentors agreed that used oil burning should be limited to the larger industrial boilers and furnaces, but they objected to regulatory requirements for certification and notification. These commentors were most frequently concerned about the chilling effect that the certification and notification requirements would have on the availability of oil-burning capacity among the desirable industrial burners. While a concern was expressed that any regulation of qualified burners would have deleterious effects, most of the criticism was directed at the proposal to allow burning of PCB-containing used oil only in the industrial boilers and furnaces whose owners have previously notified the Agency under either RCRA or TSCA of their oil or waste burning activities. The argument most frequently made was that very few industrial burners have accepted EPA's invitation to register and burn "off-specification" used oil fuel, so that the RCRA Burn Ban regulation has in fact been an impediment to the marketing of these fuels to the larger industrial boilers capable of efficient combustion.

Based upon its experiences following the promulgation of similar notification requirements under RCRA, EPA disagrees that the notification requirement of this rule will create a significant disincentive for the burning of oil containing 2 ppm to 49 ppm in industrial furnaces and boilers. As part of the rule regulating the burning of used oil for energy recovery (40 CFR Part 266, Subpart E), marketers and burners of off-specification used oil fuels are subject to certain administrative requirements, including a one-time notification as to waste burning activities and the securing of an EPA identification number. The notification provides the Agency with the number, type and location of burners. In order to minimize the reporting burden, burners which previously notified the Regional Administrator of their waste as fuel activities (see §§ 266.35(b) and 266.44(b)) are considered under the present rule to be eligible to burn under 50 ppm PCB waste oil without additional notification.

Burners which have not previously complied with 40 CFR §§ 266.35(b) and 266.44(b) are required to file a TSCA notification with the Regional Administrator and receive acknowledgement of the receipt of the notification prior to burning. This acknowledgement merely serves as a confirmation that EPA has received notification and does not serve as an approval or endorsement by EPA of the adequacy of the notifier's combustion unit or business practices.

Under this final rule, before an eligible burner accepts its first shipment of used oil fuel containing less than 50 ppm PCBs from a marketer, he is required to provide the marketer a one time written and signed notice certifying that he will burn the used oil only in an incinerator (§ 761.3) or in a combustion device identified in 40 CFR 266.41(b).

Marketers will be required to retain copies of their used oil analyses (or other information relating to PCB levels in oil) for 3 years; they would also be required to retain a copy of each certification that they have received from burners from the date of the last transaction with that burner.

There were strong objections expressed in several comments for keeping the RCRA reference to space heaters, 40 CFR 266.41(b)(2)(iii), that burn waste oil generated on-site. The RCRA provision was initially enacted in response to concerns expressed by the automotive oil industry that suggested that banning the burning of used oil in space heaters would severely disrupt the flow of used oil and possibly encourage disposal of automotive waste oils in municipal landfills. The National Oil Recyclers Association suggested that this exception flies in the face of all the discussion about significant risks in small boilers. Others amplified on the poor combustion performance of these units, particularly, their low stack temperature, small chambers, and poor efficiency during start up.

In addition, the Agency received comments on the proposed rule which indicated PCB used oil fuels are frequently burned in space heaters outside the automotive industry, i.e., transformer repair and servicing shops. In light of these comments the Agency has reconsidered the proposal to allow burning of PCB used oil fuels in space heaters. The Agency has determined that continuing to allow the burning of PCB used oil fuels only in the automotive industry's space heaters will not present an unreasonable risk to human health or the environment provided the provisions of 40 CFR 266.41(b)(2)(iii) (A), and (C) are met. However, EPA is prohibiting the burning of said fuel in space heaters outside the automotive industry area where the risks are likely to be greater. The Agency is allowing the burning of PCB used oil fuels from the automotive industry because it does not expect used oil from automotive sources to routinely contain PCBs in concentrations significantly above the level of detection. In addition, because of the historic uses of PCBs in electrical equipment and heat transfer and hydraulic equipment, EPA assumes the vast majority of PCB-containing used oil originates from industrial nonautomotive sources. Thus, EPA does not expect that a large quantity of PCB-containing used oil will in fact be burned in automotive-industry space heaters.

The burning of PCB used oil as fuel in areas including but not limited to transformer repair shops, where PCB

concentrations are likely to be well above the level of detection (i.e., 2 ppm) presents a greater likelihood for the formation of highly toxic byproducts associated with the poor combustion of higher concentration PCBs in these devices. Therefore, EPA, to remain consistent in avoiding such risks, is prohibiting the burning of PCB used oil as fuel in space heaters outside the automotive industry.

Several commentors have requested that the Agency clarify the term "detectable level of PCBs" which is used to describe the used oils to which this burning restriction applies (40 CFR 761.20(e)). The preamble of the Proposed Rule (52 FR 25854) stated that "detectable" means "practical limit of quantitation (i.e., 2 ppm). The Chemical Manufacturers Association recommended that EPA include this clarification in the regulatory language by referring specifically to the definition, "less than 2 micrograms per gram from any resolvable gas chromatographic peak," previously included in the TSCA regulations for nondetectable PCBs in products of closed waste manufacturing processes (47 FR 46995, October 21, 1982). This definition has been accepted by the Agency and will be incorporated in the Rule to clarify which used oils are considered to have detectable PCBs.

Several comments were received which addressed the availability of analytical methods for meeting the level of detection and the impact of this level on recycling and burning of waste oil for fuel. James River Corporation and Texaco Inc. requested that the Agency consider a level higher than the one proposed—specifically—5 ppm—which was felt would meet the goals of the regulation and the concerns for feasibility expressed by recyclers. Other thresholds suggested were 20 ppm (on the grounds that it was feasible in the field); 25 ppm, or even 35 ppm.

The Agency has determined that analytical procedures have been demonstrated to be capable of accurately and reproducibly determining the concentration of PCBs in Bunker C Fuel Oil at 2 ppm using a quantitation procedure based on one congener per homolog standard. Both Gas Chromatography/Electron Capture and Gas Chromatograph/Hall Detector Electron Capture are effective and easily implemented. Therefore, the level of quantitation (articulated in earlier TSCA regulations—47 FR 46995) is specified as 2 ppm.

A large number of comments addressing an alternative PCB threshold implicitly endorsed blending to meet any specified PCB threshold. These comments pointed out that the TSCA prohibitions on dilution do not apply where a regulation specifically allows it, and that allowing blending would make the rule consistent with the RCRA Burn Ban Rule. It was also suggested that blending would facilitate the injection of the fuel into the boiler, and result in better combustion and destruction of the PCBs.

Unlike RCRA regulations for hazardous waste disposal, the TSCA PCB disposal regulations dictate different disposal requirements depending upon the concentration of PCBs in the waste. This approach was adopted because EPA recognized that PCBs are ubiquitous in the environment and are present in measurable quantities as contaminants in many materials. EPA struggled to establish a manageable disposal system that recognized the widespread contamination that 30 or so years of indiscriminant disposal created yet one that would strictly control the disposal of any PCBs removed from use after the Congressional ban in 1977. The result was a disposal system based upon PCB concentrations in waste and a strict prohibition against dilution as a mechanism for avoiding proper disposal.

Allowing blending-down to either below the level of detection or below 50 ppm PCBs under this rule would be a departure from EPA's longstanding position that requires material once tested for PCB concentration to be treated under the regulations based upon its measured concentration. EPA is acutely aware of the difficulties in effectively monitoring compliance with the prohibition on dilution and is concerned about the potential avenue that it would be opening up for the improper disposal of 50 ppm or greater materials in allowing blending-down to either below the level of detection or below 50 ppm in this rule. Therefore, EPA is maintaining its longstanding policy to prohibit dilution.

EPA's proposal to allow batch testing by marketers as a way of saving analytical testing costs met with approval in the comments. The National Oil Recyclers note that, by the time a shipment of used oil reaches a processing plant, it is a mixture of oil from several generators. They maintain that the cost of testing each individual sample before it was added to a shipment would be prohibitive. In addition, they indicate that turn-around time for laboratory tests may range from a few days to 2 weeks, unless a high surcharge is paid for priority service. Costs for PCB testing have been cited as ranging from $25 to $65 per sample. With the low current markets in waste oil, as highlighted in comments from Harbor Oil, Inc., the expense of requiring individual samples, rather than batch testing, would be prohibitive. The Agency regulations, therefore, allow for batch testing, along with certification. It is important to note that, if any PCBs at a concentration of 50 ppm or greater have been added to the container, then the total container contents must be considered as having a PCB concentration of 50 ppm or greater for purposes of complying with the disposal requirements of 40 CFR 761.60. Batch testing, along with proper records documentation, provides for an environmentally sound program for collecting and burning oils with detectable levels of PCBs while at the same time preserving and protecting our limited waste oil markets.

This final rule makes the TSCA regulations more consistent with the Agency's overall strategy for regulating the recycling of used oil. After evaluating the risks posed by these activities, EPA has determined that the use, processing, and distribution in commerce of used oil containing less than 50 ppm PCBs does not generally present an unreasonable risk of injury to human health or the environment. EPA is not able to determine that burning used oil as fuel in nonindustrial boilers will not present an unreasonable risk. EPA believes that the burning of PCB-containing used oil fuels in combustion facilities which operate under inefficient combustion conditions will promote the formation of highly toxic PCDFs; (see 52 FR 25849–50 for further discussion on exposure risks associated with the incomplete combustion of PCBs).

Due to the potential for the formation of PCDFs in inefficient combustion facilities burning PCB-containing used oil, EPA believes that it is prudent to adopt an approach in this final rule which is consistent with that of the RCRA Burn Ban Rule for burning hazardous waste and off-specification used oil fuels. EPA believes that the rationale set forth in the RCRA Burn Ban Rule preamble for designating nonindustrial boilers as the prohibited class of combustion facilities (50 FR 49191) provides a compelling argument for similarly restricting the burning of used oil products containing PCBs at the less than 50 ppm level. This prohibition on burning PCB-contaminated oils in non-industrial boilers will afford an interim measure of prudent control until EPA completes its ongoing comprehensive evaluation of combustion conditions in various boilers and furnaces. Upon completing this evaluation, EPA will promulgate rules prescribing combustion performance

standards under RCRA. The net result will be to allow or disallow burning of hazardous waste fuels based on actual combustion capabilities rather than their classification as an "industrial" or "nonindustrial" boiler or furnace.

In addition to a consideration of the toxicity of PCBs and the magnitude of exposure to humans and the environment, the TSCA unreasonable risk standard requires EPA to consider the economic impacts and other societal costs associated with the regulation of a chemical. EPA evaluated the economic impacts of maintaining the current prohibition of all used oil recycling activities. (see Ref. 28, Support Document entitled "PCB Rule Revision: Cost-Effectiveness Analysis and Estimates of Exposed Population.") EPA concludes that the risks associated with the recycling (use, processing, and distribution in commerce) of used oil products containing less than 50 ppm PCBs are generally outweighed by the enormous costs associated with prohibiting such activities, the cost associated with depriving society of the benefits of recycled oil products, and the net reduction in environmental protection associated with a curtailment in recycling activities. Secondly, EPA believes that the net regulatory impact on restricting the burning of used oil containing less than 50 ppm PCBs to industrial boilers and furnaces will be insignificant. This final rule makes PCB-containing used oil (<50 ppm PCBs) available to a much larger universe of eligible combustion facilities than allowed under the previous regulation. The availability of these combustion facilities (qualified incinerators, industrial furnaces, industrial boilers, utility boilers, etc.) and the availability of other recycling markets (e.g., other industrial uses and rerefining) should provide more than adequate capacity to handle any market shifts caused by the prohibition on burning in nonindustrial boilers. EPA believes that the oil management system has already responded to the Burn Ban Rule by diverting the bulk of used oil fuels away from the nonindustrial boiler market, and any further diversion resulting from this final rule should be minimal. For these reasons, EPA concludes that allowing the burning of PCB-containing used oil fuels (<50 ppm PCBs) under the conditions set forth in this document will not present an unreasonable risk of injury to health or the environment.

In this final rule, to be consistent with the approach adopted by the RCRA Burn Ban Rule for marketers and burners of used oil fuel, EPA is implementing a combination of limited testing requirements, prohibitions, and recordkeeping requirements for burners and marketers of used oil fuel between 2 and 49 ppm PCBs. These provisions are to help ensure compliance with the prohibition on burning this PCB used oil fuel in nonindustrial boilers and furnaces.

For regulatory purposes used oil fuel is presumed to contain PCBs above the practical limit of quantitation (i.e., 2 ppm) and therefore would be subject to these restrictions, unless the marketer obtains PCB analyses (test data) or other information documenting that the used oil fuel does not contain detectable levels of PCBs. The Agency believes that presuming used oil to be contaminated with PCBs above 2 ppm is a prudent regulatory tool to ensure the proper burning of waste oils. This is not meant to imply that all waste oil is, without question, contaminated with PCBs above the level of detection, as test data and other information documenting the oil's concentration will demonstrate. The first person who makes the claim that the used oil fuel does not contain PCBs at quantifiable levels must obtain the analyses or "other information" to support his claim. The "other information" could include personal, special knowledge of the source and composition of the used oil, or a certification from the generator claiming that the oil does not contain PCBs above the practical limit of quantitation (2 ppm).

The prohibitions apply to both burners and "marketers" (as defined in 40 CFR 761.3). A person may market (process or distribute in commerce) used oil at levels between the practical limit of quantitation (2 ppm) and 50 ppm for energy recovery only to those burners who qualify either as a "qualified incinerator" under 40 CFR 761.3 or as a combustion device identified in 40 CFR 266.41(b). Before an eligible burner accepts its first shipment of used oil fuel containing PCBs at concentrations <50 ppm, but >2 ppm from a marketer, he will be required to provide the marketer a one-time written notice certifying that he will burn the used oil only in a qualified incinerator (§ 761.3) or in a combustion device identified in § 266.41(b). Marketers will be required to retain copies of their used oil analyses (or other information relating to PCB levels in oil) for 3 years; they would also be required to retain a copy of each certification that they have received from burners from the date of the last transaction with the burner.

By imposing the requirements on marketers and burners EPA believes it will effectively ensure compliance with the prohibition on the burning of used oil fuel in nonindustrial boilers. This is consistent with the RCRA Burn Ban Rule which imposes recordkeeping and reporting requirements controls to prohibit burning of off-specification used oil fuels in nonindustrial boilers.

C. Viton Glove Requirement

The Circuit Court's decision overturning EPA's rule which would allow a general 50 ppm cutoff, effectively prohibited the use of heat transfer and hydraulic systems containing less than 50 ppm PCBs. So, EPA, in the July 10, 1984 rule authorized the use of PCBs at concentrations less than 50 ppm in these systems for the remainder of their useful lives provided owners of these systems provided workers performing repair and maintenance operations on these systems with Viton elastomer gloves to protect against dermal exposure to PCBs (40 CFR 761.30(d)(6) and 761.30(e)(6)).

The Viton glove requirement was the subject of many comments received after promulgation of the July 10, 1984 rule. Due to the interest aroused by this requirement, EPA reexamined the potential exposures and economic impacts presented by the inclusion of a protective clothing requirement referring exclusively to gloves formulated from Viton elastomer. After considering additional economic information which was not considered during the previous rulemaking and after further evaluation of the potential exposures, the Agency has concluded that the Viton elastomer glove requirement is not necessary to protect against any unreasonable risks presented by the continued use of authorized heat transfer and hydraulic systems. Therefore, EPA proposed to delete the requirement from the use authorizations for heat transfer and hydraulic systems.

Several comments were received which supported the proposal to eliminate the exclusive Viton glove requirement for workers performing maintenance on heat transfer and hydraulic systems. General Motors Corporation suggested that the 1984 risk assessment greatly overstated the concentration of PCBs actually in the equipment. The data show that the average concentration of PCBs in hydraulic and heat transfer equipment to be 12 ppm. The commentor indicated that the assumption used in the 1984 risk assessment, that the PCB concentrations are constant at 50 ppm over the entire period of exposure, is not consistent with the fact that the equipment does leak and is topped off with fluids containing no PCBs. The General Motors

data are consistent with the Agency conclusions expressed in the July 8, 1987 (52 FR 25841) proposed rule that the majority of the presently authorized hydraulic and heat transfer systems have PCB concentrations well below 50 ppm and support EPA's belief that the actual lifetime average PCB exposures resulting from servicing of heat transfer and hydraulic systems should be at least one order of magnitude less than those predicted by the 1984 assessment.

All commentors agree that the risk to maintenance workers did not warrant the costs associated with the exclusive Viton polymer requirement. The National Institute for Occupational Safety and Health (NIOSH) agreed that recommending only the use of Viton gloves is overly restrictive and not warranted based on recent research findings conducted for NIOSH by the Los Alamos National Laboratory (LANL). A number of alternative glove materials were suggested (Viton SFe, butyl, neoprene, Saranex Tyvek, nitrile, Teflone) which were shown to provide good protection against a PCB mixture (52 percent Aroclor 1254 in 48 percent trichlorobenzene) for at least 8 hours. The LANL studies, while developing information relative to the effectiveness of glove materials when handling high concentration PCBs, do not address effectiveness of lower cost glove materials for use with low concentration PCB mineral oils.

The Agency recognizes the concern expressed by NIOSH for worker protection during such time as they are engaged in contact with PCBs and strongly recommends the use of impermeable gloves and clothing designed to prevent skin contact with PCBs, particularly when PCBs are present in concentrations of 500 ppm or greater. The choice of glove material will depend on the concentration of PCBs, the duration of occupational contact with PCBs, and the cost and permeability of the glove material.

The Viton glove requirement arose from concerns caused by a May, 1984 exposure assessment conducted in support of the July 10, 1984 rule. (For details of the exposure assessment see Vol. 4 of support document for the July 10, 1984 rule entitled "Exposure Assessment for Incidentally Produced Polychlorinated Biphenyls"). The hypothetical worst case dermal exposure presented in this report was believed, at the time significant enough to justify the imposition of the Viton glove requirement. However, upon further examination, EPA has concluded that the 1984 assessment overstates the likely dermal exposures and associated risks and that the estimated exposures do not justify the imposition of the enormous costs associated with the previous protective glove requirement.

EPA also considered information not previously examined by the Agency concerning the costs to industry associated with the exclusive Viton glove requirement. At the time of the July 10, 1984 rule, Viton elastomer was the only material known to EPA which possessed the necessary resistance to PCB breakthrough. Although the costs of the Viton gloves were significant, EPA reasoned that the incremented costs associated with the inclusion of the Viton glove requirement were minimal relative to the costs which industry would incur without a use authorization for less than 50 ppm systems.

However, in response to numerous comments received after the July 10, 1984 rule, EPA reexamined the costs associated with the Viton glove requirement and found them to be exorbitant in light of the "worst-case" exposures estimated in the exposure assessment. The incremental costs associated with the Viton glove requirement are in the order of $600 million over 10 years. The Agency has concluded that the potential risks presented by these activities do not warrant the imposition of incremental costs of this magnitude.

As a result of the 1984 risk assessment which over estimated the risk of dermal occupational exposure to repair and maintenance workers and the incremented costs associated with the Viton glove requirement the Agency is amending the use authorizations for hydraulic and heat transfer systems by eliminating the conditions requiring owners to provide repair and maintenance workers with gloves formulated with Viton elastomer.

D. 3 PPB Water Effluent Limitation

The Uncontrolled PCB Rule set forth, among other things, the category of "recycled PCBs" processes that are excluded from the TSCA section 6(e) bans on manufacturing, use, and distribution in commerce. These excluded processes involved manufacturers who use raw materials contaminated with Aroclor PCBs to manufacture new products instead of using virgin materials. Recycling old products yields both environmental and economic benefits since that practice conserves natural resources, reduces energy use, and reduces solid waste generation.

