(1) A refund system as defined in § 250.3;

(2) A system which provides refunds to distributors and discounts to recipient agencies; or

(3) If approved by FNS at the request of the distributing agency, another system which passes to the recipient agency the value of donated food contained in end products.

The processor shall make refund payments to distributors or recipient agencies in accordance with paragraph (k) of this section.

* * * * *

Date: May 27, 1988.

Anna Kondratas,

Administrator.

[FR Doc. 88-12481 Filed 6-3-88; 8:45 am]

BILLING CODE 3410-30-M

Agricultural Marketing Service

7 CFR Part 910

[Lemon Regulation 616]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 616 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 385,000 cartons during the period June 5 through June 11, 1988. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

DATES: Regulation 616 (§ 910.916) is effective for the period June 5 through June 11, 1988.

FOR FURTHER INFORMATION CONTACT: Raymond C. Martin, Section Head, Volume Control Programs, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 447-5697.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

This regulation is issued under Marketing Order No. 910, as amended (7 CFR Part 910) regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act (the "Act," 7 U.S.C. 601-674), as amended. This action is based upon the recommendation and information submitted by the Lemon Administrative Committee and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the marketing policy for 1987-88. The committee met publicly on June 1, 1988, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and recommended, by a 13-0 vote, a quantity of lemons deemed advisable to be handled during the specified week. The committee reports that the market for lemons is steady.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 910

Marketing agreements and orders, California, Arizona, Lemons.

For the reasons set forth in the preamble, 7 CFR Part 910 is amended as follows:

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR Part 910 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 910.916 is added to read as follows: [*This section will not appear in the Code of Federal Regulations.*]

§ 910.916 Lemon Regulation 616.

The quantity of lemons grown in California and Arizona which may be handled during the period June 5, 1988, through June 11, 1988, is established at 385,000 cartons.

Dated: June 2, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 88-12804 Filed 6-3-88; 8:45 am]

BILLING CODE 3410-02-M

7 CFR Parts 915 and 944

[Docket No. AMS-FV-88-067]

Avocados Grown in South Florida and Imported Avocados; Maturity Requirement Changes

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule and opportunity to file comments.

SUMMARY: This interim final rule changes the minimum maturity requirements currently in effect on a continuous basis for shipments of fresh avocados grown in South Florida, and for avocados imported into the United States. The rule changes the maturity shipping schedules for the Pinkerton and Reed varieties of avocados, adds the Buccaneer variety to the schedule, and deletes the Day variety from the schedule. This action also makes changes in the maturity schedule in Table I of the regulation to synchronize it with the 1988-89 calendar years. Providing fresh markets with mature fruit is important in creating and maintaining consumer satisfaction and sales. The rule is designed to promote orderly marketing conditions for avocados in the interest of producers and consumers.

DATES: Section 915.332 becomes effective June 6, 1988, and provisions applicable to avocados imported into the United States under § 944.31 shall become effective June 9, 1988. Comments which are received by July 6, 1988 will be considered prior to issuance of the final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this interim final rule. Comments should be sent to: Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2085–S, Washington, DC 20090–6456. Three copies of all written material shall be submitted, and they will be made available for public inspection at the office of the Docket Clerk during regular business hours. The written comments should reference the date and page number of this issue of the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Gary D. Rasmussen, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20250, telephone (202) 475–3918.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 915, as amended [7 CFR Part 915], regulating the handling of avocados grown in South Florida. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act.

This rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1, and has been determined to be a "non-major" rule under the criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act and rules issued thereunder are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are an estimated 34 handlers of Florida avocados subject to regulation under the marketing order for avocados grown in South Florida, and an estimated 20 importers who import avocados into the United States. In addition, there are approximately 300 avocado producers in South Florida. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.2] as those having annual gross revenues for the last three years of less than $500,000, and agricultural services firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of the handlers, importers, and producers may be classified as small entities.

The maturity regulation for Florida avocados covered under this marketing order is specified in § 915.332 Florida avocado maturity regulation. The maturity regulation for avocados imported into the United States is specified in § 944.31. These regulations were issued on a continuing basis subject to modification, suspension, or termination by the Secretary. The Florida avocado regulation provides that no handler shall handle any variety of avocados grown in the production area unless such varieties meet the prescribed minimum maturity requirements. Such requirements established color maturity specifications for certain varieties, and minimum weights and diameters for about 60 varieties during specified shipping periods each season. The avocado maturity import requirements are comparable to the requirements for Florida avocados.

This interim final rule amends the Florida avocado maturity regulation currently in effect in a continuous basis under § 915.322 [7 CFR Part 915]. This rule changes the maturity shipping schedule and minimum size requirements for weight and diameter for the Pinkerton and Reed varieties of avocados based on maturity test data developed last season. This rule also adds the Buccaneer variety to the maturity shipping schedule, and deletes the Day variety from the schedule, based on shipping data developed last season for all varieties. Such data indicates that a new variety, the Buccaneer, was shipped for the first time last season, while the Day variety was not shipped. In addition, this rule makes necessary changes in the effective periods specified in Table I of the maturity regulation to synchronize these periods with the 1988–89 calendar years.

The changes in the maturity requirements applicable to Florida avocado shipments were unanimously recommended by the Avocado Administrative Committee. The committee works with the Department in administering the marketing agreement and order program.

The committee meets prior to and during each season to consider recommendations for modification, suspension, or termination of the regulatory requirements for Florida avocados. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department reviews committee recommendations and information submitted by the committee and other available information, and determines whether modification, suspension, or termination of the regulatory requirements would tend to effectuate the declared policy of the Act.

Fresh Florida avocado shipments are projected at 1,200,000 bushels (55 pounds net weight) for the 1988–89 season, compared with fresh shipments of 1,129,587 bushels shipped in 1987–88, 956,217 bushels in 1986–87, and 1,110,130 bushels in 1985–86. Florida avocados are shipped every month of the year. The new season normally begins with light shipments of early varieties in late May or early June, with heavy shipments following in late June or early July. Florida avocados compete primarily with avocados produced in California, with estimated shipments of about 9,000,000 bushels during the 1987–88 season. Avocados imported into the United States amounted to about 287,000 bushels in 1987.

The current minimum maturity requirements applicable to fresh shipments of avocados grown in South Florida and imported avocados have been in effect on a continuous basis since the 1987–88 season. The maturity requirements for Florida avocados are intended to prevent the shipment of immature avocados, to improve buyer confidence in the marketplace, and to foster increased consumption. Similar maturity requirements have been issued each year over the past several seasons, and Florida avocado producers and handlers have found such requirements beneficial in the successful marketing of their avocado crops.

Some Florida avocado shipments are exempt from the maturity requirements. Handlers may ship up to 55 pounds of avocados during any one day under a minimum quantity exemption, and may make gift shipments of up to 20 pounds of avocados in individually addressed containers. Also, avocados utilized in commercial processing will not be covered by the maturity requirements.

It is the Department's view that changing the maturity regulations would not adversely impact growers, handlers, and importers. The application of the maturity requirements of both Florida and imported avocados over the past several years have helped to assure that only mature avocados were shipped to fresh markets. The committee continues to believe that the maturity requirements for Florida avocados ar needed to improve grower returns. Although compliance with these

maturity requirements would affect costs to handlers and importers, these costs appear to be significantly offset when compared to the potential benefits of assuring the trade and consumers of mature avocados.

The Florida avocado maturity regulation establishes maturity requirements for fresh shipments of Florida avocados in terms of minimum weights or diameters for specified time periods during the shipping season for 60 varieties and 2 seedling types of avocados grown in Florida. These time periods are for 7-day increments, beginning on Monday of each week and ending on Sunday.

The minimum weight and diameter maturity requirements are used primarily during the first part of the harvest season for each variety to make sure that the avocados are sufficiently mature to complete the ripening process prior to shipment. Another maturity requirement based on the skin color of the fruit is also used to determine maturity for certain varieties of avocados which turn red or purple when mature. The maturity requirements are designed to make sure that all shipments of Florida avocados are mature, so as to provide consumer satisfaction essential for the successful marketing of the crop, and to provide the trade and consumers with an adequate supply of mature avocados in the interest of producers and consumers.

