

(i) The reason why the generator or sample collector requires additional quantity of sample for the treatability study evaluation and the additional quantity needed;

(ii) Documentation accounting for all samples of hazardous waste from the waste stream which have been sent for or undergone treatability studies including the data each previous sample from the waste stream was shipped, the quantity of each previous shipment, the laboratory or testing facility to which it was shipped, what treatability study processes were conducted on each sample shipped, and the available results of each treatability study;

(iii) A description of the technical modifications or change in specifications which will be evaluated and the expected results;

(iv) If such further study is being required due to equipment or mechanical failure, the applicant must include information regarding the reason for the failure or breakdown and also include what procedures or equipment improvements have been made to protect against further breakdowns; and

(v) Such other information that the Regional Administrator considers necessary.

(f) *Samples Undergoing Treatability Studies at Laboratories and Testing Facilities.* Samples undergoing treatability studies and the laboratory or testing facility conducting such treatability studies (to the extent such facilities are not otherwise subject to RCRA requirements) are not subject to any requirement of this Part, Part 124, Parts 262-266, 268, and 270, or to the notification requirements of Section 3010 of RCRA provided that the conditions of paragraphs (f) (1) through (11) of this section are met. A mobile treatment unit (MTU) may qualify as a testing facility subject to paragraphs (f) (1) through (11) of this section. Where a group of MTUs are located at the same site, the limitations specified in (f) (1) through (11) of this section apply to the entire group of MTUs collectively as if the group were one MTU.

(1) No less than 45 days before conducting treatability studies, the facility notifies the Regional Administrator, or State Director (if located in an authorized State), in writing that it intends to conduct

treatability studies under this paragraph.

(2) The laboratory or testing facility conducting the treatability study has an EPA identification number.

(3) No more than a total of 250 kg of "as received" hazardous waste is subjected to initiation of treatment in all treatability studies in any single day. "As received" waste refers to the waste as received in the shipment from the generator or sample collector.

(4) The quantity of "as received" hazardous waste stored at the facility for the purpose of evaluation in treatability studies does not exceed 1000 kg, the total of which can include 500 kg of soils, water, or debris contaminated with acute hazardous waste or 1 kg of acute hazardous waste. This quantity limitation does not include:

(i) Treatability study residues; and

(ii) Treatment materials (including nonhazardous solid waste) added to "as received" hazardous waste.

(5) No more than 90 days have elapsed since the treatability study for the sample was completed, or no more than one year has elapsed since the generator or sample collector shipped the sample to the laboratory or testing facility, whichever date first occurs.

(6) The treatability study does not involve the placement of hazardous waste on the land or open burning of hazardous waste.

(7) The facility maintains records for 3 years following completion of each study that show compliance with the treatment rate limits and the storage time and quantity limits. The following specific information must be included for each treatability study conducted:

(i) The name, address, and EPA identification number of the generator or sample collector of each waste sample;

(ii) The date the shipment was received;

(iii) The quantity of waste accepted;

(iv) The quantity of "as received" waste in storage each day;

(v) The date the treatment study was initiated and the amount of "as received" waste introduced to treatment each day;

(vi) The date the treatability study was concluded;

(vii) The date any unused sample or residues generated from the treatability study were returned to the generator or

sample collector or, if sent to a designated facility, the name of the facility and the EPA identification number.

(8) The facility keeps, on-site, a copy of the treatability study contract and all shipping papers associated with the transport of treatability study samples to and from the facility for a period ending 3 years from the completion date of each treatability study.

(9) The facility prepares and submits a report to the Regional Administrator, or State Director (if located in an authorized State), by March 15 of each year that estimates the number of studies and the amount of waste expected to be used in treatability studies during the current year, and includes the following information for the previous calendar year:

(i) The name, address, and EPA identification number of the facility conducting the treatability studies;

(ii) The types (by process) of treatability studies conducted;

(iii) The names and addresses of persons for whom studies have been conducted (including their EPA identification numbers);

(iv) The total quantity of waste in storage each day;

(v) The quantity and types of waste subjected to treatability studies;

(vi) When each treatability study was conducted;

(vii) The final disposition of residues and unused sample from each treatability study.

(10) The facility determines whether any unused sample or residues generated by the treatability study are hazardous waste under § 261.3 and, if so, are subject to Parts 261 through 268, and Part 270 of this Chapter, unless the residues and unused samples are returned to the sample originator under the § 261.4(e) exemption.

(11) The facility notifies the Regional Administrator, or State Director (if located in an authorized State), by letter when the facility is no longer planning to conduct any treatability studies at the site.

(Approved by the Office of Management and Budget under control number 2050-0088)

[FR Doc. 88-16188 Filed 7-18-88; 8:45 am]

BILLING CODE 6560-50-M

Federal Register

Tuesday
July 19, 1988

Part V

Department of Labor

Wage and Hour Division, Employment
Standards Administration

29 CFR Part 502

Reporting and Employment Requirements
for Employers of Certain Workers
Employed in Seasonal Agricultural
Services; Proposed Rule

DEPARTMENT OF LABOR

Employment Standards
Administration, Wage and Hour
Division

29 CFR Part 502

Reporting and Employment
Requirements for Employers of
Certain Workers Employed in Seasonal
Agricultural Services

AGENCY: Wage and Hour Division,
Employment Standards Administration,
Labor.

ACTION: Proposed rule.