In response to the proposal to exclude these activities in the Uncontrolled PCB Rule, EPA received information from only two manufacturing industries: The asphalt roofing materials manufacturers and manufacturers of pulp and paper products. After evaluating whether these specific activities would present unreasonable risks of injury to health and the environment, EPA announced in the July 10, 1984 rule that it would exclude these PCB recycling products and processes (pulp and paper and asphalt roofing), if certain conditions are met.

The provision which excludes "recycled PCBs" from the section 6(e) prohibitions is codified at 40 CFR 761.1(f). The term "recycled PCBs" is defined at 40 CFR 761.3 by five conditions that limit Aroclor PCB concentrations in the products, wastes, water discharges, and air emissions. EPA determined in the final Uncontrolled PCBs Rule that PCB recycling activities conducted under these conditions would not present an unreasonable risk of injury to health or the environment.

The specific provision in the definition of "recycled PCBs" (40 CFR 761.3) that is the subject of this rulemaking pertains to provision number (4) which establishes the limits on releases of Aroclor PCBs in water discharges from sites processing paper products. The final rule retains the existing concentration-based discharge limit, but otherwise amends the provision by allowing a mass-based limitation. Provision number (4) stated: "The amount of Aroclor PCBs added to water discharged from a processing site must at all times be less than 3 micrograms per liter (μg/1) for total Aroclors (roughly 3 parts per billion)."

Petitioners, Ft. Howard and API, raised objections to this condition as it relates to discharges from mills in the pulp and paper industry. The major concerns were that the language which limited discharges to 3 ppb "at all times" (a concentration-based limitation) penalized paper mills which, in the interest of water conservation, decreased their volume flow or releases and, as a result, exceeded the 3 ppb limitation. EPA received no objections to this provision from the asphalt roofing industry.

EPA reexamined the 3 ppb Aroclors discharge limit for pulp and paper mills in light of the petitioners' claims and other comments received by the Agency. As a result, the Agency proposed to eliminate from the definition of "recycled PCBs" the provision limiting Aroclor PCB releases in water discharges from pulp and paper mills to 3 ppb.

EPA received comments both pro and con on this proposal. Some commenters

supported the proposal to eliminate the 3 ppb limitation because they believed that PCBs in the effluents from pulp and paper mills were being adequately controlled under the CWA permit programs. They contended that the states and EPA regional offices are in fact doing an adequate job regulating PCB discharges in their NPDES permits.

EPA also received comments that opposed the proposal to eliminate the 3 ppb limitation, arguing that the current state of regulation by the states is inadequate to control discharges from pulp and paper mills and therefore a TSCA effluent limit should be maintained to exclude these activities from the processing prohibition. These commenters argued that removing this limit would create a gap in controlling PCB discharges into water.

At this time EPA has not established an effluent guideline for PCBs under the CWA. Although states have begun to revise their water quality standards under the Water Quality Act of 1987 for CWA toxic pollutants, this process will take longer than the expected 2 years to implement. EPA has considered the concerns about the adequacy of controls on PCB effluents through individual permits and concluded that it is appropriate to retain a water discharge limit in the definition of "recycled PCBs" given the present status of some state NPDES permits and the delays in implementing state revisions of water quality standards. EPA reached this conclusion in view of the fact that there is currently no effluent limitation guideline or standard for discharges of PCBs from pulp and paper mills and in view of the ongoing but as yet incomplete process in implementing state revision of water quality standards. Any subsequent PCB discharge standard promulgated under the CWA would obviate the need for a limitation in this rule, and EPA would revoke the limitation at that time.

The final rule describes the limit in a manner which requires manufacturers in the pulp and paper industry who use raw materials contaminated with Aroclor PCBs to comply with either a concentration or mass-based limit. Comments on the Uncontrolled Rule and the July 8, 1987 proposal to amend that rule pointed out the shortcomings in EPA's approach to establishing a water discharge limit solely as an absolute concentration limit. EPA agrees that the PCB water discharge limit in this rule should be consistent with mass-based approaches already used by EPA and state authorities and permit writers under the CWA.

When EPA established the 3 ppb water discharge limit for led PCBs, the intent was to control these additional uncontrolled PCBs released into the environment. The 3 ppb limit represented a level determined by EPA to be a universally achievable and reliable level of quantitation (LOQ) which would best ensure, together with the other restrictions in the definition, that no unreasonable risk of injury to health or environment would be posed by these manufacturing processes. Under the CWA, discharges are limited by a variety of technology-based effluent limitations and standards with more stringent water quality-based standards applied as needed. When EPA promulgated the Uncontrolled PCBs Rule, the Agency did not intend to create inconsistencies in the approaches to regulation of discharges.

Comments on the proposed rule show that establishing an equivalent mass limitation on water discharges from recycled PCBs activities would provide an equivalent level of protection as the 3 ppb limit. Allowing a mass limitation would regulate the absolute amount of PCBs added to the environment from a point source. EPA has considered these comments and decided that as an alternative to the 3 ppb concentration-based limit, persons may comply with this concentration limit converted to a mass-based limitation. Conversion from concentration to mass-based limitations can be accomplished by multiplying the appropriate subcategory flow factor (average wastewater flow expressed as kl per kkg product) for a facility by the concentration limit (expressed in ppb) and an appropriate conversion factor (1.0E-06) to obtain the amount of PCBs allowed per weight of product (expressed as kg PCBs per kkg product). The total daily discharge allowance for PCBs would then be calculated by multiplying the amount of PCBs allowed per weight of product by the annual average daily production for the facility (expressed as kkg product per day). Further guidance to convert the concentration-based standard to the mass-based limitation is available in the public record.

E. Distribution in Commerce and Use of Decontaminated Equipment, Structures, and Materials

In the July 8, 1987 proposed rule, EPA proposed to exclude from regulation an additional class of materials contaminated with PCBs at levels below 50 ppm (or the applicable cleanup standard for solid surfaces). Unlike the class of products discussed earlier in this rule, the PCBs discussed in this section did not originate from contamination resulting from historic manufacturing, use, or recycling activities. Rather, the <50 ppm concentration levels (or the applicable cleanup standards for solid surfaces) present in these materials are associated with leaks and spills (i.e. improper disposal) of >50 ppm material. That is, the residual PCBs remain after proper cleanup of a spill of controlled material.

EPA proposed to formally exclude from the TSCA section 6(e) prohibitions on use and distribution in commerce, certain equipment, structures, and other materials that have inadvertently become contaminated with PCBs because of spills from, or proximity to, a PCB Item with PCB concentrations greater than 50 ppm provided that these materials were decontaminated to the specified level below 50 ppm PCBs in accordance with applicable EPA PCB cleanup policies at the time of decontamination. Spills in this case must not have been the result of any intentional discharge of PCBs, and the contamination must be attributable to PCB Items and activities which are themselves authorized.

The proposal also excluded from regulation the PCB use prohibition on materials or equipment which became contaminated with PCBs prior to the effective date of the section 6(e) bans and which have not undergone decontamination under any EPA PCB cleanup policy. However, these materials would have to be decontaminated according to current PCB cleanup policies set forth in EPA's nationwide spill cleanup policy.

The proposal was not intended to act as an alternative to the reclassification provision in 40 CFR Part 761 for PCB Equipment, PCB Articles, or other PCB Items containing PCBs. The availability of decontamination as a means of allowing the further use and distribution in commerce of PCB Items is limited to the decontamination procedures specified in 40 CFR 761.79 for PCB Containers and movable equipment in storage areas. The July, 1987 proposal was intended to merely codify an existing (though not specifically authorized) practice.

Two commentors agreed with the proposal to allow the distribution in commerce and processing of equipment and other materials that are adequately decontaminated in accordance with spill cleanup policies. One commentor objected to the terms of the proposal in codified § 761.20(c)(5) arguing that it could be construed to apply even to the metalworking, machining, or similar equipment in which used oil with under 50 ppm PCBs is used.

As stated above, this exclusion addresses equipment, structures, and other materials that have inadvertently become contaminated with PCBs >50 ppm as a result of a spill and have subsequently been decontaminated according to the appropriate spill cleanup procedures at the time of decontamination. The proposed language in § 761.20(c)(5) does not clearly set forth the Agency's intention that equipment, structures, and other materials covered by this exception are those which have inadvertently become contaminated with PCBs above 50 ppm because of spills from, or proximity to, a PCB Item whose use was authorized. Section 761.20(c)(5) has been modified to be consistent with this intent.

Since the promulgation of EPA's nationwide PCB Spill Cleanup Policy (52 FR 10688), specific cleanup levels have been established for different types of spills according to the PCB concentration involved in the spill, the type of material contaminated, and the spill location. Spills of less than 50 ppm PCBs are not covered under this policy.

In establishing this cleanup policy for typical PCB spills, EPA recognized that the risks posed by spills of PCBs vary, depending upon spill location and the amount of PCBs spilled. The PCB cleanup policy requires cleanup of PCBs to different levels depending upon spill location, the potential for exposure to residual PCBs remaining after cleanup, the concentration of the PCBs initially spilled and the nature and size of the population potentially at risk of exposure. Thus, this cleanup policy applies the most stringent requirements for spill cleanup to areas where there is the greatest potential for human exposures to spilled PCBs. Implicitly, the further use, processing, and distribution in commerce of materials decontaminated in accordance with the provisions of the nationwide cleanup policy will not present an unreasonable risk.

Since the effective date of the nationwide cleanup policy (May 4, 1987), the provisions of the policy have superseded the regional policies previously in effect. This amendment, of course, excludes from regulation eligible materials already decontaminated in conformity with regional policies prior to that date.

IV. Rulemaking Record

In accordance with the requirements of section 19(a)(3) of TSCA, EPA is issuing the following list of documents, which constitutes the record of this final rulemaking. This record includes basic information considered by the Agency in developing this final rule, including appropriate **Federal Register** notices, published and unpublished reports, economic and exposure analyses, and various communications before the final rule was issued. A full list of these materials will be available on request from EPA's TSCA Assistance office listed under "**FOR FURTHER INFORMATION CONTACT.**" However, any Confidential Business Information (CBI) that is part of the record for this rulemaking is not available for public review. A public version of the record, from which CBI has been deleted, is available for inspection.

A. Previous Rulemaking Records

(1) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs): Disposal and Marking Rule," Docket No. OPTS–66005, 43 FR 7150, February 17, 1978.

(2) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions Rule," 44 FR 31514, May 31, 1979.

(3) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Use in Electrical Equipment," Docket No. OPTS–62015, 47 FR 37342, August 25, 1982.

(4) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions: Use in Closed and Controlled Waste Manufacturing Processes." Docket No. OPTS–62017, 47 FR 46980, October 21, 1982.

(5) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Amendment to Use Authorization for PCB Railroad Transformers." Docket No. OPTS–62020, 48 FR 124, January 3, 1983.

(6) Official Rulemaking Record for "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions: Response to Individual and Class Petitions for Exemption." Docket No. OPTS–66006A, 49 FR 28154, July 10, 1984.

(7) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Exclusions, Exemptions, and Use Authorizations." Docket No. OPTS–62032A, 49 FR 28172, July 10, 1984.

(8) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Use in Electrical Transformers." Docket No. OPTS–62035D, 50 FR 29170, July 17, 1985.

(9) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions: Response to Exemption Petitions." Docket No. OPTS–66008E, 51 FR 28556, August 6, 1986.

B. Federal Register Notices

(10) 46 FR 27617, May 20, 1981, USEPA, "Polychlorinated Biphenyls (PCBs); Manufacture of PCBs in Concentrations Below Fifty Parts Per Million: Possible Exclusion from Manufacturing Prohibition; Advance Notice of Proposed Rulemaking.

(11) 44 FR 31514, May 31, 1979, USEPA, "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions."

(12) 44 FR 53438, September 13, 1979, USEPA, "Criteria for Classification of Solid Waste Disposal Facilities and Practices."

(13) 47 FR 47980, October 21, 1982, USEPA, "Polychlorianted Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions: Use in Closed and Controlled Waste Manufacturing Processes."

(14) 47 FR 52066, November 18, 1982, USEPA, "Pulp, Paper, and Paperboard Point Source Category Effluent Limitations Guidelines and New Source Performance Standards; Proposed Rule."

(15) 48 FR 55076, December 8, 1983, USEPA, "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions: Exclusions, Exemptions, and Use Authorizations: Proposed Rule."

(16) 49 FR 28172, July 10, 1984, USEPA, "Polychlorinated Biphenyls (PCBS): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions: Exclusions, Exemptions, and Use Authorizations: Final Rule."

(17) 49 FR 28154, July 10, 1984, USEPA, "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions: Response to Individual and Class Petitions for Exemptions."

(18) 50 FR 19170, July 17, 1985, USEPA, "Polychlorinated Biphenyls in Electrical Transformers: Final Rule."

(19) 50 FR 49212, November 29, 1985, USEPA, "Hazardous Waste Management System: Recycled Used Oil Standards: Proposed Rule."

(20) 50 FR 49258, November 29, 1985, USEPA, "Hazardous Waste Management System; General,

Identification and Listing of Hazardous Waste: Used Oil; Proposed Rule."

(21) 50 FR 49164, November 29, 1985, USEPA, "Hazardous Waste Management System: Burning of Waste Fuel and Used Oil Fuel in Boilers and Industrial Furnaces."

(22) 51 FR 28556, August 8, 1986, USEPA, "Polychlorinated Biphenyls (PCBs): Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions: Response to Exemption Petitions."

(23) 51 FR 41900, November 19, 1986, USEPA, "Identification and Listing of Hazardous Waste: Used Oil: Notice Announcing Decision Not To Adopt Proposed Rule Listing Used Oil as a Hazardous Waste.

(24) 52 FR 10668, April 2, 1987, USEPA, "Polychlorinated Biphenyls Spill Cleanup Policy."

(25) 52 FR 25838, July 8, 1987, USEPA, "Polychlorinated Biphenyls; Exclusions, Exemptions and Use Authorizations; Proposed Rule."

C. Support Documents

(26) August 7, 1986 Settlement Agreement filed with United States Court of Appeals for the District of Columbia Circuit, in Docket Nos. 84–1481 and 85–1118.

(27) USEPA, OPTS, EED, Versar, Inc., "Assessment of Exposures Resulting from Recycle/Reuse of Used Oil Containing PCBs at Levels Less Than 50 PPM" (January, 1987).

(28) USEPA, OPTS, ETD, Putnam, Hayes and Barlett, Inc., "PCB Rule Revision, Cost Effectiveness Analyses and Estimates of Exposed Population" (March, 1987).

(29) USEPA, OTS Versar, Inc., "Development of a Study Plan for Definition of PCBs Usage, Wastes, and Potential Substitution in the Investment Casting Industry." (January, 1976).

(30) USEPA, OPTS, ETD, ICF, Inc. "Costs of Prohibiting Reclaimed Investment Casting Wax Containing PCBs Below 50 PPM" (DRAFT) (September, 1985).

(31) USEPA, OPTS, EED, US Congress House of Reps., January 17, 1985 letter from Honorable Ralph Regula to William Prendergast, EPA, forwarding January 10, 1985 letter from constituent, Charles LeBeau, Cambridge Mill Products, Inc.

(32) USEPA, OPTS, EED, Letter from John A. Moore, EPA to Honorable Ralph S. Regula (January 3, 1985).

(33) USEPA, OPTS, EED, "Potential PCDF Formation during Combustion of Used Oil Containing Low Levels of PCBs."

(34) USEPA, OPTS, EED, "Exposure Estimates for the Amendment to the PCB Regulation." (November 20, 1986).

(35) USEPA, OPTS, EED, "Exposure Estimates for the Amendment to the PCB Regulation" (December 23, 1986).

(36) USEPA, OPTS, EED, "A Manual for the Preparation of Engineering Assessments" (September 1, 1984).

(37) USEPA, OPTS, EED, Letter from C. Nelson Schlatter, Edmont Corporation to Dr. John Moore, EPA (October 15, 1984).

(38) USEPA, OPTS, EED, Letter from Dr. John A. Moore, EPA to C. Nelson Schlatter, Edmont Corporation (November 15, 1984).

(39) USEPA, OPTS, EED, Letter from Oswald Schindler, Intermarket Latex Inc. to Martin Halper, EPA (November 13, 1984).

(40) USEPA, OPTS, ETD, "Addendum to the Heat Transfer and Hydraulic Systems RIA" (undated).

(41) USEPA, OPTS, ETD, "PCB Glove Requirement Costs: Present Value" (February, 1987).

(42) USEPA, OW, PCB Information Survey, deink Direct Dischargers by Region and NPDES Permit Numbers (November, 1984).

(43) USEPA, OPTS, EED, Letter from Richard S. Wasserstrom, American Paper Institute, Inc. to Alan Carpien, EPA (October 11, 1984).

(44) USEPA, OPTS, EED, Letter from Richard J. Kissel, Attorney for ADCI and OMC to John A. Moore, EPA (October 24, 1984).

(45) USEPA, OPTS, EED, Letter from Alan Carpien, EPA to Richard J. Kissel, Attorney for ADCI and OMC (November 20, 1984).

(46) USEPA, OPTS, EED, Letter from Timothy S. Hardy, Attorney for CMA to Alan Carpien, EPA (November 27, 1984).

(47) USEPA, OPTS, EED, Letter from Richard S. Wasserstrom, API to Alan Carpien, EPA (August 20, 1985).

(48) USEPA, OPTS, EED, letter from Timothy S. Hardy, Attorney for CMA, to Alan Carpien, EPA (August 28, 1985).

(49) USEPA, OPTS, EED, Letter from Jeffrey C. Fort, Attorney for ADCI and OMC to Alan Carpien, EPA (November 22, 1985).

(50) USEPA, OPTS, EED, Letter From Suzanne Rudzinski, EPA to Timothy S. Hardy, Attorney for CMA (January 21, 1986).

(51) USEPA, OPTS, EED, Letter from Robert J. Fensterheim, CMA to Suzanne Rudzinski, EPA (March 19, 1985).

(52) USEPA, OPTS, EED, Letter from Robert J. Fensterheim, CMA to Suzanne Rudzinski, EPA, June 17, 1985).

(53) USEPA, OPTS, EED, Letter from Suzanne Rudzinski, EPA to Robert J. Fensterheim, CMA (July 17, 1985).

(54) USEPA, OPTS, EED, Letter from Toni K. Allen, Attorney for USWAG, to Lee M. Thomas, Administrator, EPA (August 12, 1986).

(55) USEPA, OPTS, EED, Letter from John A. Moore, EPA to Toni K. Allen, Attorney for USWAG (September 9, 1986).

(56) USEPA, OPTS, EED, Letter from Suzanne Rudzinski, EPA to George Fekete, Jr., Pennwalt Corporation (October 22, 1986).

(57) USEPA, OPTS, EED, Letter to Suzanne Rudzinski, EPA from Paulette Vest, Vest Metal Company (October 22, 1986).

(58) USEPA, OPTS, EED, Letter from Suzanne Rudzinski and John J. Neylan III, EPA to Lt. General Vincent M. Russo, Defense Logistics Agency (August 28, 1986).

(59) NIOSH (1977), Criteria for recommended standard . . . occupational exposure to polychlorinated biphenyls (PCBs). U.S. Department of Health, Education, and Welfare, Public Health Service, Center for Disease Control, National Institute for Occupational Safety and Health, DHEW (NIOSH) Publication No. 77–225.

(60) USEPA, OSW, List of Facilities Who Burn Waste Fuel—Data Request for OPPI/IMS (August 10, 1987).

(61) Lake Michigan Toxic Pollutant Control/Reduction Strategy (Final Draft), May 9, 1986.

(62) USEPA, OW, Development Document for Proposed Effluent Limitation Guidelines and Standards for Control of Polychlorinated Biphenyls in the Deink Subcategory of the Pulp, Paper, and Paperboard Point Source Category (October, 1982).

(63) USEPA, Environmental Monitoring and Support Laboratory, Cincinnati, OH, "Test Method—The Determination of Polychlorinated Biphenyls in Transformer Fluid and Waste Oils" (September 1982).