A minimum grade requirement of U.S. No. 2 is also currently in effect on a continuous basis for Florida avocados under § 915.306 [7 CFR Part 915].

An avocado import maturity regulation is currently in effect on a continuous basis under section 8e [7 U.S.C. 608e–1] of the Act. Section 8e of the Act requires that when certain domestically produced commodities, including avocados, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, or maturity requirements. Comparable requirements may be issued upon not less than 3 days notice whenever the Secretary determines that the application of restrictions under a marketing order to an imported commodity is not practicable because of variations in characteristics between the imported and domestic commodity. The avocado import maturity regulation is prescribed in § 944.31 [7 CFR Part 944]. That section establishes comparable minimum weight and diameter maturity requirements for avocados imported into the United States, based on the maturity requirements specified in paragraph (a)(2) of § 915.332 for avocados grown in Florida. Moreover, avocado import grade requirements are currently in effect on a continuous basis under § 944.23 [7 CFR Part 944]. Such grade requirements specify that all avocados imported from all foreign countries must grade at least U.S. No. 2, which requires that the avocados be mature. An exemption provision in both avocado import regulations permits persons to import up to 55 pounds of avocados exempt from such import requirements.

The maturity requirements, specified herein, reflect the committee's and the Department's appraisal of the need to change the maturity requirements applicable to domestic and import shipments of avocados.

Based on the above, the Administrator of AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented, the information and recommendations submitted by the committee, and other available information, it is found that the rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that it is impracticable, unnecessary and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because:

(1) Avocado handlers are aware of this action which was unanimously recommended by the committee at a public meeting, and they will not need additional time to comply with the changed requirements; (2) the changes to synchronize effective periods in the maturity table with 1988–89 calendar years must be made by late May when 1988–89 season Florida avocado shipments are expected to begin; (3) the avocado import requirements are mandatory under section 8e of the Act; and (4) the rule provides a 30-day comment period, and any comments received will be consistent prior to issuance of the final rule.

List of Subjects

7 CFR Part 915

Marketing agreements and orders, Avocados, Florida.

7 CFR Part 944

Food grades and standards, Imports, Avocados.

For the reasons set forth in the preamble, 7 CFR Part 915 is amended as follows:

PART 915—AVOCADOS GROWN IN SOUTH FLORIDA

1. The authority citation for 7 CFR Parts 915 and 944 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

§ 915.332 [Amended]

2. Section 915.332 is amended by revising Table I in paragraph (a)(2) to read as follows (this section will appear in the Code of Federal Regulations):

* * * * *

TABLE I

Avocado variety	Effective period		Minimum size	
	From	Through	Weight (ounces)	Diameter (inches)
Kosel	3rd Mon May	5th Sun May	16	
	5th Mon May	2nd Sun June	13	
Arue	3rd Mon May	5th Sun May	16	
	5th Mon May	1st Sun July	14	3-3/16
Donnie	4th Mon May	1st Sun June	16	3-5/16
	1st Mon June	1st Sun July	14	3-4/16
Dr. Dupuis #2	5th Mon May	2nd Sun June	16	3-9/16
	2nd Mon June	1st Sun July	14	3-7/16
	1st Mon July	3rd Sun July	12	3-2/16
Fuchs	1st Mon June	3rd Sun June	14	3-3/16
	3rd Mon June	1st Sun July	12	3
K-5	2nd Mon June	4th Sun June	18	3-5/16
	4th Mon June	2nd Sun July	14	3-3/16

TABLE I—Continued

Avocado variety	Effective period		Minimum size	
	From	Through	Weight (ounces)	Diameter (inches)
Hardee	2nd Mon June	3rd Sun June	18	3-6/16
	3rd Mon June	4th Sun June	16	3-2/16
	4th Mon June	3rd Sun July	14	2-14/16
West Indian seedling [1]	3rd Mon June	3rd Sun July	18	
	3rd Mon July	3rd Sun Aug	16	
	4th Mon Aug	3rd Sun Sept	14	
Pollock	3rd Mon June	1st Sun July	18	3-11/16
	1st Mon July	3rd Sun July	16	3-7/16
	3rd Mon July	5th Sun July	14	3-4/16
Simmonds	3rd Mon June	1st Sun July	16	3-9/16
	1st Mon July	3rd Sun July	14	3-7/16
	3rd Mon July	5th Sun July	12	3-1/16
Nadir	3rd Mon June	4th Sun June	14	3-3/16
	4th Mon June	1st Sun July	12	3-1/16
	1st Mon July	3rd Sun July	10	2-14/16
Gorham	1st Mon July	3rd Sun July	29	4-5/16
	3rd Mon July	2nd Sun Aug	27	4-3/16
Reuhle	1st Mon July	2nd Sun July	18	3-11/16
	2nd Mon July	3rd Sun July	16	3-9/16
	3rd Mon July	5th Sun July	14	3-7/16
	1st Mon Aug	1st Sun Aug	12	3-5/16
	2nd Mon Aug	2nd Sun Aug	10	3-3/16
Peterson	2nd Mon July	3rd Sun July	14	3-8/16
	3rd Mon July	4th Sun July	12	3-5/16
	4th Mon July	1st Sun Aug	10	3-2/16
Biondo	2nd Mon July	2nd Sun Aug	13	
Bernecker	3rd Mon July	5th Sun July	18	3-6/16
	1st Mon Aug	2nd Sun Aug	16	3-5/16
	3rd Mon Aug	4th Sun Aug	14	3-4/16
232	3rd Mon July	5th Sun July	14	
	1st Mon Aug	2nd Sun Aug	12	
Pinelli	3rd Mon July	5th Sun July	18	3-12/16
	1st Mon Aug	2nd Sun Aug	16	3-10/16
Trapp	3rd Mon July	5th Sun July	14	3-10/16
	1st Mon Aug	2nd Sun Aug	12	3-7/16
Miguel (P)	3rd Mon July	5th Sun July	22	3-13/16
	1st Mon Aug	2nd Sun Aug	20	3-12/16
	3rd Mon Aug	4th Sun Aug	18	3-10/16
Nesbitt	5th Mon July	5th Sun July	22	3-12/16
	1st Mon Aug	1st Sun Aug	16	3-5/16
	2nd Mon Aug	3rd Sun Aug	14	3-3/16
Beta	1st Mon Aug	1st Sun Aug	18	3-8/16
	2nd Mon Aug	4th Sun Aug	16	3-5/16
K-9	1st Mon Aug	3rd Sun Aug	16	
Tower 2	1st Mon Aug	2nd Sun Aug	14	3-6/16
	3rd Mon Aug	1st Sun Sept	12	3-4/16
Christina	1st Mon Aug	3rd Sun Aug	11	2-14/16
Tonnage	1st Mon Aug	2nd Sun Aug	16	3-6/16
	3rd Mon Aug	3rd Sun Aug	14	3-4/16
	4th Mon Aug	4th Sun Aug	12	3
Waldin	1st Mon Aug	2nd Sun Aug	16	3-9/16
	3rd Mon Aug	4th Sun Aug	14	3-7/16
	5th Mon Aug	2nd Sun Sept	12	3-4/16
Lisa (P)	2nd Mon Aug	2nd Sun Aug	12	3-2/16
	3rd Mon Aug	3rd Sun Aug	11	3
Catalina	3rd Mon Aug	4th Sun Aug	24	
	5th Mon Aug	3rd Sun Sept	22	
Pinkerton (P)	1st Mon Oct	3rd Sun Oct	13	3-3/16
	3rd Mon Oct	1st Sun Nov	11	3
	1st Mon Nov	3rd Sun Nov	9	
Fairchild	3rd Mon Aug	4th Sun Aug	16	3-10/16
	5th Mon Aug	2nd Sun Sept	14	3-7/16
	2nd Mon Sept	3rd Sun Sept	12	3-4/16
Black Prince	3rd Mon Aug	4th Sun Aug	28	4-1/16
	5th Mon Aug	2nd Sun Sept	23	3-14/16
	2nd Mon Sept	1st Sun Oct	16	3-9/16
Loretta	5th Mon Aug	2nd Sun Sept	30	4-3/16
	2nd Mon Sept	1st Sun Oct	26	3-15/16
Blair	5th Mon Aug	2nd Sun Sept	16	3-8/16
	2nd Mon Sept	1st Sun Oct	14	3-5/16
Booth 8	5th Mon Aug	3rd Sun Sept	16	3-9/16
	3rd Mon Sept	1st Sun Oct	14	3-6/16
	1st Mon Oct	3rd Sun Oct	10	3-1/16
Booth 7	5th Mon Aug	2nd Sun Sept	18	3-13/16
	2nd Mon Sept	4th Sun Sept	16	3-10/16
	4th Mon Sept	2nd Sun Oct	14	3-8/16
Booth 5	1st Mon Sept	3rd Sun Sept	14	3-9/16