SUMMARY: The Employment Standards Administration (ESA) of the U.S. Department of Labor (DOL) is promulgating proposed regulations regarding the reporting and employment requirements for any employer who employs certain resident aliens in seasonal agricultural services. These reporting requirements apply to workers employed from October 1, 1988, to September 30, 1992, and were developed with the Department of Agriculture after consultation with the Department of Justice and the Bureau of the Census.

Section 210A of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act (IRCA) requires any employer to report information about the quantity of work performed by a special agricultural worker employed in seasonal agricultural services. This information is submitted in certificate form to the Federal Government and to any individual replenishment agricultural worker. In part on the basis of this information furnished to the Federal Government, the Secretaries of Labor and Agriculture will determine the number, if any, of additional replenishment agricultural workers to be admitted into the United States.

These regulations specify the employer reporting requirements and provisions concerning the terms of employment respecting replenishment agricultural workers as prescribed by section 210A of INA.

DATE: Comments must be submitted on or before August 15, 1988. Early submission of comments is requested to facilitate publication of a final rule prior to the effective date of these statutory provisions.

ADDRESS: Submit comments to Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT:
Paula V. Smith, Administrator, (202)
523-8305.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

Public reporting burden for this collection of information is estimated to average 20½ minutes per response for the report to the Federal Government on Form ESA-92, one minute per response for the report to replenishment agricultural workers (optional Form WH-501R), and one hour per year for the underlying recordkeeping. This burden estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including comments on the ESA 92 and optional WH501R and suggestions for reducing this burden, to the Office of Information Management, Department of Labor, Room N-1301, 200 Constitution Ave., NW., Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Background

The Immigration and Nationality Act of 1952 (INA) was amended by the Immigration Reform and Control Act of 1986 (IRCA) to (1) control illegal immigration into the United States and (2) make limited changes in the system for legal immigration. In this regard, section 210 of the INA grants temporary resident alien status to special agricultural workers (SAWs) who can demonstrate that they performed seasonal agricultural services for at least 90 "man-days" (referred to in this document as "work-days" and meaning any day with at least four (4) hours worked) during the 12-month period ending May 1, 1986.

On the basis, among other things, of information regarding work-days of employment (during each fiscal year (FY) from FY 1989 to FY 1992) submitted to the Federal Government, the Secretaries of Labor and Agriculture shall determine the number, if any, of additional special agricultural workers, termed replenishment agricultural workers (RAWs), to be admitted (during each fiscal year from FY 1990 to FY 1993) temporary resident alien status to the United States to perform seasonal agricultural services. The admittance of replenishment agricultural workers is to meet a shortage of workers employed in seasonal agricultural services.

To make this determination, section 210A(b)(2) of the INA requires an employer of SAWs (including RAWs) employed in seasonal agricultural services to assemble employment information which is then reported to the Federal Government for the period beginning October 1, 1988, through September 30, 1992, and to any individual replenishment agricultural worker for the period beginning October 1, 1989, through September 30, 1992.

Section 210A(f)(4) of the INA provides for assessment of a civil money penalty of not more than \$1,000 for each violation, as provided under section 503 of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), for, among other things, failure to provide, or failure to provide accurately, the information as required by INA section 210A(b)(2).

Summary of Proposed Rule

This proposed rule would establish—

(1) Data collection procedures to enable the Federal Government to make determinations about the annual number of replenishment agricultural workers to be admitted in the United States and given temporary residency status, from October 1, 1989, to September 30, 1993, to meet a shortage, or replenish, the number of workers employed in seasonal agricultural services; and

(2) A method whereby a replenishment agricultural worker can assemble information necessary to establish the work history needed to apply and qualify for permanent resident status after three years (from being admitted for temporary residency). The work history needed is 90 work-days (any day with at least four (4) hours worked) a year for three consecutive years employed in seasonal agricultural services. Accordingly, an employer who hires a replenishment agricultural worker shall report the employment information specified by this rule to the worker each pay period when seasonal agricultural services are performed, for the period through September 30, 1992. Although replenishment agricultural workers will need such information for three years to retain temporary resident alien status and to avoid deportation (any RAWs admitted in FY 1993 will need to demonstrate a work history in seasonal agricultural services at least through FY 1995 to apply and qualify for permanent residency) and will need such data for at least five years to apply for citizenship, the statute only authorizes the Department of Labor to require such reporting through September 30, 1992.

To carry out the statutory requirements, employers are mandated to 1) identify each reportable worker employed in seasonal agricultural services subject to this part, 2) report to the Federal Government the number of work-days performed by any such reportable worker, and 3) report the number of work-days performed to each replenishment agricultural worker.

Under the provisions of Section 274A of the INA, and employer may only hire persons who are eligible to work in the United States. With respect to any person hired after November 6, 1986, every employer must verify the employee's identity and employment eligibility and complete the Immigration and Naturalization Service (INS) Employment Eligibility Verification Form I-9. See 8 CFR 274a.2. When completing the Form I-9, the employer is able to recognize reportable workers subject to the provisions of this part by the INS Alien Registration Number provided by the employee on the INS Form I-9.

Any prospective employee must provide documentation that establishes both identity and employment eligibility within three business days of hire. When completing the top portion of the I-9 Form, a prospective employee who is not a United States citizen also provides an INS Alien Registration Number in completing the employee's part (Part 1) of the I-9 form. As long as the documents furnished by the worker satisfy the requirements of the INS regulations as set forth on the Form I-9, an employer may not require any additional or specific documents from the employee (see 8 CFR 274a.2(b)(v)).