(64) USEPA, OSW, TAB, Letter from Alvia Gaskill, RTI to Denise A. Zabinski, EPA (November 5, 1987).

(65) USEPA, OSW, "A Risk Assessment of Waste Oil Burning in Boilers and Space Heaters" (January 1984).

(66) USEPA, OSW, EAB, Temple, Barker and Sloane, Inc., "Background Document: Regulatory Impact Analysis of Proposed Standards for the Management of Used Oil" (November 1985).

(67) USEPA, OAQPS, "Waste Oil Combustion Cancer Risk Assessment" (October 1987).

(68) USDOJ/US Court of Appeals, Letter from I.J. Grishaw to G.A. Fisher (August 8, 1986).

(69) USEPA, OPTS, EED, Memo to Rulemaking Record from R. La Shere re: Meeting with W. Gendreau of Pioneer Fuel (September 10, 1987).

(70) USEPA, OPTS, EED, Letter from D.M. Keehner, EPA to Mark Van Putten, National Wildlife Federation (September 11, 1987).

(71) USEPA, OPTS, EED, Memo to Rulemaking Record from Jane Kim, "1984 Survey of State and Regional Permitting Personnel Concerning Limitations on PCB Discharges by Deinking Mills." (October 22, 1987).

(72) USEPA, OW, ITD, Memo from Wendy Smith, to Tom Simons, EED, OPTS, USEPA re: Office of Water Information for Amendments to Uncontrolled Rule (January, 1988).

(73) Ft. Howard Paper Company, Copies of Discharge Monitoring Report Forms for Ft. Howard Paper Company in Muskogee, OK, from January 1985 to May 1987.

(74) Ft. Howard Paper Company, Whole Fish Tissue PCB Study, Ft. Howard Corporation, Muskogee, OK. NPDES Permit No. OK 0034321. Final Report (December 10, 1987).

(75) Ft. Howard Paper Company, Expired and Current NPDES Discharge Permits for Ft. Howard Paper Corporation, Muskogee, OK.

(76) State of Wisconsin, Dept. of Natural Resources, Ft. Howard Paper Company, Green Bay, WI, NPDES Discharge Monitoring from January 1982 to October 1987, WPDES Permit # WI-0001848.

(77) USEPA, ORD, OHEA, Drinking Water Criteria Document for Polychlorinated Biphenyls (PCB's) May, 1987. Prepared for ODW, USEPA ECOA-CIN-414.

(78) USEPA, Region VIII, Comments on the Draft Final Regulation, Titled Polychlorinated Biphenyls; Exclusions, Exemptions, and Use Authorizations Including Information on Startup of Coal Fired Power Plants (March 15, 1988).

(79) USEPA, OTS, EED,CRB, Response to Comments on the Notice of Proposed Rulemaking for Amendments to the Uncontrolled PCB Rule (June 1988).

(80) USEPA, OW, EGD, Development Document for Effluent Limitations Guidelines and Standards for the Pulp, Paper, and Paper Board and the Builders' Paper and Board Mills, Point Source Categories. EPA 440/1-82/025, October 1982.

(81) EPA, OTS, Guidance for Conversion of Water Discharge Concentration-based Standards to Mass Based Limitations for PCBs under TSCA (May 1988).

V. Other Regulatory Requirements

A. Executive Order 12291

Under Executive Order 12291 issued February 17, 1982, EPA must judge whether a rule is a "major rule," and therefore, subject to the requirement that a Regulatory Impact Analysis be prepared. EPA has determined that this final rule is not a "major rule" because it does not meet the criteria set forth in section 1(b) of the Executive Order.

The effect on the economy will be the avoidance of significant costs which would otherwise be incurred if EPA maintained the existing use authorizations for hydraulic and heat transfer systems, which include the Viton glove requirement. Likewise, the rule avoids the substantial costs associated with maintaining existing prohibitions of activities involving products containing low levels (under 50 ppm) of PCB contamination.

No significant increases in prices are expected to occur as a result of this rule. No significant adverse effects are expected on competition, employment, investment, productivity, innovation, or the ability of the United States-based enterprises to compete with foreign-based enterprises.

This rule was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

B. Regulatory Flexibility Act

Section 603 of the Regulatory Flexibility Act (the Act) (15 U.S.C. 601 *et. seq.*, Pub. L. 96-534, September 19, 1980), requires EPA to prepare and make available for comment a regulatory flexibility analysis in connection with rulemaking. The initial regulatory flexibility analysis described the impact of the proposed rule on small business entities. Section 605(b) of the Act "shall not apply to any proposed or final rule if the Agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

In accordance with section 605(b) of the Act, EPA certifies that this rule will not have a significant impact on a substantial number of small businesses. The rule is, in fact, nondiscriminatory in its impact on business entities, and the impact on all business entities is generally to exclude from regulation activities currently prohibited under TSCA section 6(e), and not previously authorized, exempted, or excluded by regulation. Small businesses will share equally in the benefits of this rule, including the elimination of the Viton glove requirement in the use authorization for hydraulic and heat transfer systems, and the general exclusion for products contaminated with PCBs at levels below 50 ppm. Any impact on small business entities is not appreciably greater than the impact already being borne by these entities under the existing prohibition on burning offspecification used oil in nonindustrial boilers. This rule will implement the limited restrictions on burning PCB-containing used oil (under 50 ppm) in a manner such that any additional economic burdens will be borne primarily by the marketers of the used oil.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, authorizes the Director of OMB to review certain information collection requests by Federal agencies. Under OMB Control Number 2070-0008, OMB has approved an information collection request submitted by EPA in connection with the recordkeeping and reporting requirements which facilitate the implementation and enforcement of the Uncontrolled PCBs Rule. Further, under OMB Control Number 2050-0047, OMB has approved the information collection requirements (including invoice shipping papers, certifications, and used oil analysis) which facilitate the implementation of the prohibition on burning certain used oil fuels in nonindustrial boilers. OMB has also approved the provisions of this final rule, which requires that information related to PCBs in used oil fuels be added to the existing information collections previously approved by OMB.

List of Subjects in 40 CFR Part 761

Environmental protection, Hazardous materials, Labeling, Polychlorinated biphenyls, Reporting and Recordkeeping requirements.

Dated: June 8, 1988.

Lee M. Thomas,

Administrator.

Therefore, 40 CFR Part 761 is amended as follows:

PART 761—[AMENDED]

1. The authority citation for Part 761 continues to read as follows:

Authority: 15 U.S.C. 2605, 2607, and 2611; Subpart G also issued under 15 U.S.C. 2614, and 2616.

2. In § 761.1 by adding paragraph (f)(4) to read as follows:

§ 761.1 Applicability.

* * * * *

(f) * * *

(4) Except as provided in § 761.20 (d) and (e), persons who process, distribute in commerce, or use products containing excluded PCB products as defined in § 761.3, are exempt from the requirements of Subpart B of this Part.

3. In § 761.3 by adding and alphabetically inserting a definition for "Excluded PCB products," "Market/Marketers," and "Quantifiable Level/Level of Detection," and by revising the definitions for "Qualified Incinerator" and "Recycled PCBs" to read as follows:

§ 761.3 Definitions.

* * * * *

"Excluded PCB products" means PCB materials which appear at concentrations less than 50 ppm, including but not limited to:

(1) Non-Aroclor inadvertently generated PCBs as a byproduct or impurity resulting from a chemical manufacturing process.

(2) Products contaminated with Aroclor or other PCB materials from historic PCB uses (investment casting waxes are one example).

(3) Recycled fluids and/or equipment contaminated during use involving the products described in paragraphs (1) and (2) of this definition (heat transfer and hydraulic fluids and equipment and other electrical equipment components and fluids are examples).

(4) Used oils, provided that in the cases of paragraphs (1) through (4) of this definition:

(i) The products or source of the products containing < 50 ppm concentration PCBs were legally manufactured, processed, distributed in commerce, or used before October 1, 1984.

(ii) The products or source of the products containing < 50 ppm concentrations PCBs were legally manufactured, processed, distributed in commerce, or used, i.e., pursuant to authority granted by EPA regulation, by exemption petition, by settlement agreement, or pursuant to other Agency-approved programs;

(iii) The resulting PCB concentration (i.e. below 50 ppm) is not a result of dilution, or leaks and spills of PCBs in concentrations over 50 ppm.

* * * * *

"Market/Marketers" means the processing or distributing in commerce, or the person who processes or distributes in commerce, used oil fuels to burners or other marketers, and may include the generator of the fuel if it markets the fuel directly to the burner.

* * * * *

"Qualified incinerator" means one of the following:

(1) An incinerator approved under the provisions of § 761.70. Any level of PCB concentration can be destroyed in an incinerator approved under § 761.70.

(2) A high efficiency boiler which complies with the criteria of § 761.60(a)(2)(iii)(A), and for which the operator has given written notice to the appropriate EPA Regional Administrator in accordance with the notification requirements for the burning of mineral oil dielectric fluid under § 761.60(a)(2)(iii)(B).

(3) An incinerator approved under section 3005(c) of the Resource Conservation and Recovery Act (42 U.S.C. 6925(c)) (RCRA).

(4) Industrial furnaces and boilers which are identified in 40 CFR 260.10 and 40 CFR 266.41(b) when operating at their normal operating temperatures (this prohibits feeding fluids, above the level of detection, during either startup or shutdown operations).

"Quantifiable Level/Level of Detection" means 2 micrograms per gram from any resolvable gas chromatographic peak, i.e. 2 ppm.

* * * * *

"Recycled PCBs" means those PCBs which appear in the processing of paper products or asphalt roofing materials from PCB-contaminated raw materials. Processes which recycle PCBs must meet the following requirements:

(1) There are no detectable concentrations of PCBs in asphalt roofing material products leaving the processing site.

(2) The concentration of PCBs in paper products leaving any manufacturing site processing paper products, or in paper products imported into the United States, must have an annual average of less than 25 ppm with a 50 ppm maximum.

(3) The release of PCBs at the point at which emissions are vented to ambient air must be less than 10 ppm.

(4) The amount of Aroclor PCBs added to water discharged from an asphalt roofing processing site must at all times be less than 3 micrograms per liter (μg/L) for total Aroclors (roughly 3 parts per billion (3 ppb)). Water discharges from the processing of paper products must at all times be less than 3 micrograms per liter (μg/1) for total Aroclors (roughly 3 ppb), or comply with the equivalent mass-based limitation.

(5) Disposal of any other process wastes at concentrations of 50 ppm or greater must be in accordance with Subpart D of this part.

4. In § 761.20 by revising paragraph (a) and the introductory text of paragraph (c), and by adding paragraphs (c) (5) and (e), and the OMB control number to read as follows:

§ 761.20 Prohibitions.

* * * * *

(a) No persons may use any PCB, or any PCB Item regardless of concentration, in any manner other than in a totally enclosed manner within the United States unless authorized under § 761.30, except that:

(1) An authorization is not required to use those PCBs or PCB Items which consist of excluded PCB products as defined in § 761.3.

(2) An authorization is not required to use those PCBs or PCB Items resulting from an excluded manufacturing process or recycled PCBs as defined in § 761.3, provided all applicable conditions of § 761.1(f) are met.

(3) An authorization is not required to use those PCB Items which contain or whose surfaces have been in contact with excluded PCB products as defined in § 761.3.

(4) An authorization is not required to apply sewage sludges, contaminated with PCBs below 50 ppm, to land when regulated by authorities under the Clean Water Act and the Resource Conservation and Recovery Act.

* * * * *

(c) No persons may process or distribute in commerce any PCB, or any PCB Item regardless of concentration, for use within the United States or for export from the United States without an exemption, except that an exemption is not required to process or distribute in commerce PCBs or PCB Items resulting from an excluded manufacturing process as defined in § 761.3, or to process or distribute in commerce recycled PCBs as defined in § 761.3, or to process or distribute in commerce excluded PCB products as defined in § 761.3, provided that all applicable conditions of § 761.1(f) are met. In addition, the activities described in paragraphs (c) (1) through (5) of this section may also be conducted without an exemption, under the conditions specified therein.

* * * * *

(5) Equipment, structures, or other materials that were contaminated with PCBs because of spills from, or proximity to, a PCB Item >50 ppm, and which are not otherwise authorized for use or distribution in commerce under this part, may be distributed in commerce, provided that these materials were decontaminated in accordance with applicable EPA PCB spill cleanup policies in effect at the time of the decontamination or, if not previously decontaminated, at the time of the distribution in commerce.

* * * * *

(e) In addition to any applicable requirements under 40 CFR Part 266, Subpart E, marketers and burners of used oil who market (process or distribute in commerce) for energy recovery, used oil containing any quantifiable level of PCBs are subject to the following requirements:

(1) *Restrictions on marketing.* Used oil containing any quantifiable level of PCBs (2 ppm) may be marketed only to:

(i) Qualified incinerators as defined in 40 CFR 761.3.

(ii) Other marketers identified in 40 CFR 266.41(a)(1).

(iii) Burners identified in 40 CFR 266.41(b). Only burners in the automotive industry may burn used oil generated from automotive sources in used oil-fired space heaters provided the provisions of 40 CFR 266.41(b)(2)(iii) (A), (B) and (C) are met. The Regional Administrator may grant a variance for a boiler that does not meet the 40 CFR 266.41(b) criteria after considering the criteria listed in 40 CFR 260.32 (a) through (f). The applicant must address the relevant criteria contained in 40 CFR 260.32 (a) through (f) in an application to the Regional Administrator.

(2) *Testing of used oil fuel.* Used oil to be burned for energy recovery is presumed to contain quantifiable levels (2 ppm) of PCB unless the marketer obtains analyses (testing) or other information that the used oil fuel does not contain quantifiable levels of PCBs.

(i) The person who first claims that a used oil fuel does not contain quantifiable level (2 ppm) PCB must obtain analyses or other information to support that claim.

(ii) Testing to determine the PCB concentration in used oil may be conducted on individual samples, or in accordance with the testing procedures described in § 761.60(g)(2). However, for purposes of this part, if any PCBs at a concentration of 50 ppm or greater have been added to the container or equipment, then the total container contents must be considered as having a PCB concentration of 50 ppm or greater for purposes of complying with the disposal requirements of this part.

(iii) Other information documenting that the used oil fuel does not contain quantifiable levels (2 ppm) of PCBs may consist of either personal, special knowledge of the source and composition of the used oil, or a certification from the person generating the used oil claiming that the oil contains no detectable PCBs.

(3) *Restrictions on burning.* (i) Used oil containing any quantifiable levels of PCB may be burned for energy recovery only in the combustion facilities identified in paragraph (e)(1) of this section when such facilities are operating at normal operating temperatures (this prohibits feeding these fuels during either startup or shutdown operations). Owners and operators of such facilities are "burners" of used oil fuels.

(ii) Before a burner accepts from a marketer the first shipment of used oil fuel containing detectable PCBs (2 ppm), the burner must provide the marketer a one-time written and signed notice certifying that:

(A) The burner has complied with any notification requirements applicable to "qualified incinerators" (§ 761.3) or to "burners" regulated under 40 CFR Part 266, Subpart E.

(B) The burner will burn the used oil only in a combustion facility identified in paragraph (e)(1) of this section and identify the class of burner he qualifies.

(4) *Recordkeeping requirements.* The following recordkeeping requirements are in addition to the recordkeeping requirements for marketers found in 40 CFR 266.43(b)(6) (i) and (ii), and for burners found in 40 CFR 266.44(e).

(i) *Marketers.* Marketers who first claim that the used oil fuel contains no detectable PCBs must include among the records required by 40 CFR 266.43(b)(6)(i), copies of the analysis or other information documenting his claim, and he must include among the records required by 40 CFR 266.43(b)(6)(ii), a copy of each certification notice received or prepared relating to transactions involving PCB-containing used oil.

(ii) *Burners.* Burners must include among the records required by 40 CFR 266.44(e), a copy of each certification notice required by paragraph (e)(3)(iii) of this section that he sends to a marketer.

(Approved by the office of Management of Budget under OMB control number 2050–0047)

§ 761.30 [Amended]

5. In § 761.30 by removing paragraphs (d) (6) and (7) and paragraphs (e) (6) and (7).

6. In § 761.30, in the introductory text of paragraphs (d) and (e), by revising the reference "paragraphs (d) (1) through (7)" to read "paragraphs (d) (1) through (5)" and the reference "paragraphs (e) (1) through (7)" to read "paragraphs (e) (1) through (5)" respectively.

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June 27, 1988

Part VI

Department of Energy

48 CFR Part 970

Acquisition Regulations on Management and Operating Contractor Purchasing; Final Rule

DEPARTMENT OF ENERGY

48 CFR Part 970

Acquisition Regulations on Management and Operating Contractor Purchasing

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy today adopts a final rule which will provide a standard for purchasing activities of DOE's management and operating (M&O) contractors. The rule is intended to centralize the Department of Energy Acquisition Regulations (DEAR) coverage for M&O contractor purchasing in one subpart; to make that coverage comprehensive; and to update and appropriately alter the existing provisions applicable to M & O contractors.

EFFECTIVE DATE: This rule will be effective July 27, 1988.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Procedural Requirements

A. Review Under Executive Order 12291

This final rule is exempt from review by the Office of Management and Budget under E.O. 12291 of February 17, 1981, pursuant to an exemption for procurement regulations as discussed in OMB Bulletin No. 85–7, dated December 14, 1984.

B. Review Under Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (the Act), 5 U.S.C. 601–612, requires, in part, that an agency prepare an initial regulatory flexibility analysis for any rule, unless it determines that the rule will not have a "significant economic impact" on a substantial number of small entities. This final rule concerns the purchasing policies and procedures used by DOE M&O contractors. While many subcontractors may be small businesses, the proposed rule imposes no significant burdens and will have no significant impact on small entities. Therefore, as required by section 603(b) of the Act, DOE certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities and, accordingly, no regulatory flexibility analysis has been prepared.

C. Review Under Paperwork Reduction Act

No new information collection or recordkeeping requirements are imposed by this final rule. Accordingly, no OMB clearance is required by section 350(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*).

II. Comments on Proposed Rule

A. Publication of Proposed Rule

The Department of Energy issued a proposed rule (52 FR 30997, August 18, 1987) announcing its intention to revise that portion of the Department of Energy Acquisition Regulation (DEAR) dealing with management and operating contractor purchasing. Comments were requested through October 2, 1987.

In response to the proposed rule, the Department of Energy received 14 sets of comments. Of those all but two were either from the Department's management and operating contractors or its operations offices. Of those two sets of comments one was received from the Office of Federal Procurement Policy, and the other was from the Canadian Embassy.

The comments received, along with the responses thereto, are as follows:

B. Discussion of Comments Received

1. General

General comments were received covering either portions of the preamble or issues not related to any specific provision of the proposed rule. This preamble will not address the comments that relate to the proposed rule's preamble since none have pointed out any inaccuracies or omissions, and the preamble is not regulatory in nature. The remaining general comments were made by one commenter. We respond to each as follows:

a. The commenter stated that the numbering system of 970.50 as it was proposed "does not track" with the relevant FAR or DEAR Parts, making it "more difficult to find the subsection in the FAR when using the DEAR, or vice versa." We, of course, are aware that the numbering system within the proposed rule, specifically within 970.5004, does not reflect the FAR numbering scheme. We believe this subpart to be sufficiently short to minimize any negative effects of the numbering system.

We have noted, however, that our selection of 970.50 as the number for this subpart may have been misleading. By using the numbering system of the remainder of Part 970, the use of Subpart 970.50 suggests that its subject matter should be extraordinary contractual actions as such actions relate to management and operating contracts, it is not. Therefore, we have chosen Subpart 970.71 as the new designation. From this point forward in this preamble all references will be to the new numbering system as opposed to that of the proposed rule.