TABLE I—Continued

Avocado variety	Effective period		Minimum size	
	From	Through	Weight (ounces)	Diameter (inches)
Guatemalan Seedling [2]	3rd Mon Sept	1st Sun Oct	12	3-6/16
	1st Mon Sept	1st Sun Oct	15	
Marcus	1st Mon Oct	1st Sun Dec	13	
	1st Mon Sept	3rd Sun Sept	32	4-12/16
Brooks 1978	3rd Mon Sept	5th Sun Oct	24	4-5/16
	1st Mon Sept	2nd Sun Sept	12	3-4/16
	2nd Mon Sept	3rd Sun Sept	10	3-1/16
	3rd Mon Sept	2nd Sun Oct	8	2-14/16
Collinson	2nd Mon Sept	2nd Sun Oct	16	3-10/16
Rue	2nd Mon Sept	3rd Sun Sept	30	4-3/16
	3rd Mon Sept	1st Sun Oct	24	3-15/16
	1st Mon Oct	3rd Sun Oct	18	3-9/16
Hickson	2nd Mon Sept	4th Sun Sept	12	3-1/16
	4th Mon Sept	2nd Sun Oct	10	3
Simpson	3rd Mon Sept	2nd Sun Oct	16	3-9/16
Choquette	4th Mon Sept	3rd Sun Oct	28	4-4/16
	3rd Mon Oct	5th Sun Oct	24	4-1/16
	5th Mon Oct	2nd Sun Nov	20	3-14/16
Winslowson	4th Mon Sept	3rd Sun Oct	18	3-14/16
Leona	4th Mon Sept	2nd Sun Oct	18	3-10/16
Hall	4th Mon Sept	2nd Sun Oct	26	3-14/16
	2nd Mon Oct	4th Sun Oct	20	3-9/16
	4th Mon Oct	1st Sun Nov	18	3-8/16
Herman	1st Mon Oct	3rd Sun Oct	16	3-9/16
	3rd Mon Oct	5th Sun Oct	14	3-6/16
Lula	1st Mon Oct	3rd Sun Oct	18	3-11/16
	3rd Mon Oct	5th Sun Oct	14	3-16/16
	5th Mon Oct	2nd Sun Nov	12	3-3/16
Ajax (B-7)	2nd Mon Oct	5th Sun Oct	18	3-14/16
Taylor	2nd Mon Oct	4th Sun Oct	14	3-5/16
	4th Mon Oct	1st Sun Nov	12	3-2/16
Booth 3	2nd Mon Oct	3rd Sun Oct	16	3-8/16
	3rd Mon Oct	5th Sun Oct	14	3-6/16
Linda	5th Mon Oct	3rd Sun Nov	18	3-12/16
Monroe	1st Mon Nov	3rd Sun Nov	26	4-3/16
	3rd Mon Nov	1st Sun Dec	24	4-1/16
	1st Mon Dec	3rd Sun Dec	20	3-14/16
	3rd Mon Dec	1st Sun Jan	16	3-9/16
Booth 1	2nd Mon Nov	4th Sun Nov	16	3-12/16
	4th Mon Nov	2nd Sun Dec	12	3-6/16
Zio (P)	2nd Mon Nov	4th Sun Nov	12	3-1/16
	4th Mon Nov	2nd Sun Dec	10	2-14/16
Wagner	3rd Mon Nov	1st Sun Dec	12	3-5/16
	1st Mon Dec	3rd Sun Dec	10	3-2/16
Brookslate	2nd Mon Dec	3rd Sun Dec	18	3-13/16
	3rd Mon Dec	4th Sun Dec	16	3-10/16
	4th Mon Dec	2nd Sun Jan	14	3-8/16
	2nd Mon Jan	4th Sun Jan	12	3-5/16
	4th Mon Jan	1st Sun Feb	10	
Meya (P)	2nd Mon Dec	4th Sun Dec	13	3-2/16
	4th Mon Dec	2nd Sun Jan	11	3
Reed (CP)	2nd Mon Dec	4th Sun Dec	12	3-4/16
	4th Mon Dec	2nd Sun Jan	10	3-3/16
	2nd Mon Jan	4th Sun Jan	9	3
Buccaneer	5th Mon Oct	4th Sun Nov	13	3-6/16

[1] Avocados of the West Indian type varieties and the West Indian type seedlings not listed elsewhere in Table I.
[2] Avocados of the Guatemalan type varieties, hybrid varieties, and unidentified seedlings not listed elsewhere in Table I.

* * * * *

Dated: May 31, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 88-12551 Filed 6-3-88; 8:45 am]

BILLING CODE 3410-02-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Revision of Backfitting Process for Power Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is promulgating an amended rule which governs the backfitting of nuclear power plants. This action is necessary in order to have a backfit rule which unambiguously conforms with the August 4, 1987 decision of the U.S. Court of Appeals for the District of Columbia in Union of Concerned Scientists, et al., v. U.S. Nuclear Regulatory Commission. This action is intended to clarify when economic costs may be considered in backfitting nuclear power plants.

EFFECTIVE DATE: July 6, 1988.

FOR FURTHER INFORMATION CONTACT: Steven F. Crockett, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Phone: (202) 492–1600.

SUPPLEMENTARY INFORMATION:

Background

On September 20, 1985, after an extensive rulemaking proceeding which included sequential opportunities for public comment on an advanced notice of proposed rulemaking (48 FR 44217; September 28 1983) and a notice of proposed rulemaking (49 FR 47034; November 30, 1984), the Commission adopted final amendments to its rule which governs the backfitting of nuclear power plants, 10 CFR 50.109 (50 FR 38097; September 20, 1985). Backfitting is defined in some detail in the rule, but for purposes of discussion here it means measures which are directed by the Commission or by NRC staff in order to improve the safety of nuclear power reactors, and which reflect a change in a prior Commission or staff position on the safety matter in question.

Judicial review of the amended backfit rule and a related internal NRC Manual chapter which partially implemented it was sought and, on August 4, 1987, the U.S. Court of Appeals for the DC Circuit rendered its decision vacating both the rule and the NRC Manual chapter which implemented the rule in part. UCS v. NRC, 824 F.2d 103. The Court concluded that the rule, when considered along with certain statements in the rule preamble published in the **Federal Register**, did not speak unambiguously in terms that constrained the Commission from considering economic costs in establishing standards to ensure adequate protection of the public health and safety as dictated by section 182 of the Atomic Energy Act. At the same time, the Court agreed with the Commission that once an adequate level of safety protection had been achieved under section 182, the Commission was fully authorized under section 161i of the Atomic Energy Act to consider and take economic costs into account in ordering further safety improvements. The Court therefore rejected the position of petitioners in the case, Union of Concerned Scientists, that economic costs may never be a factor in safety decisions under the Atomic Energy Act.

Because the Court's opinion regarding the circumstances in which costs may be considered in making safety decisions on nuclear power plants was completely in accord with the Commission's own policy views on this important subject, the Commission decided not to appeal the decision. Instead, the Commission decided to amend both the rule and the related NRC Manual chapter (Chapter 0514) so that they conform unambiguously to the Court's opinion. On September 10, 1987, the Commission published proposed amendments to the rule (52 FR 34223) and provided for a comment period ending on October 13, 1987.[1] The final rule as set out in this document is substantially the same as the proposed rule (52 FR 34223; September 10, 1987).

In this rulemaking the Commission has adhered to the following safety principle for all of its backfitting decisions. The Atomic Energy Act commands the Commission to ensure that nuclear power plant operation provides adequate protection to the health and safety of the public. In defining, redefining or enforcing this statutory standard of adequate protection, the Commission will not consider economic costs. However, adequate protection is not absolute protection or zero risk. Hence safety improvements beyond the minimum needed for adequate protection are possible. The Commission is empowered under section 161 of the Act to impose additional safety requirements not needed for adequate protection and to consider economic costs in doing so.