An employer therefore is unable to determine which employees are special agricultural workers based on the document(s) presented to establish identity and employment eligibility. INS has, or will, assign INS Alien Registration Numbers in the A 90000000 series to all workers whose status has been adjusted under the provisions of the IRCA amendments to the INA, including special agricultural workers (and replenishment agricultural workers). Therefore these regulations define a reportable worker as any worker employed in seasonal agricultural services whose INS Alien Registration Number is within the A 90000000 series.

An employer must report to the Federal Government as prescribed herein on the employment of any and all resident aliens identified with an INS Alien Registration Number in the A 90000000 series who are employed in seasonal agricultural services for even one work day (any day in which at least

four hours of work are performed). Such reports must be submitted each quarter in which any reportable worker is employed in seasonal agricultural services for the period October 1, 1988, through September 30, 1992. Where employment verification has been performed by a State Employment Service, rather than the employer, these regulations require the State Employment Service to provide the Alien Registration Number on its certification to the employer. Therefore, in all cases the employer can identify the reportable worker under this part.

As set forth above, the INA as amended by IRCA requires that employers verify the identity and employment eligibility of all employees hired after November 6, 1986. However, the Act also provides that no penalties will be assessed prior to December 1, 1988, against employers with respect to employees in seasonal agricultural services. A statement of mutual understanding between representatives of agricultural growers and the INS provides that the INS will not initiate enforcement penalties against agricultural employers for failing to fulfill the I-9 requirements prior to December 1, 1988, and INS and the representatives of the growers will encourage the growers to complete the I-9 form for all employees hired after November 6, 1986. After December 1, 1988, agricultural employers will be liable for penalties for failing to conduct such verification and to complete I-9's on any workers then in their employment for whom there is no completed I-9.

These regulations require employers to report to the Federal Government on all workers employed in seasonal agricultural services after October 1, 1988, who are identified as reportable workers through the I-9 process (i.e., who have Alien Registration Numbers in the A 90000000 series. For the first quarter of reporting, October 1, through December 31, 1988, an employer must therefore report the number of workdays performed in seasonal agricultural services in the months of October and November, as well as December, with respect to all employees for whom I-9's are completed, whether completed before or after December 1, 1988, and whether the workers are employed before or after December 1, 1988.

The reports furnished to the Federal Government under these regulations are a part of the statutory process for determining the numerical limit on the number of replenishment agricultural workers admitted in the United States annually. After the reports are received by the Federal Government, the INS will

determine which of the resident alien workers in the A 90000000 series on whom reports were submitted were admitted under the special agricultural worker program. The Bureau of the Census will then use this data to determine the number of special agricultural workers employed in seasonal agricultural services (based on work performed by special agricultural workers who worked 15 work-days in the aggregate in seasonal agricultural services for any number of employers), and the average number of work-days in seasonal agricultural services performed by such special agricultural workers. In this regard, every employer of a reportable worker or workers is mandated to report as prescribed herein even one work-day (a day with four hours or more of work) in seasonal agricultural services by any reportable worker.

The determinations of the Bureau of the Census will then be used, along with other information, by the Secretaries of Labor and Agriculture to determine the number, if any, of replenishment agricultural workers to be admitted to the United States with temporary resident status to perform seasonal agricultural services in FY 1990 through FY 1993. Another rule will be promulgated to explain this procedure.

Included within the A 90000000 series are all of the replenishment agricultural workers who will be identified with an INS Alien Registration Number series to be incorporated in these regulations when announced by INS at a later date. As in the case of the special agricultural worker, any employer must report to the Federal Government on the employment of any replenishment agricultural worker in seasonal agricultural services. Also, any employer must report to each such replenishment worker, with each wage payment, information concerning the number of work-days the individual was employed in seasonal agricultural services. Since MSPA currently requires the provision of employment information to migrant and seasonal agricultural workers each pay day, optional form WH-501 used for such reports, is being modified (WH-501R) to include the work-day information required by these regulations. Employers have the option, however, of providing the information to the workers in any manner, such as on the pay stub furnished workers with their wages.

Because this employment information will be needed by replenishment workers to establish permanent residency and citizenship, these regulations require the WH-501R (or other form furnished to the workers), as

well as the underlying payroll data for such replenishment workers, to be retained for five years (the minimum employment period in seasonal agricultural services required for citizenship). This will assist the replenishment agricultural workers in establishing their employment history and will assist INS in verifying work histories provided by such workers. Other records and reports required by these regulations need to be retained for three years.

The responsible person to report to the replenishment agricultural worker and to the Federal Government is the person who prepares, and is responsible for retaining, the I-9 Form. In this regard the Department of Labor has incorporated the definitions of "employee," "employer," "employment," and "independent contractor" promulgated by the INS in its regulations, 8 CFR 274a.1. Those regulations define employer to mean the contractor, not the person using the contract labor. As a general matter, therefore, it is likely to be the farm labor contractor who is responsible for reporting, rather than grower who uses the services of the farm labor contractor.

Pursuant to section 210A (f)(1), (2), and (3) of the INA, additional provisions of the regulations require that employers of a replenishment agricultural worker must 1) provide the same transportation arrangements to other workers as are provided to a replenishment agricultural worker and 2) not discriminate against a replenishment agricultural worker. The Act at section 210A(f) further requires that employers who would otherwise be exempt from the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) (29 U.S.C. 1801 et seq.) pursuant to section 4(a)(1) or (2) of MSPA, not knowingly provide false or misleading information to a replenishment agricultural worker concerning the terms, conditions, or existence of agricultural employment.