The preamble of the proposed rule (52 FR 31000 August 18, 1987) contained a redesignation table to show the new location of material that existed throughout 970. Since the only change to that table as a result of the new subpart numbering is that the two digits following the decimal point in the "New Section" column will be "71" rather than "50," we are not republishing the redesignation table.

b. "Make-or-Buy should be covered * * *." We have altered 970.7104–8 to provide guidance on this subject.

76. "Coverage should be included concerning the relationship between DEAR 970 and the various DOE/M&O operating contracts." We believe the proposed rule to be clear that 970.71 establishes a baseline which Heads of Contracting Activities (HCAs) and contracting officers will follow in their oversight of M&O contractors. It is the standard that M&O contractors are required to meet. It does not, however, directly regulate M&O contractors. The clause at 970.5204–22 is intended to assure M&O contractor cooperation in achieving this standard. That clause should be added at the time of the annual fee negotiation but no later than the extension of an existing contract or the award of a new contract.

d. "Several sections of the subject document make reference to DOE Orders * * * If these Orders are to be applicable to M&Os, they should be incorporated into future operating contracts." Various DOE orders are referenced in 970.71. Again, this subpart establishes the standard upon which the cognizant DOE contract administration personnel judge the various aspects of performance of an M&O contrator. While practice may vary, management and operating contracts contain a provision(s) that allows for DOE

contracting officers to pass on to the contractors the requirements of appropriate DOE orders; therefore, individual orders need not be identified in M&O contracts.

2. Specific

At 970.7101(a) of the proposed rule, one commenter suggested that the phrase "as authorized pursuant to FAR Subpart 17.6" be inserted at the end of the first sentence. This has not been done because, while FAR Subpart 17.6 does recognize the concept of management and operating contracts, the Department of Energy used such contracts, based upon authorities arising principally from the Atomic Energy Act, long before the FAR was promulgated. A statement such as that suggested is unnecessary and may make it appear that DOE is relying upon the FAR as its sole authority for entering into management and operating contracts.

The same commenter suggested that the word "corporate" in the second sentence of 970.7101(b) be replaced with a more generic word like "organization" to more clearly encompass the diverse entities that are management and operating contractors. We have adopted this comment. Also, a typographical error has been corrected in the second sentence of 970.7101(b).

At 970.7102(a) one commenter has suggested rewording the qualifying phrase of the parenthetical phrase, i.e., "(For the purposes * * * Head of Contracting Activity alone.)" We have adopted this comment. That commenter also suggested that the approval of M&O-developed qualified products lists, etc., at 970.7104–9(b), be delegable. Because of the effects of such lists on competition, we believe it important to retain the approval at the Head of Contracting Activity level. We have, however, added 970.7104–28(f)(1) to the list. That provision provides for HCA authorization of certain A–E and constructor relationships, indicative of a conflict of interest. That commenter has also suggested substituting "general" for "day-to-day" in the last sentence of this section because of its being, in the commenter's opinion, more in keeping with the contracting officer's oversight role insofar as M&O contractors are concerned. We have not made this change. Oversight by the contracting officer within the context established by this final rule must be a day-to-day matter.

At 970.7102(b)(1) seven commenters took exception to the requirement for a review of the contractor's purchasing system and methods every three years. Three suggested that once every five years would be appropriate. The other four would delete the requirement or make it coincide with the cycle for or be a part of Contractor Purchasing System Reviews (CPSRs). The duration of a CPSR is normally no longer than two weeks. That time must be spent in reviewing purchase files, assessing individual transactions, and identifying any systemic weaknesses. The time period allotted for a CPSR does not allow sufficient time for the review team to also perform the detailed review of a contractor's entire purchasing system and methods, as required by 970.7102(b)(1). We have changed this provision to provide for a review at the time of contract award or contract extension.

Four comments were received with regard to 970.7102(b)(2). Two commenters recommend the insertion of "and approval" after "review." We have adopted the substance of these comments. Another commenter expressed a concern over the subjective nature of "substantive impact." We believe that "substantive impact" imparts the intended threshold of review. Any such adjectival description will be subjective in nature. Therefore, we have not changed this provision. The same commenter wondered if the term "subcontracting practices" suggests a subtle distinction as opposed to "purchasing practices" or "purchasing methods." We have, therefore, substituted "purchasing system and methods." The same commenter has also questioned whether "one-time changes ('deviations')" are intended to be encompassed by this provision. The answer is that the "changes" intended here are those to the written description of the contractor's purchasing system and methods. This provision would, therefore, not encompass transactional deviations. Other provisions of this subpart, e.g., 970.7102(b) and 970.7108, may result in DOE review of transactional deviations.

At 970.7102(b)(4) one commenter has suggested that the phrase "contractor's management of the purchasing function" is limiting, and "purchasing" should be changed to "acquisition." We have inserted "all facets of" after "contractor's management of" to assure that CPSRs include planning, receiving, inspection, cost analysis, etc.

The same commenter has suggested, at 970.7102(c), the insertion of a phrase that provides for the M&O contract to have a higher priority should its provisions conflict with this subpart. We have not made such a change. This subpart is intended as direction to DOE HCAs and contracting officers, governing their oversight of M&O contractor purchasing activities. Contractors will be required by the clause at 970.5204–22 to cooperate with the DOE contracting officer and bring their purchasing systems and methods into conformity with Subpart 970.71.

At 970.7103 (b) and (c) we have at our own initiative made minor wording changes to better reflect the roles of the HCA and the DOE contracting officer in administration of management and operating contracts. References to 970.7103(c) below reflect the addition of a new paragraph (c), which was originally proposed as paragraph (b).

At 970.7103(c)(1) a commenter has suggested the insertion of "delivery schedule" after "quality." We have added "timely and" before "efficient" in recognition of this comment.

At 970.7103(c)(3)(i) one commenter believed "and in adequate time" to be redundant considering 970.7103(c)(3)(viii). We disagree. The time consideration at 970.7103(c)(3)(i) deals with planning and timely submission of the requirement to the M&O's purchasing office, while at 970.7103(c)(3)(viii) the concern is the amount of time allowed for receipt of proposals to assure an effective competition. Another commenter has questioned this subsection, noting a Federal preference for "performance requirements." This subsection is intended to result in as complete a description of the requirement as is possible, whether by detailed specifications or performance specifications.

At 970.7103(c)(3)(v) one commenter suggests inserting "for a resonable time" after "solicitation." We do not believe the change is necessary, particularly in light of 970.7103(c)(3)(viii). The same commenter suggests changing "and" before "(B)" to "and/or." In order to make clear the intended meaning, we have moved the phrase "as appropriate" to follow "(B) use." The same commenter has also questioned whether "in the local area" is not "overly restrictive." We believe that phrase makes it clear that when an adequate number of qualified sources are located in the local area, solicitation of those firms is sufficient to satisfy the duty to publicize the requirement.

At 970.7103(c)(3)(vi) one commenter suggested changing "equal access" to "uniform access." We have not made the change, believing "equal access" more descriptive of our intended meaning.

At 970.7103(c)(3)(vii) a commenter suggested substituting "fair and reasonable" for "Government's best interest." We have not made the change. We believe that there is a difference,

from a business standpoint, between acquiring goods or services at a "fair and reasonable" cost or price and acquiring them at a cost or price that is in the M&O contractor's customer's (the Government's) best interest, the latter being a more demanding standard. This is the case even though M&O contractors are not purchasing agents for DOE.

At 970.7103(c)(3)(xi) one commenter has questioned the phrase "all potential proposers," stating the provision as written "seems unnecessarily restrictive in view of the more liberal approach of [Federal Acquisition Regulation] 15.606(b)." We disagree with the observation but have altered the wording for the sake of clarity, substituting "all firms that received a copy of the solicitation or, after the due date, all firms submitting a proposal."

At 970.7103(c)(3)(xii) one commenter states that "'clarification' should not be considered as a part of 'negotiation.'" The relevant portion of this provision has been rewritten to reflect that a management and operating contractor's purchasing system and methods may provide for the contractor's clarifying ambiguities in a given offeror's or offerors' proposal(s) without the need to undertake negotiations with all the proposers then under consideration for award, where other proposals contain no ambiguities, and the integrity of the purchasing process is maintained.

At 970.7103(c)(3)(xiii) one commenter has suggested that we include a reference to the Department of Defense (DOD) Debarred List. Any debarments and suspensions by DOD should appear in the GSA Consolidated List of Debarred, Suspended, and Ineligible Contractors, the purview of which is Government-wide. Three other commenters have suggested the substitution of "responsible" for "capable." We have purposely avoided, to the extent possible, the use of terms of art in Federal procurement, believing their use in the context of M&O purchasing could result in the imposition of many detailed Federal procurement concepts upon the Federal norm. See preamble to the proposed rule at 52 FR 30998, 30999 (Aug. 18, 1987). Here and elsewhere, we have attempted to use words that express the substance of the Federal concept without the attendant obligations that have evolved by case law or regulation.

At 970.7103(c)(4) one commenter questioned the extent to which clauses otherwise required may be omitted when making small purchases, particularly in light of "purchases on an oral contract basis." We believe the proposed provision to be sufficiently clear and, from a policy standpoint, complete. Certainly oral contracts should be entered into cautiously assuring a fail-safe system of contract terms, order, receipt, inspection, payment, and other concerns. We believe that these issues can be dealt with in an M&O contractor's purchasing system and methods and reviewed and approved by the cognizant DOE contracting officer.

At 970.7103(c)(5) two commenters stated that the last sentence is too restrictive, seeming to require the use of the *Commerce Business Daily*. We have changed the provision to make it clear that publication of appropriate requirements in the *Commerce Business Daily* is one method that may be used to promote participation by the described types of business concerns.

At 970.7103(c)(7) one commenter has questioned whether application of the FAR cost principles to subcontracts is intended to result in direct dealing between the subcontractor and the Government contracting officer. In this provision the M&O contractor's relationship with its subcontractor(s) is not intended to be any different from the relationship between a non-M&O contractor with its subcontractor(s). No direct relationship between the subcontractor and the Government is intended. In awarding and administering its subcontracts, the M&O contractor is expected to exercise the discretion in matters relating to the cost principles reserved by the FAR for the Government contracting officer in Federal prime contracts.

At 970.7104 we have added a sentence at our own initiative which requires contracting officers to assure that M&O contractors' purchasing systems and methods provide for appropriate alteration of required FAR and DEAR clauses to reflect the relationship of the parties.

At 970.7104–2 one commenter has suggested the substitution of "970.7104–9" for "970.0407." We have adopted this change.

At 970.7104–7(a) one commenter recommends deletion of the list of DEAR and FPMR authorities for purchase of the listed special items because, according to that commenter, the noted citations refer in many cases to directives which have expired, have been superseded, or no longer apply for other reasons. We have made no change but will undertake a study to ascertain whether the primary guidance should be revised.

At 970.7104–8 one commenter has requested a more definitive statement of what should be subjected to lease versus purchase analysis. We believe that this is a matter to be addressed by the M&O contractor in its proposed procedures, which would be reviewed and approved by the cognizant contracting officer, except for establishment of thresholds for application which are to be approved by the HCA. As noted earlier in this preamble, we have added a paragraph (b) to discuss the decision to make goods or perform services in house versus acquiring them by purchase and have retitled the subsection to reflect this change.

At 970.7104–9(b) two commenters questioned the provision, one requesting more detailed guidance and the other recommending the delegation of the requirement relating to HCA approval prior to the use of some form of qualified list. We have made a change to emphasize the need for both the M&O and the DOE officials responsible for oversight to periodically review any such lists to delete items that are no longer subject to the concerns for which they were originally included in the list.

At 970.7104–10 four commenters have questioned the proposed coverage, each essentially recommending some form of greater reliance on the M&O determination of the likelihood of potential organizational conflict of interest in its subcontracting. We have not altered the proposed coverage. The DOE contracting officer is the only individual authorized to analyze the likelihood of an organizational conflict of interest. These provisions affect only subcontracts falling into one or more of the classes described at 909.570–5(a).

One of those commenters also noted that application of DEAR organizational conflict of interest (OCI) provisions to "consultants" as well as subcontractors results in OCI requirements which overlap and conflict with the requirements at 970.2272, "Conduct of employees and consultants of DOE management and operating contractors." We believe that the provisions, in fact, do not conflict though they may in certain limited circumstances overlap. The organizational conflict of interest provisions at 970.7104–10 apply to subcontracts for specific types of services, whether performed by "subcontractors" or "consultants," the latter term merely being a subset of the former.

The coverage at 970.2272 applies to management and operating contractors' employees, in their capacities as M&O contractor employees and as outside consultants. Portions of it also apply to outside consultants hired by the M&O as "special employees" or subcontractors. Paragraphs (c), (d), and (g) of 970.2272,

in the case of consultants subcontracted for by an M&O contractor, cover similar concerns as are treated by portions of the organizational conflict of interest provisions of 909.57. Therefore, we do not believe that the provisions conflict.

At 970.7104–11 one commenter has suggested that cost or pricing data should be required only in the case of noncompetitive subcontracts and that this requirement is subject to OMB clearance under the Paperwork Reduction Act. By statute, cost or pricing data are required for contracts and subcontracts in the absence of "adequate price competition," not merely in the case of noncompetitive purchases. See Pub. L. 98–369, Title VII, section 2712. Paragraph (b) has clearly excluded from the requirement for cost or pricing data those situations in which there is adequate price competition. This requirement's coverage is merely restating, at the new location, coverage already existing at 970.1508–1, which has previously been subjected on OMB's Paperwork Reduction Act review.

At 970.7104–12 one commenter has suggested that this subsection not contain mandatory provisions but rather that the listed provisions merely be used to establish a guideline. We disagree and have made no changes. At 970.7104–12(a) another commenter has suggested that the provision concerning "unilateral initiation of small business set-asides" be rewritten so as to remove any implication that those set-asides should be initiated. We disagree. The FAR at 19.502–2, one of the citations listed, establishes the criteria for establishing small business set-asides. M&O contractors are expected to base their decisions to unilaterally set a requirement aside on those criteria.

At 970.7104–12(b) a commenter has suggested that the phrase "questions concerning small disadvantaged business * * *" be altered so as not to result in an overly broad interpretation causing the referral of unnecessary questions to the Small Business Administration. We agree and have made the language more focused. At 970.7104–12(c) two commenters recommended that the small purchase class set-aside remain at $10,000 in accord with current coverage at 970.1901(c). We have chosen to continue to reflect the Federal small purchase set-aside threshold as stated in the proposed rule.

At 970.7104–12(d) a commenter has suggested qualifying the $3,000,000 construction class set-aside threshold by making provision for firms with "sufficient financial capabilities." We have not made the change. Any firm selected must have sufficient financial capabilities whether under a set-aside or an unrestricted solicitation. That concern is merely one of many very important considerations that result in an M&O contractor's being able to affirm that a prospective awardee is capable of performing the work.

At 970.7104–12(e) one commenter has suggested an alternative method of providing for a set-aside program for small disadvantaged businesses. In support of its position the commenter states that the proposed set asides may detract from opportunities for small businesses and woman-owned businesses and that determining a fair and reasonable price with limited competition may be more difficult. We have made no changes. We believe that there are sufficient subcontracting opportunities for all kinds of businesses. We also believe that the M&O contractors can determine whether a fair and reasonable price has been offered. Further, this provision established a procedure that is discretionary, not mandatory.

At 970.7104–12(g) four commenters have suggested that the utilization reports be required semi-annually, rather than quarterly. Paragraph 12(g) merely reflects the provision at 952.219–9 which modifies the clause at FAR 52.219–9. The FAR clause requires contractors to submit the SF 294 semi-annually and the SF 295 quarterly. The DEAR modification deletes the requirement for the SF 295 entirely but requires the SF 294 to be submitted quarterly. Paragraph 12(g), therefore, is stating what M&O contracts should already require. Furthermore, this requirement is not new. Paragraph 12(g) is the restatement of the current provision at 970.1901(f). We have made no change.

At 970.7104–16 one commenter would like to have M&O contractors furnished with Davis-Bacon wage determinations. The determinations are published periodically in the **Federal Register** or are otherwise available from the Department of Labor. We have deleted reference of FPR Temp. Reg. 70 as a result of the publication of Federal Acquisition Circular 84–34. Another commenter was concerned that these provisions may be "redundant" considering similar provisions in the FAR. That same commenter has made a similar observation with regard to 970.7104–21 (environmental and occupational safety and health programs); 970.7104–22 (Buy American Act); 970.7104–24 (bonds and insurance); 970.7104–26 (taxes); and 970.7104–28 (construction and A/E contracts). This coverage is not redundant. It adopts or reflects the applicability of certain portions of FAR coverage in the subcontracting practices of M&O contractors. We believe the commenter apparently did not consider that the FAR regulates prime contracts awarded by the Federal government. The proposed rule and this final rule are intended to provide a comprehensive baseline by which DOE personnel will oversee the subcontracting activities of DOE management and operating contractors.

At 970.7104–22 one commenter has suggested raising the Procurement Executive's approval threshold to $100,000. We have not adopted this comment. A second commenter has suggested a revision of the penultimate sentence of paragraph (c) to correct an omission. We have added "the period of effectiveness" to the list of items which must be specified on the authorization and have otherwise clarified this portion of paragraph (c).

A third commenter has questioned entirely the application of the Buy American Act to the subcontracting practices of DOE's M&O contractors. The Buy American Act does not apply *per se* to contractors. However, 41 U.S.C. 10a provides that "[o]nly such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use." Therefore, since all purchases of goods by management and operating contractors are for carrying out the Department's mission, the purchases of those contractors are to be made in accordance with the Buy American Act. Therefore, we have changed "through" in the first sentence to "as reflected in" to communicate the statutory nature of this requirement. The activities of DOE are exempt from the General Agreement on Tariffs and Trade.

At 970.7104–24 one commenter has made four comments suggesting specific word changes to assure that it should be the first tier subcontractor, not the prime management and operating contractor, that is obligated by the Miller Act (40 U.S.C. 270a–270f) to provide performance and payment bonds.

We have made minor word changes in this provision to reflect what we believe to be the reality of application of the Miller Act to the circumstance when a management and operating contractor awards a contract for the construction,

alteration, or repair of federally owned premises. Apparently some first-teir subcontractors have defended their claims brought under performance and payment bonds which were required under their subcontracts by alleging that the Miller Act obligations are the responsibility, not of the subcontractor, but of the prime management and operating contractor, particularly where the M&O is a construction manager.

Our analysis is as follows: First, we believe that the Miller Act will apply in this circumstance since the work to be performed under the subcontract will be for "the construction, alteration, or repair of any public building or work of the United States." We also believe that it is the subcontractor, not the management and operating contractor, that fits the definition of "contractor" within the Act. The "contractor" is that party who receives the award in excess of $25,000 for the construction, alteration, or repair of any public building or public work of the United States.

Our revisions reflect the obligation of the DOE contracting officers to assure that management and operating contractor's purchasing systems and methods provide for M&O contractors' acquiring from their first-tier construction subcontractors performance and payment bonds that are consistent with Miller Act. It is our intention that this obligation reflect not only DOE's opinion about the application of the Act but that the requirement is also levied as a matter of policy. Should a court hold in some other manner as to the application of the Miller Act, the performance and payment bonding requirements will remain.

At 970.7104–24(a)(1) one commenter has suggested inserting "construction" before "subcontracts under cost-reimbursement type subcontracts." We have adopted this comment. Another commenter has suggested adding "or equal" after "Standard Form 25." We have not adopted this comment. The SF 25 is readily available, provides a uniformity of approach in this particularly important area, and has been proven by the test of time. A third commenter, a current M&O contractor, states in relation both to 970.7104–24 and 970.7104–25 that as it does more work involving environmentally hazardous materials, its subcontractors are unable to acquire a comprehensive general liability policy "for bodily injury and property damage caused by the actual or threatened release of pollutants." It says that as a result it is receiving "an increasing number of requests for indemnification from potential subcontractors." As a result it recommends that DOE initiate a process to provide indemnification under Pub. L. 85–804 for a class of subcontractors, i.e., "those performing remedial work under designated programs." This comment and its proposed action are well beyond the scope of this rulemaking. Any such policy change is a decision to be made by the Department's senior management. This regulation would be one place a change in procedure should be reflected but any substantive action must be undertaken, analyzed, and addressed by other elements of DOE.