The 1985 revision of the backfit rule, which was the subject of the Court's decision, required, with certain exceptions, that backfits be imposed only upon a finding that they provided a substantial increase in the overall protection of the public health and safety or the common defense and security and that the direct and indirect costs of implementation were justified in view of this increased protection. The amended rule, set out in this document, restates the exceptions to this requirement for a finding, so that the rule will clearly be in accord with the safety principle stated above.

Particularly in response to the Court's decision, the rule now provides that if the contemplated backfit involves defining or redefining what level of protection to the public health and safety or common defense and security should be regarded as adequate, neither the rule's "substantial increase" standard, nor its "costs justified" standard, see § 50.109(a)(3), is to be applied. (See § 50.109(a)(4)(iii).) Also in response to the Court's decision, see 824 F.2d at 119, the rule now also explicitly says that the Commission shall always require the backfitting of a facility if it determines that such regulatory action is necessary to ensure that the facility provides adequate protection to the health and safety of the public and is in accord with the common defense and security.

On instruction from the Commission, the NRC staff has amended its Manual chapter on plant-specific backfitting to ensure consistency with the Court's opinion. Copies of the revised chapter are available for public inspection in the Commission's Public Document Room, 1717 H Street NW., Washington, DC 20555.[2]

Response to Comments

Comments were received from 12 utilities, one Federal agency (DOE), one vendor, seven individuals, seven citizens' groups, and two industry groups. Lengthy and detailed comments were submitted by the Union of Concerned Scientists (UCS) and the Nuclear Utility Backfitting and Reform Group (NUBARG). Both organizations were active in the rulemaking which led to the 1985 revision of the rule. The comments submitted by these two groups encompassed most of the comments made by others. Below, the Commission paraphrases the chief comments and responds to them. The Commission has given careful consideration to every comment. The original comments may be viewed in the NRC's Public Document Room in Washington, DC.

[1] In its comments on the proposed amendments, the Union of Concerned Scientists asserts that the **Federal Register** notice of the proposed amendments was technically defective. UCS argues that since the Court had vacated the entire rule, the **Federal Register** notice should have proposed enactment of an entire, amended, rule, rather than simply amendments to the vacated rule. In weighing the technical merit of UCS' argument, it should be noted that as of the date of the **Federal Register** notice, the mandate of the Court had not yet issued and the rule was thus still legally in effect. However, the more important consideration is that the notice clearly revealed the Commission's intent to reissue the backfut rule once it had been conformed to the Court's decision. UCS understood this intent and took the opportunity to resubmit the comments it had submitted during the rulemaking leading up to the 1985 revision of the rule. In any event, the Commission is publishing the entire rule in this document.

[2] Several commenters argue that the revised Manual chapter should undergo what amounts to notice and comment rulemaking. However, the Manual chapter, if it is a rule at all, is a rule of agency organization, procedure, or practice, and therefore is not subject to the notice and comment requirements of the Administrative Procedure Act. See 5 U.S.C. 553(b)(A); see also § 553(a)(2). The Commission did publish for comment an earlier version of Manual Chapter (49 FR 16900; April 20, 1984), but that version was already in effect when it was published for comment, and it was published for comment only because the Commission was still in the process of making fundamental changes to the backfitting process and wanted comment on the procedures then in effect. See id.

"Adequate Protection"

The great majority of the commenters raised issues about the rule's use of the phrase "adequate protection". This phrase is used in the rule's exception provisions. See § 50.109(a)(4). Generally, the rule requires, among other things, that it be shown for a given proposed backfit that implementation of the backfit would bring about a "substantial increase" in overall protection to public health and safety, and that the direct and indirect costs of the backfit are justified by that substantial increase. See § 50.109(a)(3). However, § 50.109(a)(4) also requires that these two standards not be applied in three situations:

First, where the backfit is required to bring a facility into compliance with NRC requirements or the licensee's own written commitments:

Second, where the backfit is necessary to ensure that the facility provides adequate protection to the health and safety of the public and is in accord with the common defense and security; and

Third, as noted above, where the backfit involves defining or redefining what level of protection to the public health and safety or common defense and security should be regarded as adequate.

The comments on the rule's use of the phrase "adequate protection" generally took two forms, each discussed more fully later on in this notice. The first form, most fully represented by UCS' comments, was that the rule itself should actually include a definition of "adequate protection" (the final rule set out in this document does not), a phrase nowhere explicitly defined in general terms, either in the Atomic Energy Act, from which the phrase comes, or in the Commission's regulations.

The second, more modest, form of the comments on "adequate protection", most fully represented by NUBARG's comments, was that one or another of the three exception provisions in the rule was redundant (none is). While not amounting to a call for a definition of "adequate protection", NUBARG's comments displayed some of UCS' uncertainty about what the Commission meant by the phrase.

Each group had difficulty applying the phrase to characterize past Commission action in backfitting. UCS claimed that the Commission had never backfitted in order to achieve something beyond "adequate protection." NUBARG, however, claimed that the Commission had never required a backfit on the grounds that compliance with the regulations was not enough to provide adequate protection. These views, differing in emphasis, reflect the two groups' opposite concerns about the possibility that the Commission would use the phrase "adequate protection" arbitrarily. UCS is concerned that the Commission might interpret the phrase "adequate protection" to refer to a level of safety such that every proposed improvement would be subjected to cost-benefit analysis. Conversely, the industry appears concerned that the Commission might interpret the phrase "adequate protection" to refer to a level of safety such that no proposed improvement would be subjected to cost-benefit analysis.

The Commission certainly did not intend that this rulemaking should focus on the meaning of the phrase "adequate protection". The main point of this rulemaking was simply to negate the misimpression left by two statements in the preamble to the 1985 version of the backfit rule. UCS puts forward two grounds for its emphasis on the phrase "adequate protection". First, UCS asserts that "(t)he crucial decision as to whether cost benefit analysis will be used in assessing the need for backfitting is dependent on whether the particular backfitting under consideration is needed to ensure adequate safety * * *." Second, UCS claims that the Court "ordered" the Commission to "stop trying to obscure its intentions through ambiguous and vague language * * *."

However, as will be explained more fully below, the Court's decision turned not on the rule's lack of a definition of "adequate protection" but rather on two statements which seemed to the Court to imply that the Commission intended to take costs into consideration in determining what "adequate protection" required; the meaning of "adequate protection" was simply not an issue in the litigation. Moreover, UCS overestimates the role the phrase "adequate protection" plays in the backfit rule. The threshold decision in considering a proposed backfit, and very often the only decision that need be made,[3] is not whether adequate protection is at stake but rather whether the facility is in compliance with the Commission's requirements and the licensee's written commitments.

Even if UCS is right about the importance of the phrase "adequate protection", there is nothing unusual or imprudent, and certainly nothing illegal, about decisions which ultimately turn on the application—by duly constituted authority and after full consideration of all relevant information—of phrases which are not fully defined. Consider, for instance, the "reasonable assurance" determination the Commission must make before issuing an operating license.[4] Indeed, most of the Commission's rules and regulations are ultimately based on unquantified and, as we note below, presently unquantifiable ideas of what constitutes "adequate protection".

Were there something peculiarly critical about the role of "adequate protection" in the backfit rule, the issue of the phrase's meaning could have been raised in the rulemaking for the 1985 rule. Two of the three exception provisions set out above were in the 1985 revision of the rule, where they used the equivalent phrase "undue risk" instead of "adequate protection". Also, as the Court in UCS v. NRC noted, 824 F.2d at 119, the statement of considerations which accompanied the 1985 version of the rule quite explicitly at least twice limited the consideration of costs in backfitting decisions to situations where "adequate protection" was already secured.[5]

Nonetheless, an issue which is a concern of almost every commenter in this rulemaking should not be ignored. Therefore, the Commission will answer as best it can the questions the commenters have raised concerning the rule's use of the phrase "adequate protection". We begin with UCS' call for an objective and generally applicable definition of "adequate protection". We argue that such a definition is not possible in the near future, but that the public and licensees are nonetheless protected against misuse of the phrase. In the course of responding to UCS' comments, we shall, of necessity, be making at least preliminary responses to most of NUBARG's comments also.