In addition, pursuant to the definition of "seasonal agricultural services" in section 210(h) of the Act, the Department of Labor has incorporated the definitions of "field work," "horticultural specialties," "fruits," "vegetables," and "other perishable commodities" promulgated by the Department of Agriculture regulations, 7 CFR Part 1d. The Department of Agriculture is currently considering amending these provisions. Any such amendments will be automatically incorporated in these regulations. In addition, pursuant to the order issued in *National Cotton Council of America v. Lyng*, Civil No. CA-5-87-0200 (N.D.

Tex., February 8, 1988) "cotton" has been declared to be a fruit and therefore it is not listed as an example of a commodity excluded from the definition of "other perishable commodities." Because application of the provisions of sections 210 and 210A to hay, sod, and sugar cane is in litigation, these proposed regulations also include field work on those crops for purposes of these regulations only. The requirement of reporting on these crops does not constitute evidence that they are eligible crops for purposes of the special agricultural worker program. Rather, they are included to enable the Federal Government and the individual replenishment workers to obtain data on work on these crops which will be needed if it is ultimately determined that they are eligible crops. Once the issues are finally resolved in the courts, these regulations will be amended accordingly.

Finally, the regulations contain enforcement procedures, including procedures for assessing civil money penalties for violations of section 210A in accordance with MSPA, pursuant to INA section 210A(f).

Executive Order 12291; Regulatory Flexibility Act

The Department has determined that this proposed rule is not a major rule under Executive Order 12291. The Department has also determined that this rule will not have a significant economic impact on a substantial number of small entities. These conclusions are reached because most of the entities affected are already providing agricultural workers with itemized pay stubs in compliance with the requirements of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The amount of time spent preparing reports to the Federal Government will not be substantial. Consequently, the Department certifies under the Regulatory Flexibility Act, that the rule will not have significant economic impact on a substantial number of small entities.

Editorial Note: The Department presents forms in the Appendix which satisfy certain disclosure and recordkeeping aspects of the Act and the regulations. These forms, however, will not appear in the Code of Federal Regulations.

Appendix

Appendix A—Work-Day Report, ESA-92.

Appendix B—Wage Statement, WH-501R.

List of Subjects in 29 CFR Part 502

Administrative practice and procedure, Agricultural associations, Agricultural worker, Aliens, Farmers, Farm labor contractor, Immigration, Investigation, Labor, Penalties, Replenishment Agricultural Workers, Reporting requirements, Special Agricultural Workers.

For the reasons set out in the preamble, Title 29 of the Code of Federal Regulations, Chapter V, is proposed to be amended as set forth below.

Signed at Washington, DC, this 14th day of July, 1988.

Ann McLaughlin,

Secretary of Labor.

Fred W. Alvarez,

Assistant Secretary for Employment Standards.

Paula V. Smith,

Administrator, Wage and Hour Division, Employment Standards Administration.

A new Part 502 is added to read as follows:

PART 502—REPORTING AND EMPLOYMENT REQUIREMENTS FOR EMPLOYERS OF CERTAIN WORKERS EMPLOYED IN SEASONAL AGRICULTURAL SERVICES

Subpart A—General Provisions

- Sec.
- 502.0 Introduction.
- 502.1 Purpose and scope.
- 502.2 Definitions pertaining solely to a reportable worker employed in seasonal agricultural services.
- 502.3 Waiver of rights prohibited.
- 502.4 Investigation authority of Secretary.
- 502.5 Prohibition on interference with Department of Labor officials.
- 502.6 State Employment Service certificate form.

Subpart B—Employment and Reporting Requirements

- 502.10 Requirements for reporting and employing a reportable worker employed in seasonal agricultural services.
- 502.11 Recordkeeping.
- 502.12 Reporting to the Federal Government.
- 502.13 Reporting to a replenishment agricultural worker.
- 502.14 Accuracy of information furnished.
- 502.15 Discrimination prohibited.
- 502.16 Prohibition on providing false information when reporting to a replenishment agricultural worker or to the Federal Government.
- 502.17 Equal transportation provision.

Subpart C—Enforcement

- 502.20 Enforcement.
- 502.21 General.
- 502.22 Representation of the Secretary.
- 502.23 Civil money penalty assessment.
- 502.24 Enforcement of Wage and Hour investigative authority.

502.25 Civil money penalties—payment and collection.

Subpart D—Administrative Proceedings

General

502.30 Establishment of procedures and rules of practice.

502.31 Applicability of procedures and rules.

Procedures Relating to Hearing

502.32 Written notice of determination required.

502.33 Contents of notice.

502.34 Request for hearing.

Rules of Practice

502.38 General.

502.39 Service of determinations and computation of time.

502.40 Commencement of proceeding.

502.41 Designation of record.

502.42 Caption of proceeding.

Referral for Hearing

502.43 Referral to Administrative Law Judge.

502.44 Notice of docketing.

502.45 Service upon attorneys for the Department of Labor—number of copies.

Procedures Before Administrative Law Judge

502.46 Appearances; representation of the Department of Labor.

502.47 Consent findings and order.

502.48 Decision and Order of Administrative Law Judge.

Modification or Vacation of Order of Administrative Law Judge

502.49 Authority of the Secretary.

502.50 Procedures for initiating review.

502.51 Implementation by the Secretary.

502.52 Filing and service.

502.53 Responsibility of the Office of Administrative Law Judges.

502.54 Final decision of the Secretary.

502.55 Stay pending decision of the Secretary.

Record

502.56 Retention of official record.

502.57 Certification of official record.

Authority: 8 U.S.C. 1160, 1161; 29 U.S.C. 1801 et seq.; 502.6 also issued under 29 U.S.C. 49k.