At 970.7104–25 one commenter has opined that the coverage as to indemnification should be "reviewed by the Department of Justice." The coverage at 970.7104–25 of the proposed rule merely referred the reader to 970.2870 wherein the DEAR discusses the coverage given to M&O contractors pursuant to the Price-Anderson Act. DEAR 970.2870 then provides a clause, entitled "Statutory Indemnity," that is to be used in appropriate M&O subcontracts which clause merely recites for the subcontractor the protection which the Price-Anderson Act may provide it in the case of nuclear incident. DOE is not creating any systemic policy on indemnification.

At 970.7104–25 we have at our own initiative changed the reference to 970.2870 to specify paragraphs (f) and (g) of that section which pertain to indemnification of subcontractors. This was done for the sake of greater accuracy but also because, at the time of publication of this final rule, certain other portions of 970.2870 are no longer effective due to the expiration of the Department's authority to enter into indemnity agreements with prime contractors under the Price-Anderson Act. Paragraph (f) and (g) of 970.2870, however, are still valid as to subcontractors of those M&O contractors which currently hold Price-Anderson indemnification agreements executed prior to the expiration of the Department's authority. We intend to make appropriate changes to 970.2870 at such time as DOE's Price-Anderson indemnification authority is re-authorized.

At 970.7104–28(a), in the first sentence, "assume" has been corrected to "assure." At 970.7104–28(b) one commenter has suggested inserting the phrase "by the M&O contractor" after "prepared" to assure that it is understood that the M&O itself may prepare the independent estimate. We have altered the provisions of this subsection in another way to achieve the intended meaning.

At 970.7104–28(c) another commenter has suggested the deletion of this subparagraph in its entirety, believing that this requirement for the use of uniform design considerations in planning DOE facilities "defeats the intent of utilizing the management and operating contractor's experience, expertise and initiative under its prime contract" and that the responsibility for "preparation of specification does not reside in the purchasing activity." We disagree. Because of the many DOE locations, the disparate types of facilities to be modified or constructed and the extensive expertise involved, we believe there must be a uniform baseline for the preparation of specifications and the organization of construction in the planning and execution of the work. This provision must remain because specifications are a necessary part of the purchase of A–E and construction work. We have, however, edited the language of paragraph (c) to make it clearer.

At 970.7104–28(d) a commenter has recommended the addition of the phrase "or a comparable agreement form approved by the contracting officer." The commenter states that to do so would allow "for lease or rental of other equipment as well." Because of the context and title of this provision, it would be unlikely that the commenter's intention would be achieved by the suggested change. In any event we are not making a change to this provision because the standard agreement has proved itself over time.

At 970.7104–28(e) a commenter interprets the provision as ambiguous, stating, on the one hand, that a contractor's system "must reflect the essence of the Act" while, on the other hand, it "does not preclude the consideration of other factors * * *" The last sentence of this paragraph has been revised to prevent any such ambiguity.

At 970.7104–28 (f)(1) and (f)(1)(i) through (f)(1)(iii) we have at our own initiative revised the descriptions of situations in which conflicts of interest in architect-engineer and construction subcontracts may arise as to billing of costs or self-inspection. We have deleted the second sentence of 970.7104–28(f)(1), believing it to be generically descriptive of a situation that could have been presented in the examples that followed, but offering no remedial guidance. We believe that with the revisions to 970.7104–28(f)(1)(i) through (f)(1)(iii), the sentence is no longer needed. We have deleted paragraph

(f)(1)(iii), believing changes we have made to (f)(1)(ii) incorporate its meaning. We have revised paragraph (f)(1)(ii) to describe as simply and clearly as we can, the situations that give rise to a self-inspection concern. We have also renumbered the modified paragraph to become (f)(1)(i). We have inserted the phrase "for different projects" in the first sentence of what was paragraph (f)(1)(i) and have renumbered it as paragraph (f)(1)(ii). It is, we believe, descriptive of the concern over conflict of interest in charging costs. Finally, we have renumbered paragraph (f)(1)(iv) to (f)(1)(iii) to reflect the deletion of paragraph (f)(1)(iii) as it was in the proposed rule.

At what was 970.7104–28(f)(1)(iv), now (f)(1)(iii), a commenter objects to the requirement for a subcontractor's accepting liability for consequential damages as a condition to the use of a "turnkey contract." We believe this condition to be appropriate where the subcontractor has been responsible for both the design and the construction of a facility. The same commenter has correctly noted our failure to include "sub" before "contract," "contractor," and "contracts" as those terms appear in this subparagraph.

At 970.7104.30(b) one commenter suggests deletion of the phrase "such as Allowable Costs and Property" in the last sentence stating that, by that commenter's reading, the last sentence implies that the terms of the M&O contract should take precedence over the terms of the subcontract. We have made a change to reflect this comment. The revised last sentence should result in M&O contractors' writing their subcontracts in such a way that subcontracts will be no less demanding than the M&O contract itself. A second commenter questions whether it is intended that, when subcontracts are terminated for any reason other than the termination of the prime M&O contract, the termination provisions of FAR Part 49 governing subcontracts, rather than prime contracts, should govern. It is intended that, where the subcontract termination(s) result from the termination of all or a portion of the prime management and operating contract, the subcontract provisions used by M&O contractors will be in conformity with the noted FAR subparts otherwise governing termination in Federal prime contracts. Where the subcontract termination(s), either for default or convenience, are not as a result of a termination of the prime, the M&O is provided greater discretion, e.g., "general conformity," in designing its subcontract termination provisions. In the interest of avoiding unnecessary duplication we have deleted the first sentence of paragraph (b) and have also altered the fourth sentence from the end of that paragraph by changing "may" to "shall."

At 970.7104–31 a commenter has suggested deletion of "such" before "Government sources of supply." We have made this change.

At 970.7104–33 one commenter states that the provision in the proposed rule "is confusing because of differences in the requirements of FAR Part 30, which is intended to apply to Government agencies, and the requirements specified in the Administration of Cost Accounting Standards clause contained in an M&O contract." We disagree and have made no change. The requirements for covered subcontracts are the same as those for Federal prime contracts.

At 970.7104–36 a commenter asks why the reference for acquisition of real estate is to Subpart 917.74, which is more demanding than the clause at 952.217.70 intended for contracts, including management and operating contracts, in which real estate may be purchased or leased. The clause at 952.217–70 is intended to be included in contracts "where contractors acquisitions are expected to meet the criteria specified in [Subpart 917.74]." The clause requires contracting officer approval prior to the acquisition, lease or disposal of real property. The coverage at Subpart 917.74 is intended to guide the contracting officer in processing any such request. Section 917.7402 provides a procedure for making a request. It is possible that no real property acquisition, lease, or disposal would be foreseen at the time of award or extension of a contract, causing the clause to be omitted. In such cases the final rule provides the necessary direction for the M&O contractor's system and methods to call for submission of a request. Whether the requesting contractor is an M&O or not, the procedure at 917.74 is to be followed in documenting the proposed acquisition and in gaining the contracting officer's approval.

At 970.7104–43 two comments were received. The first commenter finds this provision, as written, misleading and confusing. Its recommendation for correction is to rely upon the criteria for an M&O contractor's property subcontracting practices stated at 41 CFR 109–1.5201(c), the DOE Property Management Regulations. The other commenter would substitute "inconformity with the policies and principles in" for "consistent with." Both comments suggest that the current provision calls for strict compliance with the Federal standard stated at FAR Part 45. That is not our intention. In analyzing these comments we have also noted a failure to consider existing property coverage of the DEAR and the DOE Property Management Regulations. Therefore, we have altered the proposed provision to recognize the merits of both comments and to correct our oversight.

At 970.7104–45, Anti-Kickback Enforcement Act of 1986, we have brought the governing FAR citations up to date.

At 970.7104–46 we have added a provision to reflect the existing requirement of 932.803. Contractors are not obligated by the Assignment of Claims Act and, therefore, need not allow such assignment; however, in instances in which they do, they must deal with right of setoff as provided at 932.803.

At 970.7104–47 two comments were received. One recommends word changes intended to make it clear that the listed clauses are merely examples and that other clauses by their provisions may require flowdown or extension. The other commenter suggests the addition of the Accounts, Records, and Inspection clause at 970.5204–9.

We have not adopted the first comment. There is no intent to bar or limit the flowdown effect of clauses included in any management and operating (prime) contract. The provisions in 970.7104 are intended to establish the minimum requirements that any such contractor must meet in formulating its purchasing system and methods. The list of clauses at 970.7104–47 is merely a recognition of the flowdown or extension requirements of certain clauses required in M&O contracts. Those clauses require no additional guidance or further discussion, so they have merely been listed. If other clauses in the prime contract require flowdown by their terms, the fact that they are not listed does not limit their effect. We have adopted the second comment after assuring that the clause at 970.5204–9 is a required management and operating contract clause. It does provide for flowdown.

At 970.7105 one commenter stated that the proposed coverage needs to be clarified. First, it recommends that the method of purchase from contractor-affiliated sources be left to the HCA. We disagree. These types of purchases, because of the opportunity for favoritism, must be no less regulated than a normal competitive transaction.

In fact, we believe that such purchases must be more strictly regulated.

Secondly, in relation to 970.7105 the same commenter questioned the conditions of allowability of costs incurred in the transactions described at 970.3102–15(b). Those provisions place restrictions on the price a contractor-affiliated source may be paid. We do not now intend to make any substantive change to 970.3102–15(b).

At 970.7105(a)(1) another commenter has questioned the meaning of "independent" as used in this paragraph. It asks whether two divisions are "independent" if both "are controlled by the same parent corporation." The use of "independent" in this paragraph relates to the M&O purchasing function, not whether the contractor-affiliated source is a separate corporation. Therefore, so long as the M&O purchasing function is not doing work for, or is part of, the contractor-affiliated source, this provision would not be violated.

At 970.7105(c) a commenter questioned the conditions governing the allowability of capital cost of money in purchases from a contractor-affiliated source, e.g., with respect to the extent of competition. This regulation is intended to limit the potential conflicts that can occur when an M&O contractor contracts with an affiliated source.

At 970.7107 two comments were received. One commenter suggests inserting "calendar" after "10" and before "days" in paragraph (e). This is what was intended by the regulation. We believe that unless days are described as "business days," rules of regulatory and statutory interpretation call for days to be computed as "calendar days." Therefore, we have not adopted this comment.

The second commeter has noted that the statement about the applicability of the cost recovery provisions of the Competition in Contracting Act to protests involving M&O subcontract awards at paragraph (f) "conflicts with reent [Comptroller General] decision B–227091." The provisions of 970.7107 are essentially a republication of a separate rulemaking that culminated in the final rule published at 51 FR 31339 (September 3, 1986). Until thoroughly argued and decided to the contrary, we will retain the provision as it appeared in the proposed rule.

At 970.7108 one commenter stated that paragraph (a) is not consistent with 970.7102(b)(3). We have compared the two provisions. They are part of the same process, i.e., the HCA's setting the individual transaction review thresholds in 970.7108(a) and ensuring reviews are carried out as part of the basic DOE oversight responsibility in 970.7102(b)(3). We see no inconsistency.

At 970.7108(g) another commenter expressed a concern that the duty of an M&O contractor to document purchases in writing "will eliminate the administrative benefit of placing oral purchases." We will not make any change in this provision. There must be a record of a purchase no matter how "paperless" one intends to design a system. This admonition does not state that oral purchases may not be made by an M&O contractor. It does say that the order must be documented, which we believe is an absolute necessity for any large purchasing activity.

In a second similar comment with regard to 970.7108(h) the same commenter suggested that record retention be limited to six months or such longer period as determined by the contracting officer. We totally disagree. Many portions of the purchase transaction are barely complete in terms of audit responsibility even six months after completion. For instance, such a period would limit the ability of a contractor purchasing system review team to evaluate a purchasing system. This comment also conflicts with paragraph (d) of the clause at 970.7104–9 entitled Accounts, Records, and Inspection. We have not adopted the comment.

At 970.7109 one commenter stated that it considers the requirement for advance notice of award in the case of "fixed price-type subcontracts which exceed $25,000" of paragraph (a)(2) to be "not economically prudent where an M&O contractor has an approved procurement system." This requirement is a recitation of the requirement of section 304(b) of the Federal Property and Administrative Services Act of 1949, as amended. The commenter should, however, take note of paragraph (b) in which the "non-impairment" authority of section 602(d)13 of that Act provides an exemption from the requirement for advance notification with regard to purchases involving "functions derived from the Atomic Energy Commission."

At 970.7109 (a) and (c) a second commenter has questioned whether the advance notice should be submitted "prior to solicitation or after award." It also questioned to whom the notice should be directed. We have added the phrase "to the contracting officer" following "advance notice" and have inserted "proposed" before "award" in paragraph (a) to clarify these points.

A third commenter has stated it believes that paragraph 970.7109(a) conflicts with the HCA's authority to establish thresholds below which M&O contractors need not submit a proposed subcontract award for consent in 970.7108(a). There is no conflict. The requirement for advance notice in 970.7109(a) is a statutory requirement. Consent or approval of such transactions is not required. The requirement for consent or approval by the HCA in 970.7108(a) and 970.7102(b)(3) is a matter of contract administration similar to those of the "Subcontracts" clause at FAR 52.244–2.

At 970.7109(b) another commenter questioned how "an M&O contractor could determine which functions of DOE are considered to be derived from the Atomic Energy Commission." This is a matter that the contractor may resolve with the cognizant contracting officer where there is any doubt; however, that phrase, we believe, communicates the intended meaning, i.e., functions that would have been performed by the Atomic Energy Commission under its authorities in atomic and nuclear missions, particularly pursuant to the Atomic Energy Act of 1954, as amended.

At 970.7109(c) a commenter questioned the use of the phrase "anticipated competition." The point is well taken. We have deleted "anticipated."

With regard to the revision of the contractor purchasing system clause at 970.5204–22, two comments were received. Both comments questioned the last sentence in paragraph (b) wherein it is stated that, "[s]ubcontracts shall be in the name of the contractor and shall not bind or purport to bind the Government." Both commenters are concerned that that sentence calls into question whether the M&O contractor is an agent of DOE and one of them expresses additional concerns over the ability of the M&O to assume administration of M&O subcontracts.

It is the position of DOE that the M&O contractor relationship is unique, involving some of the indicia of a principal-agent relationship, yet it is not an agency relationship. In various instances the Department and its predecessors have asserted an agency to describe the parties' relationships in such matters as state taxation of amounts of Federal money spent by an M&O contractor. *United States v. New Mexico*, 455 U.S. 720 (1982), wherein the Supreme Court recognized the unique nature of the management and operating contractor-Department of Energy relationship but held that there was no agency for the purpose of the State of New Mexico's imposition of compensating use and gross receipts taxes on Federal money spent by a DOE management and operating contractor. In matters relating to purchases by M&O

contractors, the Department objects to any characterization of the relationship as one of purchasing agent. DOE's position has been that M&O subcontractors do not have direct access to the Energy Board of Contract Appeals as a matter of right under the Contract Disputes Act because the M&Os are not, in general, designated as purchasing agents for DOE. DOE has also consistently and successfully asserted before the General Accounting Office that M&O contractors are not DOE purchasing agents with regard to protests against M&O subcontract awards. The sentence in question is intended to make that point clear. As to the second portion of the comment, DOE operations offices should administer M&O subcontracts, if at all, only under the most unusual circumstances.

It should be noted that there are occasional word changes made at our own initiative in the interests of clarity. We have described every such change that has had any meaningful effect on the final rule.

List of Subjects in 48 CFR Part 970

Management and operating contracts.

For the reasons set out in this preamble, Part 970 of Title 48 of the Code of Federal Regulations is amended, as set forth below.

Issued in Washington, DC June 16, 1988.

Berton J. Roth,

Director, Procurement and Assistance Management Directorate.

PART 970—[AMENDED]

1. The authority citation for Part 970 continues to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

Subpart 970.03—[Removed and Reserved]

2. Subpart 970.03 consisting of section 970.0304 is removed and reserved.

970.0407 [Amended]

3. Section 970.0407 is amended by putting a period after "management and operating contractors" in the first sentence and removing the remainder of the sentence.

970.0811, 970.0870, 970.0871, 970.0872 and 970.0902 [Removed]

4. Sections 970.0811, 970.0870, 970.0871, 970.0872, and 970.0902 are removed.

970.0905 [Amended]

5. Section 970.0905 is amended by removing the paragraph designation "(a)" from the first paragraph; removing all of the first paragraph after the third complete sentence; and removing paragraph (b).

970.1508-1 [Amended]

6. Section 970.1508-1 is amended by removing the paragraph designation "(a)" from the first paragraph and removing paragraphs (b) and (c).

970.1901 [Amended]

7. Section 970.1901 is amended by removing paragraphs (a) through (g) and by redesignating paragraphs "(h)" and "(i)" as "(a)" and "(b)," respectively.

Subpart 970.20—[Removed and Reserved]

8. Subpart 970.20 consisting of section 970.2001 is removed and reserved.

970.2202 through 970.2204 [Removed]

9. Sections 970.2202, 970.2203, and 970.2204 are removed.

970.2206 [Amended]

10. Section 970.2206 is amended by removing paragraph (a) and by removing the paragraph designation "(b)" from the remaining paragraph.

970.2208 [Amended]

11. Section 970.2208 is amended by inserting a period after "management and operating contracts" the first time it appears in the paragraph and by removing the remainder of the paragraph.

970.2210 [Amended]

12. Section 970.2210 is amended by removing the paragraph designation "(a)"; removing all of the first paragraph after the first sentence; and removing all of paragraph (b).

970.2213 and 970.2214 [Removed]

13. Sections 970.2213 and 970.2214 are removed.

Subpart 970.25—[Removed and Reserved]

14. Subpart 970.25 consisting of 970.2501 is removed and reserved.

970.2800, 970.2801, 970.2803, 970.2804 and 970.2805 [Removed]

15. Sections 970.2800, 970.2801, 970.2803, 970.2804, and 970.2805 are removed.

970.2903 [Amended]

16. Section 970.2903 is amended by removing the paragraph designation "(a)" from the first paragraph; by inserting a period after "management and operating contracts" the first time it appears and removing the remainder of the paragraph; and by removing paragraph (b).

970.3101-4 [Amended]

17. Subsection 970.3101-4 is amended by removing the paragraph designation "(a)" from the first paragraph; by removing the remainder of the paragraph after the fourth sentence; and by removing paragraph (b).

970.3102-15 [Amended]

18. Subsection 970.3102-5 is amended by:

a. Substituting "contractor-affiliated" for "contractor-controlled" in the title;

b. Substituting "970.71" in place of "970.44" as it appears twice in paragraph (a); and

c. Substituting "contractor-affiliated sources (See 970.7105)" for "contractor-controlled sources (See 970.4404)" in the title of paragraph (b)."

970. 3600 through 970.3605 [Removed]

19. Sections 970.3600, 970.3601, 970.3602, 970.3603, 970.3604, and 970.3605 are removed.

970.3606 [Redesignated as 970.3601]

20. Section 970.3606 is redesignated as section 970.3601.

970.3607 and 970.3608 [Removed]

21. Sections 970.3607 and 970.3608 are removed.

Subpart 970.44—[Removed]

22. Subpart 970.44, consisting of sections 970.4401 through 970.4409, is removed.

Subpart 970.46—[Removed]

23. Subpart 970.46, consisting of section 970.4601, is removed.

970.4901 [Amended]

24. Section 970.4901 is amended by removing "principles" from the title; by removing the paragraph designation "(a)" from the first paragraph; and by removing paragraph (b).