UCS argues that the rule permits the agency to escape its legal responsibility

---

[3] For instance, a majority of the plant-specific backfits carried out during the first year after the 1985 revision of the backfit rule became effective were for the sake of compliance. See SECY-86-46, Evaluation of Managing Plant-Specific Backfit Requirements (November 21, 1986), Enclosure 1.

[4] "* * * [A]n operating license may be issued by the Commission * * * upon finding that: * * * (t)here is reasonable assurance * * * that the activities authorized by the operating license can be conducted without endangering the health and safety of the public * * *." 10 CFR 50.57(a)(3).

[5] "The consideration and weighing of costs contemplated by the rule applies to backfits that are intended to result in incremental safety improvements for a plant that already provides an acceptable degree of protection[.]" 50 FR 38103, col. 1; also, "(t)he costs associated with proposed new safety requirements may be considered by the Commission provided that the Atomic Energy Act finding 'no undue risk' can be made." Id. at 38101, col. 3.

to articulate the factors on which it bases its backfitting decisions. UCS asserts that the rule should "enunciate criteria and guidelines about what constitutes redefining and defining adequate protection levels, what constitutes an adequate as opposed to a beyond adequate protection level, and what factors place a particular circumstance within the rule or within the exceptions." Another comment asserts that any definition of "adequate protection" should include the resolution of all outstanding safety issues. Yet another calls for "objective criteria", "some real numbers" on releases, accident consequences, and the like.

There does not exist, and cannot exist, at least not yet, a generally applicable definition of "adequate protection" which would guard against every possible misuse of the phrase. Congress established "adequate protection" as the standard the Commission is to apply in licensing a plant, see 42 U.S.C. 2232(a), and gave the Commission authority to issue rules and regulations necessary for protection of public health and safety, see 42 U.S.C. 2201, but Congress did not define "adequate protection", nor did it command the Commission to define it.

Such a definition would have to take one of two forms, one of them incapable of preventing the abuses the commenters are concerned about, and the other simply not possible yet. The first of these would be a verbal definition of the kind encountered in, for instance, the various "reasonable man" standards in the common law. After the pattern of these, the Commission could say, correctly, that "adequate protection" is not zero risk, that it is the same as "no undue risk", that it has long-term and short-term aspects, and that it is that level of safety which the Atomic Energy Act requires for initial and continued operation of a nuclear power plant. However, such a definition clearly will not, of itself, prevent the abuses UCS and NUBARG are concerned about, nor is such a standard sufficiently helpful to the NRC staff in actual practice.

Thus, if there is to be a useful and generally applicable definition of "adequate protection", it must take another, more precise form, namely, quantitative. Several of the commenters seem to have such a definition in mind when they call for "objective criteria", some "real numbers", and the like. In fact, the Commission is actively pursuing reliable quantitative measures of safety, and some quantitative and generally applicable definition of "adequate protection" may eventually emerge as a byproduct of the Commission's efforts, still in their early stages, to implement its general safety goals, which take a partly quantitative form. (See 51 FR 30028; August 21, 1986, Policy Statement on Safety Goals.) However, given the state of the art in quantitative safety assessment, it is not reasonable to expect that the Commission could make licensing decisions—let alone decisions on whether to consider cost in backfitting—wholly on a quantitative definition of "adequate protection". Surprisingly, some of the commenters who call for "objective criteria", "some real numbers", and the like, have in the past criticized quantitative risk assessments.

Nonetheless, even in the absence of a useful and generally applicable definition of "adequate protection", the Commission can still make sound judgments about what "adequate protection" requires, by relying upon expert engineering and scientific judgment, acting in the light of all relevant and material information. As UCS itself said in its comments on the proposed 1985 revision of the rule, "(u)ltimately, the determination of what standards must be met in order to provide a reasonable assurance that the public health and safety will be protected comes down to the reasoned professional judgment of the responsible official."

The Commission's exercise of this judgment will take two familiar forms, of which the most important is rule and regulation. An essential point of the Commission's having regulations is to flesh out the "adequate protection" standard entrusted to the Commission by Congress. See UCS v. NRC, 824 F.2d at 117–18. Exercising engineering and scientific judgment in the light of all relevant and material information, the NRC identifies potential hazards and then requires that designs be able to cope with such hazards with sufficient safety margins and reliable backup systems. Regulations and guidance arrived at in this way do not, strictly speaking, "define" adequate protection, since there will be times when the NRC issues rules which require something beyond adequate protection. Nonetheless, compliance with such regulations and guidance may be presumed to assure adequate protection at a minimum. As the Commission has said on many occasions, compliance with the Commission's regulations and guidance "should provide a level of safety sufficient for adequate protection of the public health and safety and common defense and security under the Atomic Energy Act." (49 FR 47034, 47036, col. 2, November 30, 1984, proposed 1985 rule; see also 50 FR 38097, 38101, col. 3, September 20, 1985, final 1985 rule; 51 FR 30028, col. 1, August 21, 1986, Policy Statement on Safety Goals.)

Because "adequate protection" is presumptively assured by compliance with the regulations and other license requirements, all the versions of the backfit rule—the 1970 rule, the 1985 rule, and the one set out in this document, see § 50.109(a)(4)(i)—have a "compliance" exception: plants out of compliance may be backfitted without findings of "substantial increase" in protection or a "justification" of costs.

However—and here is where the lack of a general definition for "adequate protection" poses a challenge—"adequate protection" is only presumptively assured by compliance. As the Commission said in promulgating the 1985 revision, the presumption may be overcome by, for instance, new information which indicates that improvements are needed to ensure adequate protection. (50 FR 38101, col. 3.) Such new information may reveal an unforeseen significant hazard or a substantially greater potential for a known one, or insufficient margins and backup capability. Engineering judgment may, in the light of such information, conclude that restoration of the level of protection presumed by the regulations requires more than compliance. Thus both the 1985 revision and the revision below contain exemptions for backfits necessary to assure "adequate protection", or, as the 1985 rule equivalently said, "no undue risk". See § 50.109(a)(4)(ii) of the rule set out in this document.

If compliance does not assure adequate protection, the Commission must be able to determine how much more protection is required, and a precise and generally applicable definition of "adequate protection" would facilitate that determination. But such a definition would have only a limited role to play. The first and most crucial question is whether the proposed backfit is required to bring a plant into compliance. Only if the proposed backfit requires more than compliance with NRC regulations and license conditions need there be a determination as to what "adequate protection" requires. Given this relation between compliance and "adequate protection", the industry might be more concerned than UCS is about the lack of a general definition of "adequate protection", for UCS will at least have the comfort of knowing that compliance will be secured before cost is considered, but the industry cannot be

sure how much more than compliance may be asked of it despite the cost.

Where, as in the cases contemplated by the second exception provision of the rule, more than compliance is required and quantitative criteria do not define "adequate protection", the agency must fall back on the second familiar form in which engineering judgment is exercised by the Commission, namely, case-by-case. Administrative agencies are not required to proceed by rule alone, for the method of case-by-case judgment is quite capable of meeting the requirement that the factors on which administrative decisions are based be articulated. Rather than proceeding by an almost ministerial application of "objective criteria", the Commission must fashion a series of case-by-case judgments into a well-reasoned and factually well-supported body of decisions which, acting as reasoned precedent, can control and guide the Commission's exercise of the discretion granted it by Congress in precisely the way in which common-law precedents control and guide the common law judge's exercise of his or her judgment. See Nader v. Ray, 363 F.Supp. 946, 954–55 (D.D.C. 1973) (determining what constitutes adequate protection calls for exercise of discretion in a judgmental process very different from acting in accord with a clear, non-discretionary legal duty).

The Commission foresaw the need to proceed case-by-case on occasion and therefore made it a principal aim of the backfit rule to centralize the responsibility and document the bases for case-by-case decisions for such decisions. The Commission thereby hoped to better assure that such decisions as might of necessity be case-by-case would form a reasoned and coherent body.[6]

Nothing in the Court's ruling in UCS v. NRC forbids the Commission's approach to "adequate protection". UCS boldly asserts that the proposed rule "completely fail[ed] to comport with the orders and directions of the Court of Appeals in UCS v. NRC", that the Court "could not have been more clear about the defects of the backfit rule", that the proposed revised rule "suffers from the exact same defects" as the one vacated, that, indeed, "the new proposal is even more devoid of objective guidance or criteria * * * than was its predecessor."