Subpart A—General Provisions

§ 502.0 Introduction.

(a) Pursuant to the requirements of Section 210A of the Immigration and Nationality Act (INA), the regulations in this part are promulgated and apply to employers with obligations, among other things, to provide reports applicable to the employment of any reportable worker (as defined in this part) employed in seasonal agricultural services. Reporting shall be to the Federal Government and to any individual replenishment agricultural worker.

(b) The statute requires the Director of the Bureau of Census, on the basis of

information which is reported to the Federal Government, to estimate (1) the number of special agricultural workers employed in seasonal agricultural services in the United States at any time during the fiscal year and (2) the average number of "man-days" of labor performed by these workers during the fiscal year. [For purposes of this part, an alternative term "work-day" is adopted and incorporated into the text of this part in lieu of "man-day" and means any day when at least four (4) hours are worked.]

(c) The regulations contained in this part are issued in accordance with section 210A of INA in order to establish the rules necessary to carry out the provisions of INA.

§ 502.1 Purpose and scope.

(a) The INA was amended by the Immigration Reform and Control Act (IRCA) in 1986, in order to more effectively control illegal immigration to the United States and to make certain changes in the system for legal immigration.

(b)(1) Section 210 of the INA provides that the Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the Attorney General determines that the alien resided in the United States and performed work in seasonal agricultural services in the United States for at least 90 work-days during the 12-month period ending on May 1, 1986. This worker is called a special agricultural worker (SAW). A special agricultural worker is given an INS Alien Registration Number in the A 90000000 series.

(2) Section 210A of the INA provides that before the beginning of each fiscal year (beginning 1990 and ending 1993), the Secretaries of Labor and Agriculture shall jointly determine the number (if any) of replenishment agricultural workers (RAWs) to be admitted to the United States, or otherwise acquire the status of aliens lawfully admitted for temporary residence, to meet a shortage of agricultural workers. A replenishment agricultural worker will be identified by an INS Alien Registration Number in a series (within the A 90000000 series) that INS will announce at a later date.

(c) This regulation establishes a method whereby an employer must assemble employment information on certain resident alien workers employed in seasonal agricultural services to be reported to the Federal Government and to any replenishment agricultural worker. This will assist the Secretaries of Labor and Agriculture in determining the number of replenishment agricultural workers to be admitted and will assist

the replenishment agricultural worker in establishing a work history so that after three (3) consecutive years the worker can apply for and be granted permanent residency in the United States. After five (5) years with such work history the worker can apply for naturalization. The work history needed is 90 work-days a year employed in seasonal agricultural services for three consecutive years after admission to qualify for permanent residency and for five years to apply for citizenship. The Act and these regulations require the reporting by the employer to the Federal Government and to the replenishment agricultural worker for employment in seasonal agricultural services from October 1, 1988, until September 30, 1992.

(d) Any person who hires any worker must complete the Employment Eligibility Verification Form (INS Form I-9). Any resident alien who is identified with an INS Alien Registration Number in the A 90000000 series (termed "reportable worker") on the I-9 Form, including any replenishment agricultural worker (who will be identified with an INS Alien Registration Number in a series, within the A 90000000 series, that INS will announce at a later date) and who is employed in seasonal agricultural services, is an employee subject of this part. Employers cannot determine whether such an employee is a special agricultural worker since potential employees cannot be required to document such status to anyone other than INS (see 8 CFR 274a.2(b)(v)).

(e) The provisions of Section 210A(b)(2) of INA establish reporting requirements when employing certain workers in seasonal agricultural services. These regulations require that for the period beginning October 1, 1988, and ending September 30, 1992—

(1) Any person or entity employing any reportable worker in seasonal agricultural services shall report employment information to the Federal Government each quarter;

(2) Any person or entity employing any replenishment agricultural worker in seasonal agricultural services shall report employment information directly to the replenishment agricultural worker individually on a pay period basis at the time of each wage payment and no less frequently than twice per month (as well as to the Federal Government each quarter).

(f) Any employment of a reportable worker (with an INS Alien Number within the A 90000000 series) in seasonal agricultural services is subject to the reporting requirements to the Federal Government. Additionally, any employment of a replenishment

agricultural worker (who will be identified with an INS Alien Registration Number in a series within the A 90000000 series that INS will announce at a later date) in seasonal agricultural services is subject to both the reporting requirements to the Federal Government and to the individual worker.

(g) The certificate submitted by an employer to the Federal Government shall contain the number of work-days of employment in seasonal agricultural services performed by each reportable worker employed during the preceding fiscal quarter. This information shall be provided to the Commissioner of the Immigration and Naturalization Service who shall determine which reportable workers are special agricultural workers. Information concerning them shall be provided to the Director of the Bureau of Census for use in—

- (1) Estimating the number of special agricultural workers employed in seasonal agricultural services;
- (2) Determining the average number of work-days performed by special agricultural workers; and
- (3) Reporting to the Congress.

(h) Any person or entity who employs a reportable worker in seasonal agricultural services will meet the requirements of this regulation when—

- (1) Accurate records are kept and reports are made as required under this part to the Federal Government;
- (2) Accurate records are kept and reports are made as required under this part to each replenishment agricultural worker;
- (3) The same transportation provided to any replenishment agricultural worker is provided to any other worker;
- (4) There is no discrimination against any replenishment agricultural worker; and
- (5) A replenishment agricultural worker is not knowingly furnished false or misleading information concerning the terms, conditions, or existence of agricultural employment with respect to the disclosure, posting, and recordkeeping requirements found in Sections 301 (a), (b), and (c) of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801 et seq.