25. Section 970.5204-22, is revised to read as follows:

970.5204-22 Contractor purchasing system.

Contractor Purchasing System (June 1988)

(a) (Name of contractor) shall develop and implement formal policies, practices, and procedures to be used in the award of subcontracts, which purchasing system and methods shall be fully documented and acceptable to DOE, in accordance with the policies set forth in DEAR 970.71. DOE reserves the right at any time to require that the contractor submit for approval any or all purchases under this contract. The contractor shall not purchase any item or service the purchase of which is expressly prohibited by the written direction of DOE and shall use such special and directed sources as may be

expressly required by the DOE contracting officer.

(b) The obligations of (*name of contractor*) under paragraph (a) above, including the development of the purchasing system and methods, and purchases made pursuant thereto, shall not relieve the contractor of any obligation under this contract (including, among other things, the obligation to properly supervise, administer, and coordinate the work of subcontractors). Subcontracts shall be in the name of the contractor, and shall not bind or purport to bind the Government.

(c) In addition to, and without derogation of any rights under paragraph (a) of this clause and any other provision in this contract, (*name of contractor*) shall require all subcontractors to furnish cost or pricing data under those conditions and in accordance with the requirements set forth in FAR 15.804, and shall include in such subcontracts the appropriate clause set forth in 970.5204–24 except as otherwise directed or approved by DOE.

(d) Purchase or transfer of equipment, materials, supplies, or services from a contractor-affiliated source shall be treated in accordance with DEAR 970.7105.

(e) Proposed awards to firms or individuals on either the GSA Consolidated List of Debarred, Suspended, and Ineligible Contractors or the DOE Consolidated List of Debarred, Suspended, Ineligible, and Voluntarily Excluded Awardees shall be forwarded to DOE for approval notwithstanding any prior purchasing system acceptance.

(f) (*Name of Contractor*) shall provide advance notice of proposed subcontract awards in accordance with DEAR 970.7109; shall document purchase in writing; and shall establish and maintain subcontract files which present an accurate and adequate record of all purchasing transactions.

25. Subpart 970.71 is added as follows:

Subpart 970.71—Management and Operating Contractor Purchasing

Subpart 970.71—Management and Operating Contractor Purchasing

970.7101 General.

(a) The Department of Energy contracts for the management and operation of DOE facilities, the design and production of nuclear weapons, energy research and development, and the performance of other services. These management and operating (M&O) contractors have been selected for their technical and managerial expertise and are expected to bring to bear these technical and managerial skills to accomplish the significant Federal mission(s) described in their contracts with, and work plans approved by, DOE.

(b) Purchasing done by management and operating contractors is one area in which the particular skills of the contractors will be brought to bear in order to more readily accomplish the contractors' assigned missions. The contracting procedures of the contractor's organization, therefore, form the basis for the development of a purchasing system and methods that will comply with its contract with DOE and this subpart.

(c) Completion is fundamental to M&O contractor purchasing.

(d) The Federal Acquisition Regulation generally is not directly applicable to the purchasing activities of management and operating contractors. There are, however, certain Federal laws, Executive Orders and Federal and DOE regulations which do pertain to and apply to purchases by management and operating contractors and thus should be reflected in the contractor's purchasing system and methods. These requirements are identified in this subpart.

970.7102 DOE responsibility.

(a) In the Department of Energy, overall responsibility for the oversight of the performance of management and operating contractors, including their purchasing activities, rests with the cognizant DOE contracting activity and, in particular, the Head of Contracting Activity (HCA). Contracting officers are responsible for management and operating contractors' conformance with this subpart and their contracts, and for determining whether those purchasing activities provide timely and effective support to DOE programs. (For the purposes of this subpart, the term "Head of Contracting Activity" includes his or her duly authorized representative except for the HCA actions identified in 970.7104–8(a), 970.7104–9(b), 970.7104–22(c), 970.7104–28(f)(1), and 970.7108(a), which actions are nondelegable. Further, when the term "contracting officer" is used in this subpart, it refers to that individual who has been delegated authority by the HCA for the day-to-day oversight of a management and operating contractors' purchasing activities.)

(b) In carrying out their overall responsibilities, HCAs shall:

(1) Require management and operating contractors to maintain written descriptions of their individual purchasing system and methods and further require that, upon award or extension of the contract, the entire written description be submitted to the

contracting officer for review and acceptance;

(2) Require that any changes to the management and operating contractor's written description having any substantive impact upon the contractor's purchasing system and methods be submitted to the contracting officer for review and acceptance prior to issuance;

(3) Ensure review of individual purchasing actions of certain types or above stated dollar levels by the contracting officer to assure that management and operating contractors implement DOE policies and requirements, as defined in this subpart, in accordance with the contractor's accepted system and methods; and

(4) Ensure that periodic appraisals (e.g. Contractor Purchasing System Review (CPSR) and Surveillance Review) of the contractor's management of all facets of the purchasing function are performed by the contracting officer in accordance with established policies. (See Subpart 944.3 and 970.7108).

(c) In performing the reviews required by paragraphs (b) (1) and (2) and the appraisals of paragraph (b)(4) of this section, HCAs shall assure that contracting officers determine that the contractors' written systems and methods are consistent with this subpart and the provisions of their contracts.

970.7103 Policies.

The following shall apply to the purchasing practices of management and operating contractors. Within these policies it is expected that purchasing systems and methods will vary according to the types and kinds of purchases to be made, the mission needs of the particular programs and facilities, and the experiences, methods, and practices of the contractor. In the development of their purchasing system and methods, contractors are expected to use their experience, expertise, and initiative consistent with this subpart.

(a) The purchasing systems and methods used by management and operating contractors should be well defined, consistently applied, and should follow good business practices appropriate for the requirement and dollar amount of the purchase involved.

(b) Management and operating contractors' purchasing systems should produce the proper balance between the government's decision to use the experience and expertise of these contractors in managing and operating its programs and facilities and the objectives and the attendant requisites of the Federal acquisition process. In evaluating the proper balance between commercial purchasing practices and the requisites of the Federal acquisition process a concept referred to as the "Federal norm" has evolved. The Federal norm refers to those fundamental principles embodied in law and regulation that should be reflected in contractor purchases even though such purchases are not Federal procurements.

(c) DOE has identified the following specific tenets of Federal procurement policy that must be addressed in a contractor's purchasing system:

(1) Purchases must be effected in the manner that will be most advantageous in meeting the overall mission with price, quality, and timely and efficient performance of the contract considered.

(2) Although the Competition in Contracting Act of 1984 (Pub. L. 98-369) is not applicable to management and operating contractor purchases, the contractor's purchasing system and methods must ensure competitive subcontracting consistent with the contractor's efficient performance of the contractual mission and the nature of supplies and services purchased. The objective is to provide fair and effective competition through application of the principles set out below.

(3) The contractor's purchasing system and methods shall ensure that for purchases in excess of those discussed at 970.7103(b)(4) below, all competitors are treated fairly and equitably by:

(i) Describing the requirement as completely as possible and in adequate time to promote competition. [Supplies and services should be purchased through the use of specifications, standards or descriptions which clearly and accurately describe the supplies or services to be purchased];

(ii) Preparing solicitation documents setting forth the contract terms and conditions, describing the requirement clearly, accurately, and completely, but avoiding unnecessarily restrictive specifications or requirements;

(iii) Stating in the solicitation the factors that will comprise the basis for award, i.e., lowest evaluated price or a combination of price and technical merit. [In the event of the latter the solicitation shall state the importance of technical considerations versus cost considerations and note any criterion(ia) that is of significantly greater or lesser importance than other criterion];

(iv) Conducting evaluations and making awards in accordance with the stated factors and the descriptions of their importance;

(v) Publicizing the solicitation by (A) distribution to a reasonable number of prospective offerors and (B) use, as appropriate, of such means as plan rooms, journals, expressions of interest or other public notices, or the Commerce Business Daily particularly where there are not adequate numbers of qualified sources in the local area;

(vi) Providing equal access to solicitation data and information;

(vii) Offering sufficient numbers of qualified entities the opportunity to propose, and tailoring the method of carrying out the competition such that there is every expectation that proposals will be received in numbers that will substantiate that the costs or price is in the Government's best interest;

(viii) Allowing sufficient time for preparation and submission of proposals;

(ix) Providing for a uniform time for submission;

(x) Taking precautions to assure that the contents of each proposal are maintained in confidence to prevent technical transfusion and technical leveling;

(xi) Handling responses in a manner to assure fairness and impartiality, and communicating, where necessary to clarify solicitations, with all firms that received a copy of the solicitation or, after the due date, all firms submitting a proposal;

(xii) Conducting negotiations, as appropriate, in such a way as to enhance competition and ensure the understanding of substantive aspects of the offerors' proposals. [A management and operating contractor's purchasing system and methods may provide for receipt of amended proposals following communication with a select group of offerors deemed most likely to receive the award in accordance with the expressed evaluation criteria; for award without communication; and for clarification of ambiguous portions of an offeror's proposal not as a part of negotiations];

(xiii) Awarding only to capable offerors whose offers conform to the solicitation. [Awards shall not be made to firms or individuals listed on the GSA Consolidated List of Debarred, Suspended, and Ineligible Contractors or the DOE List of Debarred, Suspended, Ineligible or Voluntarily Excluded Awardees without prior approval of the DOE contracting officer]; and

(xiv) Ensuring that access authorizations to classified information will not be a limiting factor in obtaining competition except where time will not permit securing additional authorizations.

(4) Small purchases (those valued at $25,000 or less or other value that may be approved by the HCA) should be made by methods designed, considering the award value, to:

(i) Obtain fair and reasonable prices,

(ii) Reduce administrative costs of making such purchases to the minimum required in order to establish the propriety of placing the order at the price paid with the supplier concerned, and

(iii) Improve opportunities for small and small disadvantaged business concerns to obtain a fair proportion of awards.

(5) A fair proportion of supplies and services shall be purchased from small business concerns, small disadvantaged business concerns, labor surplus area concerns, and woman-owned business concerns. Publication of appropriate requirements in the Commerce Business Daily is one method that may be used to promote the participation of such concerns.

(6) Price or cost analyses shall be performed consistent with the principles of FAR Subpart 15.8 and Subpart 915.8 of this regulation.

(7) Allowable costs for cost reimbursable subcontracts are to be determined in accordance with the cost principles of FAR Part 31, appropriate for the type of organization to which the subcontract is to be awarded, as supplemented by Part 931. Allowable costs in the purchase or transfer from contractor-affiliated sources shall be determined in accordance with 970.7105 and 970.3102–15(b).

(8) The contractor's purchasing system and methods shall establish a dollar value above which the basis for each non-competitive purchase must be clearly documented and a dollar value above which non-competitive purchases must be supported by separate justifications prepared by the requesting organization, and approved at appropriate levels in the contractor's purchasing organization.

(9) The selection of the type of contract to be used should be based on consideration of the nature of the supplies and services required and other circumstances surrounding the purchase. The cost-plus-percentage-of-cost method of contracting shall not be used in any event.

970.7104 Conditions of purchasing by management and operating contractors.

This section and the entire subpart provide the standard against which the cognizant DOE contracting officer shall evaluate the purchasing system and methods of a management and operating contractor. The following specific provisions, some of which are implementations of statute or applicable Government or DOE policies, pertain to purchasing by DOE management and operating contractors. To the extent these provisions allow for the exercise of discretion by management and operating contractors, the contracting officer will use as the standard of compliance the exercise of good business judgment by the management and operating contractor in pursuit of carrying out the contractual mission. Where compliance with this section requires the use of clauses from the FAR or DEAR, the contracting officer shall assure that the purchasing system and methods of the M&O contractor ensure that the relationship between the contractor and subcontractor is clearly described and that references to the Government and the contracting officer are changed, as appropriate, to refer to the contractor.

970.7104–1 Contingent fees.

The policies and requirements of FAR Subpart 3.4 shall be applied to the purchasing activities of management and operating contractors. See 970.5203–1 for the amendment to the clause at FAR 52.203–5.

970.7104–2 Record retention requirements.

The record retention requirements for cost-reimbursement type subcontractors to management and operating contractors shall be in accordance with the clause at 970.5204–9.

970.7104–3 Acquisition of utility services.

When authorized by DOE (subject to appropriate delegation) to acquire utility services, such acquisition shall be in compliance with 970.0803.

970.7104–4 [Reserved]

970.7104–5 Leasing of motor vehicles.

Management and operating contractors shall abide by the provisions of FAR 8.11 and 908.11 in the leasing of motor vehicles.

970.7104–6 Strategic and critical materials.

Management and operating contractors who use strategic and critical materials shall fulfill their requirements in accordance with 908.70.

970.7104–7 Purchases of special items.

(a) Purchase of the following items shall be in accordance with the provisions of the DEAR and FPMR, as shown.

Item	Citation
(1) Motor vehicles	908.7101
(2) Aircraft	908.7102
(3) Office machines	908.7103
(4) Office furniture and furnishings	908.7104
(5) Filing cabinets	908.7105
(6) Security cabinets	908.7106
(7) Alcohol	908.7107
(8) Helium	908.7108
(9) Fuels and packaged petroleum products.	908.7109
(10) Coal	908.7110
(11) Arms and ammunition	908.7111
(12) Relacement materials handling equipment.	908.7112
(13) Calibration services	908.7113
(14) Wiretappinig and eavesdropping equipment.	908.7114
(15) Forms	908.7115
(16) Electronic data processing tapes.	908.7116
(17) Tabulating machine cards	908.7117
(18) Rental of post office boxes	908.7118
(19) Heavy water	908.7121(a)
(20) Precious metals	908.7121(b)
(21) Lithium	908.7121(c)
(22) Products and services of the blind and other severely handicapped.	FPMR 41 CFR 101–26.701
(23) Products made in Federal penal and correctional institutions.	FPMR 41 CFR 101–26. 702

(b) The management and operating contractor's purchasing system and methods may provide for the acquisition of items (3), (4), and (5) above from non-Federal Supply Schedule sources in those circumstances in which items of the same or greater quality may be purchased at a lesser price, or there is otherwise an inability to meet a critical program schedule.

970.7104–8 Purchasing alternative determinations.

(a) Management and operating contractors shall provide in their purchasing systems and methods, using FPMR 41 CFR 101–25.5 as a guide, for a system to determine whether required equipment should be purchased or leased. The system based upon these guidelines shall establish appropriate thresholds for application (as approved by the HCA) of lease-versus-purchase determinations and shall be used in making such determinations:

(i) At time of original acquisition,

(ii) When lease renewals are being considered, or

(iii) At other times as circumstances warrant.

(b) The contracting officer shall assure that the management and operating contractor provides in its purchasing system and methods for a determination of whether to purchase certain goods or services or provide those goods or services within its own organization. While cost may be a significant factor, the determination may also consider such things as efficiency of performance, scheduling, classification and security, control of production or performance, and maintenance of management and operating contractor capabilities.

970.7104-9 Qualifications requirements.

(a) Management and operating contractors are authorized to use Qualified Bidders Lists (QBL), Qualified Material Lists (QML) and Qualified Products Lists (QPL), developed by executive agencies pursuant to FAR Subpart 9.2, for the purchase of goods or services for which list(s) was developed.

(b) Heads of Contracting Activities may authorize management and operating contractors to develop QBLs, QMLs, or QPLs for critical applications; however, management and operating contractors shall not unnecessarily restrict potential suppliers from qualification testing and inclusion among qualified vendors. Management and operating contractors shall provide in their purchasing systems and methods for periodic review of the items or sources on these lists to assure the need to continue the restrictions.

970.7104-10 Organizational conflicts of interest.

(a) Management and operating contractors shall abide, by 909.5 in their purchase of supplies and services as if their subcontractors, including consultants, at any tier were performing the work as prime contractors to DOE.

(b) The cognizant contracting officer is the individual authorized to determine whether there exists, with regard to a proposed subcontract, little or no likelihood of an organizational conflict of interest.

(c) In obtaining disclosure of relevant interests in appropriate potential subcontracts, management and operating contractors may allow proposers to submit their responses directly to the cognizant contracting officer.

970.7104-11 Cost of pricing date.

(a) Management and operating contractors are required to:

(1) Obtain certified cost or pricing date prior to the:

(i) Award of a negotiated subcontract when the subcontract price is expected to exceed $100,000; or

(ii) Modification of any subcontract when the price adjustment is expected to exceed $100,000, unless unrelated and separately priced changes, for which certified cost or pricing data would not otherwise be required, are included.

(2) Incorporate appropriate contract provisions that provide for the reduction of a negotiated subcontract price by any significant amount that the subcontract price was increased because of submission of subcontractor defective cost or pricing data, at any tier.

(b) The exemptions from certified cost or pricing data identified by FAR 15.804-3 shall also apply in implementing the above cost or pricing data requirements.

(c) The clause at 970.5204-24 shall be included in management and operating contracts requiring the flowdown of the provision contained therein to subcontractors at all tiers as described therein.

970.7104-12 Small business and small disadvantaged business concerns.

(a) The policies and procedures in the following FAR sections and subpart shall be applied to the purchasing activities of management and operating contractors in their unilateral initiation of small business set-asides: 19.301, 19.302, 19.502-2, 19.502-3, 19.508(b), 19.508(c), 19.508(d), and Subpart 19.7.

(b) Protests received by management and operating contractors regarding small business status shall be referred to the Small Business Administration through the cognizant DOE contracting officer. Inquiries as to whether a given concern qualifies as a disadvantaged business will be forwarded through the cognizant DOE contracting officer to the SBA for response.

(c) Purchases of $25,000 or less awarded through small purchase procedures shall be reserved exclusively for small businesses where there is a reasonable expectation that bids, competitive as to price, quality and delivery, will be obtained from two or more responsible small business concerns.

(d) Purchase by a management and operating contractor of construction estimated to cost $3 million or less, including new construction, and repair and alteration of structures, shall be required to be set aside on a class basis for small business concerns. When, in the judgment of the contractor, a particular acquisition falling within these dollar limits is determined to be unsuitable for a small business set-aside, notification shall be made to the DOE contracting officer. Upon obtaining the approval of the DOE contracting officer, the contractor may proceed to process the acquisition on an unrestricted basis. For acquisition of construction in excess of $3 million, small business set-aside preferences should be considered on a case-by-case basis.

(e) Management and operating contractors may provide in their purchasing systems and methods for the setting aside of requirements for small disadvantaged businesses, provided there are sufficient such qualified entities available to assure effective competition, and provided that the cost or price of the successful offer is found by the M&O contractor to be fair and reasonable.

(f) In pursuit of the objective of M&O purchasing of a fair proportion of supplies and services from the concerns described at 970.7103(b)(5), the HCA may authorize the use of innovative means after approval by the Procurement Executive and the DOE Office of Small and Disadvantaged Business Utilization.

(g) Management and operating contractors shall prepare quarterly reports on utilization of small business, small disadvantaged business, and women-owned small business in accordance with the directions of the DOE contracting officer.

970.7104-13 Labor surplus area concerns.

(a) Management and operating contractors are authorized to unilaterally initiate labor surplus area (LSA) set-asides where there is a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible LSA concerns so as to ensure that awards will be made at fair and reasonable prices. The priorities set forth in FAR 19.504 are to be utilized in determining the type of set-aside to be employed.

(b) Protests received or questions raised by contractors regarding LSA status shall be handled in consultation with the Department of Labor through the DOE contracting officer.

(c) LSA set-aside purchases made by management and operating contractors shall be reported quarterly in a form satisfactory to the DOE contracting officer.

970.7104-14 Convict labor.

The provisions of FAR Subpart 22.2 shall apply to purchases by management and operating contractors.

970.7104-15 Contract Work Hours and Safety Standards Act (other than construction contracts).