UCS' criticisms are based on part of a single paragraph in the Court's decision. In pertinent part, that paragraph says, "* * * In our view, the backfitting rule is an exemplar of ambiguity and vagueness; indeed, we suspect that the Commission designed the rule to achieve this very result. The rule does not explicate the scope or meaning of the three listed 'exceptions'. The rule does not explain the action the Commission will (in italics) take when a backfit falls within one of these exceptions. In short, the rule does not speak in terms that constrain the Commission from operating outside the bounds of the statutory scheme." 824 F.2d at 119.

UCS says that this portion of a paragraph was an "order" by the Court to get the Commission to "stop trying to obscure its intentions through ambiguous and vague language * * *." Whether the Court's language amounts to an "order" or only strong advice, we have followed it. For one thing, the rule explicitly says that backfits falling within the exceptions will be imposed (inexplicably, UCS asserts that the proposed rule did not have this provision). See § 50.109(a)(4). For another, both in what we have already said, and in what we shall be saying in response to NUBARG's comments on the exceptions provisions, we shall have explicated the scope and meaning of the three listed exceptions.

However, we have not taken the quoted language of the Court to mean that, after years of making rules and adjudicating cases which ultimately depend on the Commission's judgment about what "adequate protection" requires, the Commission should be obliged to give a mechanically applicable definition of "adequate protection" in order to avoid using the time-honored method of case-by-case, precedent-guided, judgment to implement only a part of the backfit rule. Certainly, the Court never even noted a lack of a general definition of "adequate protection" in the rule, let alone "ordered" the Commission to provide such a definition.

[6] UCS alleges that in three instances the Commission has abused its discretion by applying cost considerations in specific cases where licensees are in compliance but adequate protection is at stake. However, UCS is misinformed about the first of the three cases, and its allegations about the other two reduce simple to disagreement over what constitutes adequate protection. We briefly discuss the three cases below.

Citing trade journal articles which quote unnamed NRC sources, UCS claims that the backfit rule caused the NRC staff to change its mind about requiring two licensees to conduct certain inspections and analyses in order to justify continued operations. The two plants in question had reactor pump coolant shafts similar to ones which elsewhere had shown a high probability of shearing off under certain conditions. UCS asserts that "[w]e * * * learn from this example the inherent lack of logic and circularity embedded in the rule: NRC is prevented, by operation of the rule, from asking questions needed to learn the degree of risk of a known equipment problem because they do not know the answers in advance."

However, the facts of the situations were not what UCS alleges them to have been: indeed the backfit rule was not involved. Letters were sent on April 23, 1986 requiring the licensees to submit within 20 days information which would "enable the Commission to determine whether or not (their) license(s) should be modified." Such information included information on design, operational history, schedules for inspection, plans for operator training, and "any analysis performed subsequent to those done for the FSAR (Final Safety Analysis Report) which would address the consequences of a locked rotor or broken shaft event during plant operation." These letters were sent under the first part of 10 CFR 50.54(f). This part authorizes such information requests without consideration of cost. As an earlier draft of the April 23 letter available in the NRC's Public Document Room shows, the NRC had planned to ask for new analyses under a later part of § 50.54(f) which authorizes requests not required to assure adequate protection if "the burden to be imposed * * * is justified in view of the potential safety significance of the issue to be addressed in the requested information." 10 CFR 50.54(f). (This "safety significance" standard, by its emphasis on "potential", requires less than is required by the "(actural) substantial increase" standard in the backfit rule and also avoids the circularity UCS alleges.) However, the staff sensibly opted for first asking whether such analyses had already been done. In fact they had, or were underway when the letters were sent. The backfit rule played no part here.

UCS' second instance of alleged abuse involves the Mark I containment, about whose performance in beyond-design-basis accidents (ones which involve damage to the reactor core) there is substantial uncertainty. UCS asserts that cost considerations have blocked staff action which would have brought about a significant reduction in some of the figures which estimate the probability that the Mark I would fail in certain kinds of beyond-design-basis accidents. UCS adds in passing that those figures represent undue risk. The NRC staff has already made a formal reply to similar charges of undue risk. See, e.g., Boston Edison Co. (Pilgrim Nuclear Generating Station), Interim Director's Decision under 10 CFR 2.206, DD–87–14, 26 NRC 87, 95–106 (1987). Suffice it here to say that the NRC staff has by no means completed its considerations of the Mark I containment, but that, given present information, the staff has concluded that overall severe-accident risks at plants with Mark I containments are not undue. Id. at 104–106. UCS is content to put forward only unsupported assertions to the contrary. Thus the staff may legitimately consider cost when deciding whether to backfit the Mark I containments.

UCS' third allegation of abuse rehearses part of its February 10, 1987 § 2.206 Petition to the Commission for immediate action to relieve allegedly undue risks posed by nuclear power plants designed by the Babcock & Wilcox Company. The NRC's Director of Nuclear Reactor Regulation responded fully to the Petition, denying it, on October 19, 1987 (UCS' comments on the proposed backfit rule were submitted on October 13). See Director's Decision Under 10 CFR 2.206, DD–87–18, 26 NRC—(October 19, 1987). The Director concluded that "there are no substantial health and safety issues that would warrant the suspension or revocation of any license or permit for such facilities." Slip Opinion at 63. Simply because UCS disagrees with such conclusions does not mean that the Commission is misusing the "adequate protection" standard.

UCS' position lacks all sense of proportion. We must emphasize the core of the Court's decision, rather than get bogged down by transforming a suspicion and a few criticisms of the rule into an order to undertake an unprecedented task of definition.

Reviewing the exceptions in the rule, and various statements in the Federal Register notice accompanying the rule, the Court said, "We conceivably could read the terms of this rule to comply with the statutory scheme we have described above (that is, a scheme in which economic costs can play no part in establishing what adequate protection requires)." Id. Moreover, the Court says this despite the lack of any summary, general, "objective" definition of "adequate protection" in the rule.

But the Court then went on to say, "Statements that the Commission has made in promulgating the rule and in defending it before this court, however, disincline us from interpreting the rule in this fashion." Id. Again, it is not the lack of a definition of adequate protection that disinclined the Court from saving the rule, but rather certain statements the Commission had made which seemed to suggest that the Commission might consider economic cost when deciding what adequate protection required.

The Three Exceptions

Echoing the Court's remark that the rule "does not explicate the scope or meaning of the three listed 'exceptions' ", id., NUBARG "believes that there is a substantial amount of overlap in these exceptions and that they have not been adequately defined or explained in the proposed rule." NUBARG and others representing the industry are concerned that the two exception provisions which use the phrase "adequate protection", §§ 50.109(a)(4) (ii) and (iii), may "swallow" the rule. One industry commenter objects to the notion, implied by § 50.109(a)(4)(ii), that adequate protection might require more than compliance. Another is concerned that § 50.109(a)(4)(iii), the exception which has been added in response to the Court's ruling, might lead to redefinitions of "adequate protection" that would threaten loss of licenses.

To avoid these results, NUBARG and others recommend deleting one of the two exception provisions which use the phrase "adequate protection". NUBARG's choice is § 50.109(a)(4)(ii), retained from the 1985 version of the rule, where it used the equivalent phrase, "no undue risk". This section provides that the "substantial increase" and "costs justified" standards will not apply to backfits necessary to provide adequate protection to public health and safety. NUBARG calls this provision redundant to the exception for backfits required for the sake of compliance, § 50.109(a)(4)(i). As was noted above, NUBARG reports that its research has uncovered no case in which the Commission "has recognized that some additional measures not contained in existing requirements are necessary to ensure that a facility continues to meet the current level of adequacy." Two other commenters believe that the exception provision added because of the litigation, § 50.109(a)(4)(iii), should be deleted, as being redundant to the provision NUBARG would like to see deleted.

No matter which of the two provisions the commenter would like to see deleted, the commenter would like some restrictions placed on the use of the remaining one. The restriction by far the most frequently proposed is that no action may be taken under the remaining exception provision in the absence of "significant new information or the occurrence of an event which clearly shows" that the action is necessary.