(i) An employer of a reportable worker employed in seasonal agricultural services who is subject to the requirements of the Fair Labor Standards Act (FLSA) (29 U.S.C. 201 et seq.) and/or MSPA is required to comply with both the requirements of this part and the statutory labor standards protections provided by FLSA and/or MSPA.

(j) The Secretary of Labor may impose sanctions pursuant to Section 210A(f)(4)(C) of the INA, which incorporate the penalty provisions of MSPA. Accordingly, these regulations provide that the Secretary of Labor is empowered to impose an assessment and to collect a civil money penalty of not more than \$1,000 for each violation, to seek a temporary or permanent restraining order in a United States District Court, and to seek the imposition of criminal penalties under 18 U.S.C. 1001.

(k) Subparts A and B set forth the substantive regulations relating to any employer of a reportable worker employed in seasonal agricultural services. These subparts cover the applicability of the Act, the recordkeeping and reporting requirements, antidiscrimination protections, and prohibition against furnishing false statements, and equal transportation requirements.

(l) Subpart C sets forth enforcement responsibility and procedure.

(m) Subpart D sets forth the rules of practice for administrative hearings on the assessment of civil money penalties.

(n) The Department of Labor has developed two (2) forms for carrying out the purposes of the Act:

(1) The optional form (WH-501R) is offered to assist in carrying out the requirement that each replenishment agricultural worker receive a report each pay period in the form of a certificate from each employer indicating the number of work-days (any day with at least four (4) hours worked) employed in seasonal agricultural services; and

(2) The Work-Day Report (Form ESA-92) required to be submitted to the Federal Government, to certify the number of work-days performed by each reportable worker employed in seasonal agricultural services each quarter in which any reportable worker was employed in seasonal agricultural services for at least one work-day.

§ 502.2 Definitions pertaining solely to a reportable worker employed in seasonal agricultural services.

For purposes of this part:

(a) "Act" and "INA" mean the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA 8 U.S.C. 1101 et seq.), with references particularly to sections 210 and 210A.

(b) "Administrator" means the Administrator of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor, and such authorized representatives as may be

designated by the Administrator to perform any of the functions of the Administrator under this part.

(c) "Administrative Law Judge" means a person appointed as provided in Title 5 U.S.C. and qualified to preside at hearings under 5 U.S.C. 3105. "Chief Administrative Law Judge" means the Chief Administrative Law Judge, United States Department of Labor, Washington, DC 20036.

(d) "Alien 'A' Number" refers to an INS Alien Registration Number assigned to each alien.

(e) "DOL" means the United States Department of Labor.

(f) "Employee," "employer," "employment," and "independent contractor" are defined for purposes of the INA in regulations issued by INS at 8 CFR 274a.1, which definitions are incorporated into this part. They are restated in part and set forth below for information purposes only.

(1) "Employee" means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in this part.

(2) "Employer" means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term "employer" shall mean the independent contractor or contractor and not the person or entity using the contract labor;

(3) "Employment" means any service or labor performed by an employee for an employer within the United States.

(4) "Independent contractor" includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: Supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; directs the order or sequence in which the work is to be done; and determines the hours during which the work is to be done. The use of labor or services of an independent contractor is subject to the restrictions

in section 274A(a)(4) of the Act and 8 CFR 274a.5.

(g) "Employment Standards Administration" means the agency within the Department of Labor (DOL), which includes the Wage and Hour Division, and which is charged with carrying out certain functions of the Secretary under section 210A of the INA.

(h) "Exempt person" means a person or entity who would be subject to the provisions of the MSPA but for paragraph (1) or (2), or both, of section 4(a) of MSPA.

(i) "Form I-9" is an INS Form, "Employment Eligibility Verification" (EEV), which reflects the requirements established under section 274A(9)(b) of INA requiring employers to examine documents which establish the identity and employment eligibility of individuals hired since November 6, 1986. The EEV information must be recorded on a INS Form I-9 and be made available for inspection by INS and/or DOL representatives.

(j) "Immigration and Naturalization Service (INS)" is the component of the U.S. Department of Justice which is responsible for administering the INA.

(k) "Man-day". See "Work-day".

(l) "MSPA" refers to the Migrant and Seasonal Agricultural Worker Protection Act (29 USC 1801 et seq.), and is referred to in section 210A of INA. MSPA provides for the protection of migrant and seasonal agricultural workers and for the registration of contractors of migrant and seasonal agricultural labor.

(m) "Replenishment Agricultural Worker (RAW)" is an alien (to be identified with an INS Alien Registration Number in a series within the A 90000000 series to be incorporated in these regulations when announced by INS at a later date) who is admitted during FY 1990 through FY 1993 for lawful temporary resident status or for the adjustment of status to lawful temporary residency to meet a shortage of workers employed in seasonal agricultural services.

(n) "Reportable Worker" is an alien employed in seasonal agricultural services who was admitted with lawful temporary resident status or whose status was adjusted to lawful temporary residency, and who is identified by an INS Alien Registration Number in the A 90000000 series. This series includes (1) a legalized temporary resident alien admitted under section 245A of the INA, (2) a temporary resident alien-special agricultural worker admitted under section 210 of the INA, and (3) an anticipated temporary resident alien-replenishment agricultural worker

admitted between FY 1990 and FY 1993 under section 210A of the INA.

(o)(1) "Seasonal agricultural services" as provided by section 210(h) of the Act means "the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture".