The requirements of FAR Subpart 22.3 shall apply to purchases by management and operating contractors to the same extent and under the same conditions such requirements apply to direct DOE procurements.

970.7104-16 Labor standards for contracts involving construction.

The requirements of FAR Subpart 22.4 apply to subcontracts involving construction awarded by DOE management and operating contractors to the same extent that they would if the subcontract had been directly awarded by DOE. Subpart 922.4 provides guidance, including examples of work situations, to assist in determining the

applicability of these standards. The Davis-Bacon Act is deemed to apply to purchases by management and operating contrators in accordance with 970.2273.

970.7104-17 Walsh-Healey Public Contracts Act.

The requirements of FAR Subpart 22.6 and this section shall apply to purchases by management and operating contractors to the same extent and under the same conditions such requirements apply to direct DOE procurements.

970.7104-18 Equal employment opportunity.

The equal employment opportunity provisions of FAR Subpart 22.8 and Subpart 922.8, of this chapter, including E.O. 11246 and 41 CFR Part 60, are applicable to subcontracts awarded by DOE management and operating contractors.

970-7104-19 Service Contract Act.

(a) It is the policy of DOE that subcontracts awarded by management and operating contractors are subject to the Service Contract Act to the same extent and under the same conditions as contracts awarded directly by DOE.

(b) Subcontracts awarded by management and operating contractors shall include the applicable clause in FPR Temporary Regulation No. 76 or successor FAR coverage with such modifications as would otherwise be appropriate had this clause been included in the prime contract.

970.7104-20 Special disabled and Vietnam Era veterans.

The provisions of FAR Subpart 22.13 shall apply to purchases by management and operating contractors.

970.7104-21 Application of environmental and occupational safety and health programs.

Contracting officers shall assure that management and operating contractors address environmental and occupational safety and health concerns in covered purchases in accordance with 970.2303. Management and operating contractors shall include the clauses at 970.5204-2, 970.5204-26, 952.223-72, and 952.223-75 in appropriate subcontracts and provide for flowdown to appropriate lower tier subcontracts.

970.7104-22 Buy American.

(a) Management and operating contractors are required, as reflected in the contract clauses prescribed at 970.7103-3 and 970.7103-5, to comply with the provisions of the Buy American Act. The list at FAR 25.108(d) contains excepted articles, materials, and supplies which have been determined to be unavailable in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(b) Determination of nonavailability under FAR 25.102 may be made by the DOE contracting officer responsible for the administration of the M&O contract.

(c) When the management and operating contractor's purchasing system and methods have been approved after a review in accordance with 970.7102(b), the Head of the Contracting Activity may authorize the contractor to make determinations of nonavailability for individual items under individual procurement actions. Each authorization shall be in writing and shall specify a dollar value limit for the aggregate of domestically unavailable items in individual procurement actions. Authorizations for dollar value limits in excess of $25,000 require the prior concurrence of the Procurement Executive. Each authorization shall also specify the effective date, the activity, the division or facility authorized to make the determination, the period of effectiveness, and any special conditions or requirements.

970.7104-23 Patents, data, and copyrights.

Contracting officers shall assure that management and operating contractors' purchasing systems and methods provide for distribution of patent and data rights and copyrights in their purchases in accordance with 970.27.

970.7104-24 Bonds and insurance.

The contracting officer shall assure that management and operating contractors provide in their purchasing systems and methods for obtaining bonds (i.e. bid, performance and payment bonds) from subcontractors as provided in this subsection and in a manner that will assure adequacy and legal sufficiency of all types of bonds and the acceptability of sureties in accordance with this subsection to protect the interests of the United States. The contractor's purchasing system and methods shall treat the obtaining of insurance in accordance with FAR Subpart 28.3 and DEAR Subpart 928.3.

(a) *Performance bonds.*—(1) *Construction subcontracts.* A performance bond on Standard Form 25 (modified to name the M&O contractor as well as the United States of America as obligees) shall be required for all fixed price and unit-price construction subcontracts in excess of $25,000 and subcontracts under cost-reimbursement type subcontracts. The penal amounts shall be determined as set forth in FAR 28.102(a).

(2) *Other than construction subcontracts.* Situations which may warrant the requiring of performance bonds in addition to those listed in FAR 28.103-2(a) are:

(i) Where doubt exists as to the financial or technical ability of likely suppliers.

(ii) Where the subcontractor's talent is overly concentrated in a few key personnel whose illness or departure could seriously impair the subcontractor's ability to perform the proposed work.

(iii) Where other commitments of the subcontractor might delay performance.

(iv) Where a delay in performance of the proposed work might disrupt other operations of the management and operating contractor and impair its overall efficiency; or

(v) Where the item being manufactured is a component for another article and is required by a particular date in order to avoid delay in delivery of the end product.

(b) *Payment bonds.*—(1) *Construction subcontracts.* A management and operating contractor shall be required to obtain from the subcontractor a payment bond on Standard Form 25A, modified to name the management and operating contractor, as well as the United States of America, as obligees for all fixed price and unit-price construction subcontracts in excess of $25,000. The management and operating contractor shall be required to include such a requirement in its cost-reimbursement construction subcontracts in excess of $25,000. The penal amounts shall be determined as set forth in FAR 28.102-2.

(2) *Other than construction subcontracts.* The management and operating contractor may make a determination that it is necessary on an individual subcontract to require payment bonds in connection with other than construction work. Whenever the management and operating contractor has reason to believe that work under a proposed action might be delayed because of concern over the credit standing of a prospective subcontractor, it should consider the advisability of requiring a payment bond.

(c) *Corporate co-sureties.* More than one corporate surety may be accepted as surety upon recognizance, stipulation, bond, or undertaking in connection with either construction or other contracts, provided that in no case will the liability of any such co-surety exceed the

maximum penal sum in which the corporate surety is qualified to any one obligation. On bonds covering contracts other than construction contracts, where the amount of the bond is greater than the limitation of the corporate surety, the latter may reinsure with a corporation on the acceptable list of corporate sureties having the required underwriting capacity. Reinsurance agreements are not acceptable in connection with construction contracts. Corporate co-sureties need not obligate themselves for the full amount of the bond. Each corporate surety may, by setting forth the limit of its liability in the bond as a definite and specified sum, limit such liability on the condition that each co-surety bind itself "jointly and severally" for the purpose of allowing a joint action or actions against any or all of them.

970.7104-25 Indemnification.

Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods for the treatment of nuclear hazards indemnification in subcontracts in accordance with paragraphs (f) and (g) of 970.2870. No subcontractor may be otherwise indemnified except with the prior approval of the Procurement Executive.

970.7104-26 Taxes.

(a) Contracting officers should assure that tax matters are appropriately treated in their review and approval of management and operating contractors' purchasing systems and methods and in their review and approval of individual subcontracts by the contractor.

(b) The purchasing system and methods of a management and operating contractor shall require:

(1) The inclusion of a clause similar to that at 970.5204-23 in cost-type subcontracts of any tier where the prime contract or higher-tier subcontract(s) are cost-type which clause will require the subcontractor to take certain actions with regard to nonpayment, payment, protest, or other treatment of specific taxes.

(2) The inclusion of an appropriate tax clause in all fixed-price purchase orders and subcontracts and should contain provisions covering all tax matters which may require special consideration.

970.7104-27 Audit of subcontractors.

(a) Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods for:

(1) periodic postaward audit of cost-reimbursement subcontractors at all tiers and

(2) Audits, where necessary, to provide a valid basis for pre-award cost or price analysis.

Responsibility for determining the costs allowable under each cost-reimbursement subcontract remains with the management and operating contractor or next higher-tier subcontractor. Management and operating contractors' purchasing systems and methods shall provide, in appropriate cases, for the timely involvement of the management and operating contractor and the DOE contracting officer in resolution of questions of subcontract cost allowability.

(b) Where audits of subcontracts of any tier are required, arrangements may be made to have the cognizant Federal agency perform the audit of the subcontract. These arrangements shall be made administratively between DOE and the other agency involved and shall provide for the cognizant agency to audit in an appropriate manner in light of the magnitude and nature of the costs of the subcontract. The contracting officer shall assure that the audit results properly reflect the application of the applicable cost principles of the subcontract (See 970.7103 (b)(7)). In no case, however, shall these arrangements preclude determination by the DOE contracting officer of the allowability or unallowability of subcontractor costs claimed for reimbursement by the management and operating contractor.

970.7104-28 Construction and architect-engineer (A-E) contracts.

(a) *Scope.* Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods for acquisition of A–E services and construction in conformance with this subsection. FAR Part 36 and DEAR Part 936 shall be used as guides.

(b) *Independent estimates.* A detailed, independent estimate of costs shall be prepared for all construction work to be subcontracted under management and operating contracts. The services of an architect-engineer, the management and operating contractor, another management and operating contractor, or a construction contractor other than the constructor may be used, as appropriate, in the preparation of the independent estimate.

(c) *Specifications.* Management and operating contractors shall assure that specifications for construction are prepared in accordance with the DOE publication entitled "General Design Criteria Manual" (DOE Order 6430.1, dated December 12, 1983, or successor version) in preparing specifications for construction work.

(d) *Agreement for rental of construction equipment.* Management and operating contractors shall provide in their purchasing systems and methods for the rental of construction equipment from a third party in accordance with the agreement outlined at 936.7102.

(e) *Guidelines for the award of architect-engineer subcontracts.* The Brooks Act, Pub. L. 92–582, establishes the policy and procedures necessary to assure that selection of A–E contractors by the Federal Government is based solely upon the qualifications of competing A–E firms. That Act does not directly govern the award of A–E subcontracts by DOE management and operating contractors. HCAs shall assure that the purchasing systems and methods of management and operating contractors reflect the essence of the Federal policy by providing for selection of A–E subcontractors based primarily upon proposers' qualifications, however, this does not preclude the consideration of other factors, including cost or price, in the selection of A–E subcontractors.

(f) *Prevention of conflict of interest—*
(1) *Limitations on architect-engineer/construction services.* Combinations of subcontracts for architect-engineer and construction services, which may result in self-inspection of construction work, tend to prevent a subcontractor from rendering unbiased decisions, or create difficulties in segregating costs between subcontracts, and should be avoided. Unless otherwise authorized by the HCA, the following relationships shall not be established within any subcontract(s) awarded by a management and operating contractor involving the same firm or affiliated companies:

(i) A subcontract or combination of subcontracts for both architect-engineer and construction services on the same construction project. Should the HCA authorize the M&O to award a subcontract(s) to a firm or affiliates under which it is to be responsible for both design and construction services, Title III inspection services shall be performed by another organization approved by DOE.

(ii) Both a cost-reimbursement subcontract and fixed-price subcontract for different projects if any portion of the work under either subcontract will be performed concurrently in the same general location. This restriction applies to subcontracts for construction services, architect-engineer services, or

construction and architect-engineer services.

(iii) The provisions of paragraph (f)(1)(i) of this section shall not preclude the award of a single subcontract for the delivery of a discrete facility, e.g., "turnkey contract," so long as the subcontractor assumes all liability for defects in design and construction and consequential damages. Such subcontracts should provide for periodic inspection of the construction of the facility by the management and operating contractor or DOE or both.

(2) *Limitation on inspection.* (i) Inspection services may be performed by the architect-engineer responsible for the design. Inspection services may not be purchased from a fixed-price construction subcontractor with respect to its own work. Under cost-reimbursement type subcontracts where the construction subcontractor and architect-engineer subcontractor are the same, some degree of self-inspection may be permitted, but shall not constitute final inspection and acceptance by the Government.

(ii) When one subcontractor is to inspect the work of another, the inspecting subcontractor will be given written instructions by the M&O contractor defining its responsibilities and stating that it is not authorized to modify the terms and conditions of the subcontract, direct any additional work, waive any requirements of the subcontract, or settle any claims or disputes. Copies of the instructions will be given to the subcontractor who is to be inspected, with a request to acknowledge receipt on one copy and return it to the M&O contractor. In this manner, both subcontractors are on notice as to the authority and limitations on the authority of the inspecting subcontractor.

970.7104-29 Quality assurance.

Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods for inspection and acceptance and the use of an appropriate clause. Such provisions shall provide no less protection for the Government than is provided by the contract articles in prime contracts.

970-7104-30 Termination.

(a) The termination clause included in management and operating contracts gives the Government the right to terminate the contract for convenience or default and provides that after receipt of a termination notice the contractor shall, to the extent requested by the contracting officer, cancel existing orders, subcontracts and commitments. Also, management and operating contractors may find it necessary to terminate subcontracts either for default or convenience in the course of exercising responsibilities for program or project performance under the contract rather than as a result of termination of the prime contract. Therefore, contracting officers shall assure that the purchasing systems and methods of management and operating contractors provide for the inclusion of an appropriate termination clause or clauses in their subcontracts. The termination clauses set forth at FAR 52.249–1 through 52.249–14 may be used as guides in the development of subcontract termination clauses.

(b) When subcontracts are terminated as a result of the termination of all or a portion of the prime contract, contractors shall settle with subcontractors in conformity with the policies and principles relating to settlement of prime contracts in FAR Subparts 49.1, 49.2, and 49.3. When subcontracts are terminated for reasons other than termination of the prime contract, the contractor shall settle such subcontract terminations in general conformity with the policies and principles in FAR Subparts 49.1, 49.2, and 49.3, and 49.4. In any event, each such termination settlement shall be documented. Those which require approval by the Government pursuant to prime contract requirements or approved procedures must be supported by accounting data and other information as may be directed by the DOE contracting officer. Also, the settlement must be in conformity with the provisions of the subcontract and consistent with provisions of the management and operating contract.

970.7104-31 Authorization for subcontractors' use of Government supply sources.

With the approval of the DOE contracting officer, management and operating contractors may authorize cost-reimbursement type subcontractors, where all higher tier subcontractors are cost-reimbursement types, to acquire materials and services directly from Government sources of supply in accordance with the requirements of 970.51 or the consent of agencies involved.

970.7104-32 Safeguarding classified information.

Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods for the inclusion in appropriate subcontracts of clauses consistent with 970.0404.

970.7104-33 Cost Accounting Standards.

The provisions of FAR Part 30 shall apply to purchases by management and operating contractors.

970.7104-34 Clean air and water.

The provisions of FAR Subpart 23.1 shall apply to purchases by management and operating contractors.

970.7104-35 Air transportation by U.S.- flag carriers.

The provisions of FAR Subpart 47.4 shall apply to purchases by management and operating contractors.

970.7104-36 Acquisition of real property.

Management and operating contractors shall contract for the lease or purchase of real property in accordance with 917.74.

970.7104-37 Management, acquisition, and use of information resources.

Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods, with regard to the purchase of automatic data processing resources and telecommunication facilities, services, and equipment, for review and approval of requirements in ways that conform to the procedures contained in applicable DOE orders (1360 series and 5300 series, respectively).

970.7104-38 Privacy Act.

Management and operating contractors shall award and administer applicable subcontracts in accordance with FAR Subpart 24.1.

970.7104-39 Officials not to benefit.

Mangement and operating contractors shall abide by the provisions of FAR Subpart 3.1 in the award of subcontracts.

970.7104-40 Subcontractors reporting systems.

Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods for the flowdown of the cost and schedule control system requirement as provided at 970.5204–50. In addition for subcontracts of lesser value, those purchasing systems and methods shall provide for the receipt from subcontractors of status, manpower, and financial information necessary to comply with DOE requirements for financial and performance data for subcontracts at all tiers.

970.7104-41 Employment of the handicapped.

The provisions of FAR Subpart 22.14 shall apply to purchases by management and operating contractors.

970.7104-42 Unclassified controlled nuclear information.

Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods for treatment of unclassified controlled nuclear information in accordance with 10 CFR Part 1017.

970.7104-43 Government property.

Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods for the identification, inspection, maintenance, protection, and disposition of Government property in conformity with the policies and principles in FAR 45, DEAR 945, the Federal Property Management Regulations, the DOE Property Management Regulations, and their contracts.

970.7104-44 Foreign travel.

Contracting officers shall assure that management and operating contractors provide in their purchasing systems and methods for DOE approval consistent with the clause at 952.247-70 of foreign travel under subcontracts.

970.7104-45 Anti-Kickback Enforcement Act of 1986.

Contracting officers shall assure that management and operating contractor purchasing systems and methods provide for compliance in subcontracting with the FAR Subpart 3.502.

970.7104-46 Setoff of assigned subcontract proceeds.

Contracting officers shall assure that the management and operating contractors provide in their purchasing systems and methods that in cases in which they have allowed a subcontractor to assign payments to a financial institution, the assignment shall treat any right of setoff in accordance with 932.803.

970.7104-47 Additional flowdown and extension provisions.

In addition to the clauses and provisions required to be included in appropriate subcontracts awarded by management and operating contractors, there are certain clauses the provisions of which require flowdown or extension to subcontractors. These are:

Examination of Records by the Comptroller General.....970.5203-2
Accounts, Records, and Inspection 970.5204-9
Printing.....970.5204-19
Priorities, Allocations, and Allotments.....970.5204-33

970.7105 Purchasing from contractor-affiliated sources.

(a) A management and operating contractor may purchase from sources affiliated with the contractor (any division, subsidiary, or affiliate of the contractor or its parent company) in the same manner as from other sources, provided:

(1) The management and operating contractor's purchasing function is independent of the proposed contractor-affiliated source;

(2) The same terms and conditions would apply if the purchase were from a third party;

(3) Award is made in accordance with policies and procedures designed to permit effective competition which have been approved by the contracting officer (See 970.7101(c)). (This requirement for competition shall not preclude acquisition of technical services from contractor-affiliated entities where those entities have a special expertise, and the basis therefor is documented.); and

(4) The award is legally enforceable where the entities are separately incorporated.

(b) Subcontracts for performance of contract work itself (as distinguished from the purchase of supplies and services needed in connection with the performance of work) require DOE authorization and may involve an adjustment of the contractor's fee, if any. If the management and operating contractor seeks authorization to have some part of the contract work performed by a contractor-affiliated source, and that contractor's performance of that work was a factor in the negotiated fee, DOE approval would normally require:

(1) That the contractor-affiliated source perform such work without fee or profit, or

(2) An equitable downward adjustment to the management and operating contractor's fee, if any.

(c) Determination on cost of money allowance as prescribed at FAR 31.205-10 shall be treated as follows:

(1) When a purchase from a contractor-affiliated source results from competition and is in accord with provisions and conditions of paragraphs (a)(1) through (a)(4) of this section, the contractor-affiliated source may include cost of money as an allowable element of the costs of its goods or services supplied to the contractor; provided:

(i) The purchase is based on cost as set forth in 970.3102-15 and

(ii) The cost of money amount is computed in accordance with FAR 31.205-10 and related procedures (see 970.30).

(2) When a purchase from a contractor-affiliated source is made non-competitively, cost of money shall not be considered an allowable element of the cost of the contractor-affiliated source purchase.

970.7106 Procedures for handling mistakes relating to management and operating contractor purchases.

(a) HCAs shall assure that management and operating contractors include in their purchasing systems and methods provision for correction of mistakes in bids and withdrawal of offers.

(b) Such systems shall make provision for correction of mistakes before award only upon the offering by the bidder of clear and convincing evidence of the mistake and the bid intended. Those systems shall distinguish situations in which another bidder's lower bid may be displaced if the correction were to be allowed.

(c) The systems shall deal with mistakes after award and shall result in rescission or reformation of the contract only upon a clear and convincing showing of mutual mistake.

(d) The systems shall allow withdrawal of a bid if there is sufficient evidence to establish a mistake but otherwise does not meet the necessary tests for correction, stated in paragraphs (b) and (c) of this section.

(e) In all cases before any remedial action is allowed, it shall be determined that the mistake was made in good faith and that the interests of the United States are not prejudiced.

(f) Corrections of mistakes or other remedial actions taken pursuant to this section shall be documented by a written statement setting forth the circumstances and basis for such action and shall be made a part of the subcontract file.