In sum, these commenters either reopen an issue settled in 1985 or they recommend deleting that part of the rule which directly responds to the Court's ruling. We take neither course, for, even putting the 1985 rule and the Court's ruling aside, if either of the two provisions were to be deleted, an essential power of the Commission would be remain unimplemented.

First, the exception for backfits necessary to secure adequate protection, § 50.109(a)(4)(ii), must be retained, because it must be made clear that Commission action is not to be obstructed by cost considerations in a situation where compliance has indeed proved to be insufficient to secure the level of protection presumed in the rule, order, or commitment in question. Despite the results of NUBARG's research, such situations have arisen. See, e.g., SECY-86-346, "Evaluation of Managing Plant-Specific Backfit Requirements", November 21, 1986. Accordingly, this exception provision is not redundant to the exception for backfits necessary to restore compliance. Neither is it redundant to the exception for backfits involving the defining or redefining of "adequate protection", for the latter exception assumes some change in the NRC's judgment of what level of protection should be regarded as "adequate".

Retaining § 50.109(a)(4)(ii) will not give the Commission the power to proclaim at will that compliance is not enough. As we said in the statement of considerations accompanying the 1985 rule, and have in part reiterated in the response to UCS' comments, the regulations, though they do not define "adequate protection", are presumed to ensure it, and, in the absence of a redefinition of "adequate protection", that presumption can be overcome only by significant new information or some showing that the regulations do not address some significant safety issue. "(I)t may be presumed that the current body of NRC safety regulations provides adequate protection. Where new information indicates that improvements are needed to ensure there is 'no undue risk' on * * * a * * * basis which the Commission believes to be the minimum necessary, such requirements must be imposed." (50 FR at 38101-102.)

Second, the exception provision for backfits which are necessary under a defining or redefining of "adequate protection", § 50.109(a)(4)(iii), must be retained because it must be made clear that, as the Court held, cost may not be a factor in setting the level of protection judged as "adequate".[7] As NUBARG acknowledges, citing Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 408 (1961), the Commission has both the power to define "adequate protection", and the power to re-define it.[8] Without this last exception provision, it might appear from the rule either that the Commission had no such power or that it was restricted by cost considerations, contrary to the Court's ruling. Nor should this exception provision be limited to situations involving "significant new information," as proposed in several comments.

This last exception may be thought by some to threaten to swallow the backfit rule. We believe, however, that instances of backfits based on a "redefinition" of "adequate protection" will be rare. Moreover, the case-by-case approach which is required in the

[7] As the rule notes in § 50.109(a)(7), cost may nonetheless be a consideration in choosing the means of achieving "adequate protection".

[8] The words "defining or redefining" in this third exception should not be construed necessarily to mean "providing a useful and generally applicable definition", at least not until such a definition becomes possible. Under present conditions, the Commission will have "defined or redefined what level of protection is to be regarded as adequate" if it makes a judgment that, although compliance assures the level of protection that had been thought of as adequate, that level of protection should no longer be considered adequate.

absence of a general definition of "adequate protection" provides licensees—and the public—a large measure of protection from arbitrary action by the Commission. Citing case law, NUBARG says that, in applying this last exception provision, the Commission "must act rationally and consistently in light of available evidence", and "must apply a reasoned analysis indicating the prior policies and standards are being changed, not casually ignored * * *." We wholly agree, and believe that the approach envisioned by the backfit rule will facilitate the Commission's acting accordingly.

Other Matters

Two other comments bearing on the phrase "adequate protection" require an explicit response. First, several commenters from the industry would prefer that the rule state that the "documented evaluation" which the NRC must prepare in connection with any action under one of the exception provisions, see § 50.109(a)(4), should include consideration of as many of the factors which § 50.109(c) requires of a "backfit analysis" as are appropriate.

The suggested modification of the rule would have only limited utility. Few of the factors listed in § 50.109(c) of the rule are appropriate for consideration in a documented evaluation justifying action under the compliance exception in the rule. It is true that several of the factors in § 50.109(c), indeed, all of them but those in paragraphs (c) (5) and (7) and some of those in paragraph (c)(8) are appropriate for consideration under the "adequate protection" exception, to the extent that they require a showing of exactly what the licensees must do and a showing that the backfit in question actually contributes to safety. However, the Commission believes that the rule's requirement that the documented evaluation "include a statement of the objectives of and reasons for the modification and the basis for invoking the exception" adequately assures that the factors in § 50.109(c) will be considered to the extent relevant, without their being listed and labeled as if they were a part of a § 50.109(c) analysis. Thus, little, if anything, is to be gained by an explicit requirement that § 50.109(c) factors be considered in a documented evaluation.

Second, one citizens' group asserts that the backfit rule should not apply to rulemaking. This issue was thoroughly discussed in 1985. However, this group's comment puts the issue in a slightly altered light, and provides another opportunity to clarify the meaning of "adequate protection". The group argues that since rules "define" "adequate protection", the Commission cannot apply the rule's "substantial increase" and "cost justified" standards in rulemaking without applying cost considerations in setting the standard of adequate protection, contrary to the Court's holding.

The answer to this comment is, of course, that the rules do not, strictly speaking, "define" "adequate protection", and they only presumptively assure it. Not only may there, as stated above, be individual cases that require actions that go beyond what is necessary under the regulations to assure adequate protection, there will also be times when the NRC issues a rule which requires something beyond adequate protection. This follows directly from the Commission's power under section 161 of the Atomic Energy Act, affirmed by the Court, to issue rules or orders to "minimize danger to life or property." See 42 U.S.C. 2201; see also USC v. NRC, 824 F.2d at 118. If a proposed rule requires something more than adequate protection, applying a cost standard to the proposed rule will not be introducing cost considerations into the setting of the adequate protection standard and is therefore permitted. Of course if the rule is directed at either establishing what level of protection is "adequate" or assuring that such a level of protection is met, then cost will play no role.

The backfit rule as set out below is substantially the same as the rule proposed in the **Federal Register**. (See 52 FR 34223; September 10, 1987.) Provisions which appeared at the end of § 50.109(a)(4) of the proposed rule, or in the footnote to that paragraph, appear below in new paragraphs (a) (5) through (7).

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(3). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, Approval Number 3140–0011.

Regulatory Analysis

The revision to 10 CFR 50.109 will bring it into conformance with the holding in Union of Concerned Scientists, et al., v. U.S. Nuclear Regulatory Commission, D.C. Cir. Nos. 85–1757 and 86–1219 (August 4, 1987). The revision clarifies the backfit rule to reflect NRC practice that, in determining whether to adopt a backfit requirement, economic costs will be considered only when addressing those backfits involving safety requirements beyond those needed to ensure the adequate protection of public health and safety. Such costs are not considered when establishing the adequate protection of public health and safety. This revised rule does not have a significant impact on State and local governments and geographical regions, public health and safety, or the environment; nor does it represent substantial costs to licensees, the NRC, or other Federal agencies. This constitutes the regulatory analysis for this rule.

Regulatory Flexibility Act Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this final rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. The affected facilities are licensed under the provisions of 10 CFR 50.21(b) and 10 CFR 50.22. The companies that own these facilities do not fall within the scope of "small entities" as set forth in the Regulatory Flexibility Act or the Small Business Size Standards set forth in regulations issued by the Small Business Administration in 13 CFR Part 121.

Backfit Analysis

The NRC has determined that a backfit analysis is not required for this rule because it does not impose requirements on 10 CFR Part 50 licensees.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire prevention, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and Recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 50.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 is revised to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92, Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102. Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 50.10 (a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.10 (b) and (c), and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.9, 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. Section 50.109 is revised to read as follows:

§ 50.109 Backfitting.

(a)(1) Backfitting is defined as the modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules or the imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable staff position after:

(i) The date of issuance of the construction permit for the facility for facilities having construction permits issued after October 21, 1985; or

(ii) Six months before the date of docketing of the operating license application for the facility for facilities having construction permits issued before October 21, 1985; or

(iii) The date of issuance of the operating license for the facility for facilities having operating licenses; or

(iv) The date of issuance of the design approval under Appendix M, N, or O of this part.