(2) The Department of Agriculture regulation, 7 CFR Part 1d, definitions of "field work", "horticultural specialties", "fruits", "vegetables" and "other perishable commodities" are incorporated in this part. They are set forth below for information purposes only:

(i) "Field work" means any employment performed on agricultural lands for the purpose of planting, cultural practices, cultivating, growing, harvesting, drying, processing, or packing any fruits, vegetables, or other perishable commodities. These activities have to be performed on agricultural land in order to produce fruits, vegetables, and other perishable commodities, as opposed to those activities that occur in a processing plant or packinghouse not on agricultural lands. Thus, the drying, processing, or packing of fruits, vegetables, and other perishable commodities in the field and the "on the field" loading of transportation vehicles are included. Operations using a machine, such as a picker or a tractor, to perform these activities on agricultural land are included. Supervising any of these activities shall be considered performing the activities.

(ii) "Horticultural specialties" means field grown, containerized, and greenhouse produced nursery crops which include juvenile trees, shrubs, seedlings, budding, grafting and understock, fruit and nut trees, fruit plants, vines, ground covers, foliage and potted plants, cut flowers, herbaceous annuals, biennials and perennials, bulbs, corms, and tubers.

(iii) "Fruits" means the human edible parts of plants which consist of the mature ovaries and fused other parts or structures, which develop from flowers or inflorescence.

(iv) "Vegetables" means the human edible leaves, stems, roots, or tubers of herbaceous plants.

(v) "Other perishable commodities" means those commodities which do not meet the definition of fruits or vegetables, that are produced as a result of field work, and have critical and unpredictable labor demands. This is limited to Christmas trees, cut flowers, herbs, hops, horticultural specialties,

spanish reeds (arundo donax), spices, sugar beets, and tobacco. This is an exclusive list, and anything not listed is excluded. Examples of commodities that are not included as perishable commodities are animal aquacultural commodities, birds, dairy products, earthworms, fish including oysters and shellfish, forest products, fur bearing animals and rabbits, hay and other forage and silage, honey, horses and other equines, livestock of all kinds including animal specialties, poultry and poultry products, sod, sugar cane, wildlife, and wool.

(3) For purpose of these regulations, "seasonal agricultural services" include field work related to hay, sod, and sugar cane. The requirement of reporting on these commodities does not constitute evidence that they are eligible commodities for purposes of the special agricultural worker program. They are included to enable the Federal Government and the individual replenishment agricultural worker to obtain data on work on these commodities which will be needed if it is ultimately determined that they are eligible commodities. This regulation will be amended in accordance with the final disposition of the litigation concerning the application of sections 210 and 210A to these commodities.

(p) "Secretary" means the Secretary of Labor or the Secretary's designee.

(q)(1) "Solicitor of Labor" means the Solicitor, United States Department of Labor, and includes employees of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this part.

(2) "Associate Solicitor for Fair Labor Standards" means the Associate Solicitor, who, among other duties, is in charge of litigation for MSPA, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210, or the Associate Solicitor's designee.

(3) "Regional Solicitors" means the attorneys in charge of the various regional offices of the Office of the Solicitor, or their designees.

(r) "Special Agricultural Worker" (SAW) is (1) an alien granted temporary resident alien status as a result of an application filed pursuant to section 210 of the INA, establishing residence in the United States and employment in seasonal agricultural services for at least 90 work-days during the 12-month period ending May 1, 1986; and (2) a replenishment agricultural worker (RAW) granted temporary residency pursuant to section 210A of the INA.

(s) "Work-day" means a calendar day during which at least 4 hours of work in seasonal agricultural services is

performed. If one worker performs seasonal agricultural services for more than one employer on any one day, only one work-day will be counted.

Note: The alternative term "work-day" is adopted and incorporated into the text of this part to distinguish it from the term "man-day" as used in both the Fair Labor Standards Act (FLSA) and the MSPA, which in those acts means any calendar day when at least one hour of work is performed.

§ 502.3 Waiver of rights prohibited.

No person shall seek to have any worker waive rights conferred under section 210A of the INA or under these regulations. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the Act or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or these regulations. This does not prevent agreements to settle private litigation.

§ 502.4 Investigation authority of Secretary.

The Secretary, either pursuant to a complaint or otherwise, may investigate and, in connection therewith, inspect such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Secretary to determine compliance under section 210A of the INA or these regulations.

§ 502.5 Prohibition on interference with Department of Labor officials.

No person shall interfere with any official of the Department of Labor assigned to perform an investigation, inspection or law enforcement function pursuant to the INA and these regulations during the performance of such duties. The Wage and Hour Division of the Employment Standards Administration will seek such action as it deems appropriate, including an injunction to bar any such interference with an investigation and/or assess a civil money penalty therefor. Federal statutes which prohibit persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.

§ 502.6 State Employment Service certificate form.

Pursuant to Section 274A of the INA, any State Employment Service may voluntarily establish a system to perform employment eligibility verification for employers when referring job applicants for employment vacancies listed through the local State

Employment Service offices. See 8 CFR 274a.6. In order that each employer can identify the reportable workers subject of this part, the State Employment Service certificate furnished to the employer must include the INS Alien Registration Number, if any, for each applicant referred for agricultural employment.

Subpart B—Employment and Reporting Requirements

§ 502.10 Requirements for Reporting and Employing a Reportable Worker Employed in Seasonal Agricultural Services.