970.7107 Protest of management and operating contractor procurements.

(a) The General Accounting Office (GAO) policies on protests state that GAO will consider subcontract-level protests when the subcontracts are "by" or "for" the Government. The term "for" has generally been defined by the GAO as including acquisitions by management and operating (M&O) contractors.

(b) The Department of Energy will also consider protests of acquisitions of M&O contractors.

(c) Upon receipt or notice of a protest filed with the GAO, or with the Department against an M&O contractor acquisition, the cognizant DOE contracting activity shall assure that the M&O contractor is aware of such protest and prepare or coordinate the preparation by the contractor of a report for submittal to the GAO or the Department official deciding the protest. Such a report shall be prepared in accordance with the applicable procedures in FAR Part 33 and Part 933 of the DEAR.

(d) Assistance shall be obtained from the local DOE Counsel in the preparation of the report and any supplementary documents setting forth the position of the contracting activity relative to a protest.

(e) Upon receiving notice of a protest to the Department involving an M&O procurement action prior to award, the contracting activity shall direct that award not be made prior to resolution of such protest unless an HCA request to make award, concurred in by counsel, using the criteria of 933.103(a), and endorsed by the program secretarial officer, is approved by the Procurement Executive. If notice of a protest is filed with the DOE contracting officer within 10 days after award, the contracting activity shall contact the Business Clearance Division, Headquarters, for guidance as to continuation of performance or issuance of a stop work order.

(f) Since the bid protest provisions of the Competition in Contracting Act of 1984 (Pub. L. 98–369) (CICA) only apply to acquisitions by Federal executive agencies, the CICA "stay" provisions (sections 3553 (c) and (d) of Pub. L. 98–369 and cost recovery provisions (section 3554(c), Pub. L. 98–369) do not apply to protests lodged with the GAO that involve M&O contractor acquisitions. Nevertheless, upon receiving notice of a protest to the GAO involving an M&O acquisition whether prior to or after award, the contracting activity shall immediately contact the Business Clearance Division, Headquarters, for guidance on suspending award or suspending performance.

(g) The General Services Board of Contract Appeals hears subcontract level protests involving the purchase of Automatic Data Processing Equipment (ADPE), as defined at 40 U.S.C. 759(a)(2)(A), only in cases in which the prime contractor is acting as a purchasing agent for the Government. Should a protest be lodged against an M&O's purchase of ADPE, upon receiving notice of the protest, the cognizant DOE contracting officer shall promptly notify local counsel and the Office of the Assistant General Counsel for Procurement and Finance, Headquarters (AFCPF). The Department's position on such subcontract level protests shall be coordinated with the AGCPF. The contracting officer, promptly after receipt of a protest, and the decision(s) of the GSBCA, shall also furnish a copy thereof with related pertinent correspondence to the Business Clearance Division, Headquarters.

970.7108 Review and approval.

(a) Heads of Contracting Activities shall establish thresholds by subcontract type and dollar level for the review and approval of proposed subcontracting actions by each management and operating contractor under their cognizance. Such thresholds may not exceed the authority delegated to the Head of the Contracting Activity by the Procurement Executive. In establishing these review and approval thresholds, the Heads of Contracting Activities should consider such factors as the following:

(1) The nature of work to be performed under the management and operating contract;

(2) The size, experience, ability, reliability, and organization of the management and operating contractor's purchasing function;

(3) The internal controls, procedures, and organizational stature of the management and operating contractor's purchasing function; and

(4) Policies with respect to such reviews and approvals established by the Procurement Executive.

(b) Prior approval shall be required for the subcontracting of any work a contractor is obligated to perform under a contract entered into under section 41, entitled Production of Special Nuclear Material, of the Atomic Energy Act of 1954, as amended.

(c) Heads of Contracting Activities shall take such action as may be required to insure compliance with the procedure for purchasing from contractor-affiliated sources or the purchase of specific items, or classes of items, which by the terms of the contract may require DOE approval.

(d) The Heads of Contracting Activities may raise or lower the review and approval thresholds established pursuant to paragraph (a) of this section at any time. Such action may be considered upon the periodic review of the contractor's purchasing system, but in any case those adjusted thresholds may not exceed the approval authority delegated to the Head of the Contracting Activity by the Procurement Executive.

(e) Department of Energy approvals of specific proposed purchases pursuant to this subpart shall communicate that such approval does not relieve the management and operating contractor of any obligation under its prime contract with DOE; is given without prejudice to any rights or claims of the Government thereunder; creates no obligation on the part of the Government to the subcontractor, and is not a predetermination of the allowability of costs to be incurred under the subcontract.

(f) Contracting officers shall assure that management and operating contractors establish and maintain subcontract files which contain those documents essential to present an accurate and adequate record of all purchasing transactions.

(g) Contracting officers shall assure that management and operating contractors document purchases in writing, setting forth the information and data used in determining that the purchases are in the best interest of the Government. The scope and detail of this documentation shall be consistent with the nature, dollar value, and complexity of the purchase.

(h) Heads of Contracting Activities will assure that the contracting activity establishes and maintains files of the documents associated with the review and approval of subcontract actions subject to DOE review and approval. Those files shall include, among other necessary documentation, an appraisal of the proposed action by the contracting activity and a copy of the approving or disapproving document forwarded to the management and operating contractor, containing a listing of any deficiencies, a listing of any required corrective actions, any suggestions, or other relevant comments.

970.7109 Advance notification.

(a) Pursuant to section 304(b) of the Federal Property and Administrative Service Act of 1949, as amended (41 U.S.C. 254(b)) contracting officers shall assure that the written description of the management and operating contractor's purchasing system and methods provides for advance notice to the DOE contracting officer of the proposed award of the following specified types of subcontracts, except as stated in paragraph (b) of this section:

(1) Cost reimbursement-type subcontracts of any award value; and

(2) Fixed price-type subcontracts which exceed $25,000; and

(3) Purchases from contractor-affiliated sources over a value established by the HCA.

(b) Pursuant to section 602(d)13 of the Act (40 U.S.C. 474(13)) referred to in paragraph (a) of this section, the advance notification requirement for the types of purchases listed in paragraphs (a) (1) and (2) of this section shall not apply to subcontracts relating to functions derived from the Atomic Energy Commission.

(c) The advance notice shall contain, as a minimum, a description of work, estimated cost, type of contract or reimbursement provisions, and extent of competition, or justification for a noncompetitive purchase procurement. The contracting officer may at any time request additional information that must be furnished promptly and prior to award of the subcontract.

970.7110. Nuclear material transfers.

(a) Management and operating contractors, in preparing contracts or other agreements in which monetary payments or credits depend on the quantity and quality of nuclear material, shall be required to assure that each such contract or agreement contains a:

(1) Description of the material to be transferred;

(2) Provision specifying the method by which the quantities are to be measured and reported;

(3) Provision specifying the procedures to be used in resolving any differences arising as a result of such measurements;

(4) Provision for the use of an independent third party as an umpire to settle unresolved differences in the analytical samples; and

(5) Provision specifying in detail which party shall bear the costs of resolving a difference and what constitutes such costs.

(b) The provisions providing for resolution of measurement differences must be such that resolution is always accomplished, while at the same time minimizing any advantage one party may have over the other.

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Federal Register

Monday
June 27, 1988

Part VII

Department of Education

34 CFR Parts 350 and 357

National Institute on Disability and Rehabilitation Research; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Parts 350 and 357

National Institute on Disability and Rehabilitation Research

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the National Institute on Disability and Rehabilitation Research (NIDRR). The regulations are needed to modify the Institute's current Field-Initiated Research Projects program to meet the need for investigator-initiated projects in development and dissemination of new rehabilitation techniques and devices, and to correct problems that the Institute has observed in the evaluation of applications for field-initiated projects. These regulations define the purpose and activities of the program, and specify criteria for selecting applicants to receive awards.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the Federal Register or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Betty Jo Berland, National Institute on Disability and Rehabilitation Research, Department of Education, 400 Maryland Avenue SW., Switzer Building, Room 3070, Washington, DC 20202; deaf or hearing impaired individuals may call (202) 732-1198 for TTY services.

SUPPLEMENTARY INFORMATION: On March 12, 1984, the Secretary published regulations establishing the Field-Initiated Research Projects Program (FIR). The Secretary now amends those regulations to revise and improve that program by: Defining the scope of the program to include certain types of projects for information dissemination and for the development of devices and techniques, as well as research; clarifying the types of projects that can be funded in each of the three categories—research and demonstrations, development, and dissemination; and establishing new selection criteria for the evaluation of applications received in the program.

In the past, the Institute limited the investigator-initiated program to strictly research and demonstration projects. NIDRR received many applications for activities that were research-related, but involved development or dissemination, that were difficult to evaluate under the existing criteria. On the basis of that experience, the Secretary determined that the program should have a broader scope and clearer purpose to accommodate other types of activities authorized under the Institute and necessary to carry out its mission.

Previously, NIDRR used the same selection criteria for FIR and certain other grant competition programs, including various types of Centers. These criteria proved confusing to the peer reviewers and contributed to less than optimum feedback to the applicants. The Secretary is therefore adopting a set of simplified criteria specifically for this program. The new evaluation criteria reflect differences among the three types of projects—research and demonstrations, development, and dissemination—that may be conducted under this program.

The new selection criteria are: Importance of the problem to be addressed; effectiveness of the design of the project in addressing the problem; staffing of the project; and project management and evaluation. The selection criteria remove any reference to Institute funding priorities (a reference that was confusing to potential applicants since the Institute does not establish annual priorities in this program) and eliminate the need for reviewers to determine which criteria are relevant to a given application. The new criteria place greater emphasis on the quality of the project design, and take into account factors that are relevant to evaluating projects for activities other than research. Other aspects of the review and evaluation procedure remain unchanged.

Analysis of Comments and Changes

NIDRR received comments on the proposed regulations from seven respondents. The comments were generally favorable, with a few suggestions for changes in the regulations.

Comment: One commenter stated a concern that the expansion of the program to include development and innovative dissemination projects would dilute the level of funding support available for research, and urged that additional funds be allocated to the program to accommodate the broader scope.

Discussion: The level of funding support for this program is determined each year based on the amount of discretionary funds available to the agency and the extent of need for NIDRR-directed research in priority areas. NIDRR does not anticipate that the expanded scope will dilute significantly the funds available for research. Rather, the new statement of purpose is expected to clarify the types of eligible projects and provide suitable criteria for evaluating them.

Changes: None.

Comment: Several commenters stated that the grant evaluation system affords too much discretion to the Secretary in making awards, diminishing the importance of the scores in the final funding decision.

Discussion: Peer review scores and agency funding recommendations in all programs are advisory to the Secretary, who has the responsibility for making the final decisions on awards. In establishing an investigator-initiated program, the Secretary was mindful of a need to assure that the resulting program would include a balanced research portfolio that would complement, and not duplicate, NIDRR's directed research agenda. Therefore, the Secretary must exercise discretion in selecting from among those applications recommended for funding in this program.

Changes: None.

Comment: Several commenters suggested that the new evaluation criteria requiring evaluation and operations plans are not really applicable to research projects, or at least are not relevant to the same extent as to development and dissemination projects. They urged that the scoring system be revised to reflect this.

Discussion: The Secretary believes that it is important to evaluate research projects in terms of accomplishment of planned activities (e.g., obtaining appropriate subject sample as planned; delivery of complete treatment interventions in a uniform manner as planned). Similarly, the Secretary believes that there must be some management plan for research projects that would indicate how staffing, supervision, recordkeeping, and achievement of interim goals would be monitored and accomplished. Also, the Secretary points out that these elements are only part of the fourth criterion, and that a score is assigned on the overall criterion. The Secretary has, however, modified the elements of that criterion to indicate that the evaluation plan and the plan of operations should be judged according to their appropriateness to the type of project that is being proposed.

Changes: The regulations in § 357.32 have been modified slightly to emphasize that the evaluation and operation plans should be assessed in terms of their appropriateness to the type of project that is proposed.

Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations specified in the order.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority in the United States. Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects

34 CFR Part 350

Administrative practice and procedure, Education, Educational research, Grant programs—education, Handicapped.

34 CFR Part 357

Education, Educational research, Grant programs—education, Handicapped, Manpower training programs, Vocational rehabilitation.

Dated: June 7, 1988.

(Catalog of Federal Domestic Assistance Number 84.133G, National Institute on Disability and Rehabilitation Research)

William J. Bennett,

Secretary of Education.

The Secretary amends Title 34 of the Code of Federal Regulations by amending Parts 350 and 357 as follows:

PART 350—DISABILITY AND REHABILITATION RESEARCH: GENERAL PROVISIONS

1. The authority citation for Part 350 continues to read as follows:

Authority: 29 U.S.C. 760–762, unless otherwise noted.

2. Section 350.1 is amended by revising paragraph (b)(7) to read as follows:

§ 350.1 Disability and rehabilitation research.

* * * * *

(b) The Secretary awards financial assistance through nine types of programs.

* * * * *

(7) Field-initiated projects (34 CFR Part 357).

* * * * *

3. Section 350.30 is amended by revising the heading and the second sentence to read as follows:

§ 350.30 What is the peer review process for these programs?

* * * Peer review panels review applications on the basis of the applicable selection criteria in 34 CFR 350.34, 352.31, 353.31, 357.32, 358.32, or 359.31.

(Authority: Sec. 202(e); 29 U.S.C. 761a(e))

4. Section 350.33 is amended by revising the heading and paragraph (a) to read as follows:

§ 350.33 How does the Secretary evaluate an application under 34 CFR Parts 351, 354, or 355?

(a) The Secretary evaluates an application under 34 CFR Part 351, 354, or 355 on the basis of the selection criteria in § 350.34.

* * * * *

5. Section 350.34 is amended by revising the heading and paragraph (a)(1) to read as follows:

§ 350.34 What selection criteria does the Secretary use in reviewing applications under Parts 351, 354, or 355?

(a) Potential Impact of Outcomes: Importance of Program (Weight 3.0). The Secretary reviews each application to determine to what degree—

(1) The proposed activity relates to the announced priority;

* * * * *

PART 357—DISABILITY AND REHABILITATION RESEARCH: FIELD-INITIATED PROJECTS

6. The authority citation for Part 357 continues to read as follows:

Authority: 29 U.S.C. 760–762, unless otherwise noted.

7. The title of Part 357 is revised to read as set forth above.

8. Section 357.1 is revised to read as follows:

§ 357.1 What is the field-initiated projects program?

This program is designed—

(a) To encourage eligible parties to originate valuable ideas for research and demonstration, development, or knowledge dissemination projects to further the purposes of the Institute; and

(b) To support research and demonstration, development, or knowledge dissemination projects as described in § 357.10, that address important activities not supported by Institute-funded research or that complement that research in a promising way.

(Authority: Secs. 200(1); 202(i)(1); 204; 29 U.S.C. 760(1), 761(a)(1), 762)

9. Section 357.120 is revised to read as follows:

§ 357.10 What types of projects are authorized under this program?

The following types of projects may be funded under this program:

(a) Research and demonstration projects, including—

(1) Scientific investigations into the nature of disability and its prevalence and distribution;

(2) Methods of analyzing disability;

(3) Techniques and devices for habilitation, rehabilitation, and restoration of physical, emotional, cognitive, communicative, vocational, and social functioning;

(4) Analyses of social, economic, industrial, geographic, and demographic factors affecting disability and rehabilitation;

(5) Studies of architectural, administrative, employment, and transportation barriers and other problems encountered by individuals with disabilities in their daily lives; and

(6) General scientific and technological inquiries to develop methods and devices to enable persons with disabilities to live with maximum independence, and other comparable research and demonstration activities.

(b) Knowledge dissemination projects related to the dissemination and utilization of new knowledge in disability and rehabilitation, including—

(1) Studies of the most effective means to disseminate new knowledge to disabled consumers and service providers;

(2) Controlled demonstrations of selected techniques to encourage the utilization of new knowledge; and

(3) Studies to develop and test new curricula to train service providers in specific clinical or service skills or in the management of services.

(c) Development projects to—

(1) Design and develop new devices or techniques to assist individuals with disabilities to engage in activities of daily living;

(2) Fabricate prototype devices;

(3) Evaluate prototypes and other important but untested devices in clinical and daily living settings;

(4) Develop standards for assistive devices; and

(5) Develop techniques to promote the manufacture, evaluation, and distribution of new devices.

(Authority: Secs. 202(e) and 202(i)(1); 29 U.S.C. 761a(e) and 761a(i)(1))

10. Section 357.32 is revised to read as follows:

§ 357.32 How does the Secretary evaluate an application under this program?

(a) *Importance of the problem.* (20 points) The Secretary reviews each application to determine the extent to which—

(1) The proposed project addresses a problem that is significant to persons with disabilities or to those who provide services to them; and

(2) The proposed project is likely to produce new and useful knowledge, techniques, or devices that will develop or disseminate solutions to problems confronting persons with disabilities.

(b) *Design of the project. (45 points)*

(1) The Secretary reviews each application for a research and demonstration project to determine the extent to which—

(i) The review of the literature is appropriate and indicates familiarity with the relevant current research;

(ii) The research hypotheses are theoretically sound and based on current knowledge;

(iii) The sample populations are adequate and appropriately selected;

(iv) The data collection instruments and methods are appropriate and likely to be successful;

(v) The data analysis measures are appropriate; and

(vi) The application discusses the anticipated research results and demonstrates how those results would satisfy the original hypotheses.

(2) The Secretary reviews each application for a knowledge dissemination project to determine the extent to which—

(i) The need for the information has been demonstrated;

(ii) The target populations are appropriately specified;

(iii) The dissemination methods are appropriate to the target populations;

(iv) The materials for dissemination are prepared in media accessible to the target population;

(v) There are adequate means of documenting and evaluating the effectiveness of the dissemination activity.

(3) The Secretary reviews each application for a development project to determine the extent to which—

(i) The proposed project will use the most effective and appropriate technology available in developing the new device or technique;

(ii) The proposed development is based on a sound conceptual model that demonstrates an awareness of the state-of-the-art in technology;

(iii) Devices or techniques will be developed and tested in an appropriate environment;

(iv) The applicant considers the cost-effectiveness and usefulness of the device or technique to be developed for persons with disabilities; and

(v) The applicant discusses the potential for commercial or private manufacture, marketing, and distribution of the product.

(c) *Personnel.* (20 points) The Secretary reviews each application to determine the extent to which—

(1) The key personnel have adequate training and experience in the required disciplines to conduct the proposed activities;

(2) The allotment of staff time is adequate to accomplish the proposed activities; and

(3) The applicant ensures that personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(d) *Management and Evaluation.* (15 points) The Secretary reviews each application to determine the extent to which—

(1) The resources of the applicant are adequate, appropriate, and accessible to individuals with disabilities;

(2) The proposed budget is adequate and appropriate for the activities to be carried out;

(3) There is a plan, appropriate to the type of field-initiated project, to evaluate the effectiveness of the project in accomplishing its goals and objectives;

(4) The applicant provides a plan of operations, appropriate to the type of field-initiated project, indicating that it will achieve the project objectives in a timely and effective manner; and

(5) Appropriate collaboration with other agencies is assured.

(Authority: Secs. 202(e) and 202(i)(1); 29 U.S.C. 761a(e) and 761a(i)(1))

(Approved by the Office of Management and Budget under Control Number 1820-0027)

11. Section 357.33 is amended by revising paragraphs (b)(1) and (b)(2), and removing paragraph (b)(3) to read as follows:

§ 357.33 What are the priorities for funding under this program?

* * * * *

(b) * * *

(1) The proposed project represents a unique opportunity to advance rehabilitation knowledge to improve the lives of individuals with disabilities.

(2) The proposed project complements research already planned or funded by the Institute through annual priorities published in the **Federal Register** or addresses that research in a new and promising way.

(3) [Removed].

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