(2) Except as provided in paragraph (a)(4) of this section, the Commission shall require a systematic and documented analysis pursuant to paragraph (c) of this section for backfits which it seeks to impose.

(3) Except as provided in paragraph (a)(4) of this section, the Commission shall require the backfitting of a facility only when it determines, based on the analysis described in paragraph (c) of this section, that there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection.

(4) The provisions of paragraphs (a)(2) and (a)(3) of this section are inapplicable and, therefore, backfit analysis is not required and the standards in paragraph (a)(3) of this section do not apply where the Commission or staff, as appropriate, finds and declares, with appropriated documented evaluation for its finding, either:

(i) That a modification is necessary to bring a facility into compliance with a license or the rules or orders of the Commission, or into conformance with written commitments by the licensee; or

(ii) That regulatory action is necessary to ensure that the facility provides adequate protection to the health and safety of the public and is in accord with the common defense and security; or

(iii) That the regulatory action involves defining or redefining what level of protection to the public health and safety or common defense and security should be regarded as adequate.

(5) The Commission shall always require the backfitting of a facility if it determines that such regulatory action is necessary to ensure that the facility provides adequate protection to the health and safety or the public and is in accord with the common defense and security.

(6) The documented evaluation required by paragraph (a)(4) of this section shall include a statement of the objectives of and reasons for the modification and the basis for invoking the exception. If immediately effective regulatory action is required, then the documented evaluation may follow rather than precede the regulatory action.

(7) If there are two or more ways to achieve compliance with a license or the rules or orders of the Commission, or with written licensee commitments, or there are two or more ways to reach a level of protection which is adequate, then ordinarily the applicant or licensee is free to choose the way which best suits its purposes. However, should it be necessary or appropriate for the Commission to prescribe a specific way to comply with its requirements or to achieve adequate protection, then cost may be a factor in selecting the way, provided that the objective of compliance or adequate protection is met.

(b) Paragraph (a)(3) of this section shall not apply to backfits imposed prior to October 21, 1985.

(c) In reaching the determination required by paragraph (a)(3) of this section, the Commission will consider how the backfit should be scheduled in light of other ongoing regulatory activities at the facility and, in addition, will consider information available concerning any of the following factors as may be appropriate and any other information relevant and material to the proposed backfit:

(1) Statement of the specific objectives that the proposed backfit is designed to achieve;

(2) General description of the activity that would be required by the licensee or applicant in order to complete the backfit;

(3) Potential change in the risk to the public from the accidental off-site release of radioactive material;

(4) Potential impact on radiological exposure of facility employees;

(5) Installation and continuing costs associated with the backfit, including the cost of facility downtime or the cost of construction delay;

(6) The potential safety impact of changes in plant or operational complexity, including the relationship to proposed and existing regulatory requirements;

(7) The estimated resource burden on the NRC associated with the proposed backfit and the availability of such resources;

(8) The potential impact of differences in facility type, design or age on the relevancy and practicality of the proposed backfit;

(9) Whether the proposed backfit is interim or final and, if interim, the justification for imposing the proposed backfit on an interim basis.

(d) No licensing action will be withheld during the pendency of backfit analyses required by the Commission's rules.

(e) The Executive Director for Operations shall be responsible for implementation of this section, and all analyses required by this section shall be approved by the Executive Director for Operations or his designee.

Dated at Rockville, Maryland, this 31st day of May, 1988.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 88-12624 Filed 6-3-88; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF THE TREASURY

Comptroller of the Currency

12 CFR Part 4

[Docket No. 88-9]

Description of Office, Procedures, Public Information; Deputy Chief Counsel (Operations) et al.

AGENCY: Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The structure of the Law Department of the Office of the Comptroller of the Currency ("OCC") has recently been changed. This final rule sets forth the new descriptions for the positions of Deputy Chief Counsel (Operations) and Deputy Chief Counsel (Policy).

EFFECTIVE DATE: June 6, 1988.

FOR FURTHER INFORMATION CONTACT: Ferne Fisherman Rubin, Attorney, Legal Advisory Services Division, (202) 447-1880, Office of the Comptroller of the Currency, 490 L'Enfant Plaza East, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: On April 6, 1988, the OCC's Chief Counsel announced certain changes to the positions of Deputy Chief Counsel (Operations) and Deputy Chief Counsel (Policy); this amendment reflects these changes.

Notice and Comment

The OCC has determined that notice and comment are unnecessary under 5 U.S.C. 553(b)(3)(A) since this final rule pertains to rules of agency organization and procedure.

Reason for Immediate Effective Date

This final rule informs the public about a change in the Law Department's organization that has already occurred. Confusion could result if the proper position descriptions are not employed immediately.

Regulatory Flexibility Act

A Regulatory Flexibility Analysis is required only for rules issued for notice and comment. Because this final rule pertains to office organization and is therefore exempt from notice and comment procedures, no Regulatory Flexibility Analysis will be prepared.

Executive Order 12291

Section 1(a)(3) of Executive Order 12291 exempts from the requirements that a Regulatory Impact Analysis be prepared those regulations related to agency organization, management or personnel. Since this final rule is so classified, no Regulatory Impact Analysis is required.

List of Subjects in 12 CFR Part 4

National banks, Organization and functions (government agencies), Public information, Official forms, District offices, Field offices, Procedures, Delegation.

For the reasons given in the preamble, Part 4 of Chapter I, Title 12 of the Code of Federal Regulations is amended as follows:

PART 4—DESCRIPTION OF OFFICE, PROCEDURES, PUBLIC INFORMATION

1. The authority citation for Part 4 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 5 U.S.C. 552, unless otherwise noted.

2. In Part 4, § 4.1a is amended by revising paragraph (a) (20) and (21) to read as follows:

§ 4.1a Central and field organization; delegations.

(a) * * *

(20) *Deputy Chief Counsel (Operations).* The Deputy Chief Counsel (Operations) is responsible for Law Department administration, the District Counsels, and the Legislative and Regulatory Analysis Division of the Law Department.

(21) *Deputy Chief Counsel (Policy).* The Deputy Chief Counsel (Policy) is responsible for the Enforcement and Compliance, Legal Advisory Services, Litigation, and Securities and Corporate Practices Divisions of the Law Department.

* * * * *

Date: May 27, 1988.

Robert L. Clarke,

Comptroller of the Currency.

[FR Doc. 88-12605 Filed 6-3-88; 8:45 am]

BILLING CODE 4810-33-M

FEDERAL HOME LOAN BANK BOARD

12 CFR Part 563

[No. 88-427]

Miscellaneous Conforming and Technical Amendments

Date: May 31, 1988.

AGENCY: Federal Home Loan Bank Board.

ACTION: Final rule; miscellaneous conforming and technical amendments.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as the operating head of the Federal Saving and Loan Insurance Corporation ("FSLIC"), is amending its regulations in order to correct typographical and other technical errors, and to correct a reference to the Board's recordkeeping requirements with respect to accounts held in institutions the deposits of which are insured by the FSLIC ("insured institutions").

EFFECTIVE DATE: June 6, 1988.

FOR FURTHER INFORMATION CONTACT: Jerome L. Edelstein, (202) 377-7057, Deputy Director; or Carol J. Rosa, (202) 377-7037, Paralegal Specialist, Regulations and Legislation Division, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: On August 15, 1986, the Board adopted final amendments expanding and clarifying its regulation concerning basic loan records that institutions chartered by the Board or insured institutions and their service corporations are required to maintain. 51 FR 30848 (August 29, 1986). One of the amendments revised 12 CFR 563.17-1(c) by providing that records related to accounts held in insured institutions reflect the Board's recent deletion of the requirement that for insurance of accounts purposes the insured institution's records disclose the names of the settlor (grantor) and trustee of a trust and contain a signature card for the trust executed by the trustee. The Board's deletion of this recordkeeping requirement was adopted on April 4, 1986. 51 FR 12122 (April 9, 1986). The April 1986 revision of 12 CFR 564.2 to delete paragraph (b)(3) was intended to decrease the recordkeeping requirements associated with obtaining trust account insurance coverage and to expedite settlement of insurance claims on such accounts. This amendment was not intended to apply to loan recordkeeping requirements of an insured institution or its service corporations but only to insurance