Effective beginning October 1, 1988, any person employing a reportable worker in seasonal agricultural services shall do the following:

(a) *Identification of a reportable worker.* (1) When completing the I-9 at the time of hiring, identify any reportable worker subject to these regulations. A reportable worker is identified as a worker with an INS Alien Registration Number in the A 90000000 series employed in seasonal agricultural services;

(2) When employment eligibility has been verified by the State Employment Service, the Alien Registration Number, if any, shall be set forth on the certification furnished to the agricultural employer by the State Employment Service.

(b) *Report to the Federal Government.*

(1) For the period October 1, 1988, through September 30, 1992, furnish to the Federal Government each quarter a certificate (Form ESA-92) containing the information specified in this part, formulated from information derived from employment records maintained, on any reportable worker employed in seasonal agricultural services; and

(2) Furnish accurate, complete, and legible information in the certificate (Form ESA-92) to the Federal Government.

(c) *Report to the worker.* (1) For the period October 1, 1988, through September 30, 1992, furnish to any replenishment agricultural worker (identified by an INS Alien Registration Number in a series that INS will announce at a later date), employed in seasonal agricultural services, a report on each pay day containing the information specified in this part, formulated from employment records maintained; and

(2) Furnish accurate, complete, and legible information in the report to the replenishment agricultural worker.

(d) *Worker's rights.* (1) Not perform any act of discrimination against a replenishment agricultural worker;

(2) Provide the same transportation arrangements or assistance provided any replenishment agricultural worker to all other workers; and

(3) Not provide false or misleading information concerning the terms, conditions, or existence of agricultural employment to a replenishment agricultural worker.

§ 502.11 Recordkeeping.

(a) Any person employing a reportable worker in seasonal agricultural services shall maintain for each such worker the records listed below for the period October 1, 1988, through September 30, 1992. Records may be maintained and preserved in any recordkeeping format, provided they are accessible, legible, and provided to a Department of Labor representative upon request. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be provided to the Department of Labor representative within 72 hours of a request from such representative.

(1) Name in full, INS Alien Registration Number, and social security account number;

(2) Local address including ZIP code and permanent address;

(3) Crop worked and tasks performed;

(4) Hours worked each day; and

(5) A copy of each—

(i) Dated and signed Work-Day Report (Form ESA-92) submitted to the Federal Government; and

(ii) Dated report provided to any replenishment agricultural worker of the number of work-days employed in seasonal agricultural services and the period covered by the report. The optional form WH-501R may be used for this purpose.

(b)(1) Records required by paragraph (a) of this section shall be maintained for three years, except with regard to such records on employment of replenishment agricultural workers.

(2) Records on employment of replenishment agricultural workers required by paragraph (a) of this section shall be maintained for five years.

(c) If subject to the requirements of MSPA, refer to 29 CFR 500.80 for the additional recordkeeping requirements.

(d) If subject to the requirements of FLSA, refer to 29 CFR Part 516 for the additional recordkeeping requirements.

§ 502.12 Reporting to the Federal Government.

(a) For the period beginning October 1, 1988, through September 30, 1992, any person employing a reportable worker in seasonal agricultural services shall

provide a certified report each quarter regarding each such worker's employment to the Federal Government.

(b) A reportable worker is any worker having an INS alien registration number ("A" Number) in the A 90000000 series who was employed in seasonal agricultural services at any time during the quarter reported. The alien registration number is furnished by the resident alien when the Form I-9 is completed at the time of hiring (or by a State Employment Service Agency on the certification of employment eligibility verification furnished the employer when referring an employee for agricultural employment).

(c) Each such worker's employment to be reported to the Federal Government shall be certified using the required form, Work-Day Report, Form ESA-92. Copies of Form ESA-92 can be obtained from the U.S. Departments of Labor or Agriculture and can be copied or reproduced. The signed and dated report shall include the employer name, address, telephone number (including area code), employer identification number, type of agricultural business, and crops on which such workers were employed. Other information furnished in the ESA-92 is derived from records required to be kept in section 502.11. This information for each reportable worker employed in seasonal agricultural services for one or more work-days during a calendar quarter is the following:

(1) Resident alien's name and INS Alien Registration Number; and

(2) The number of work-days (any day with at least four (4) hours of work) of employment performed by any alien during the fiscal quarter; and

(3) If hay, sod, or sugar cane, the crop in which the worker was employed.

(d) The information provided for this certified report must be tabulated and reported to the Federal Government each fiscal quarter. The first period to be reported will be October 1 through December 31, 1988. The last period to be reported will be July 1 through September 30, 1992. The reporting shall follow a regular sequence each year as follows:

(1) For the period October 1 thru December 31, certified report due by the following January 16;

(2) For the period January 1 thru March 31, certified report due by the following April 17;

(3) For the period April 1 thru June 30, certified report due by the following July 17; and

(4) For the period July 1 thru September 30, certified report due by the following October 16.

(e) The employing entity will keep a copy of the completed ESA-92s furnished to the Federal Government for no less than three years.

(f) The Form ESA-92 will be addressed to "Committee for Employment Information on Special Agricultural Workers" and mailed to P.O. Box XXXX, Washington, D.C. XXXX.

§ 502.13 Reporting to the replenishment agricultural worker.

(a) For the period beginning October 1, 1989, through September 30, 1992, any person employing any replenishment agricultural worker (identified by an INS Alien Registration Number in a series within the A 90000000 series that INS will announce at a later date) shall provide such worker, with each wage payment, but no less often than twice per month, a report certifying such alien's employment.

(b) The report shall include the date the report is furnished to the employee, employer name, address, telephone number (including area code), employer identification number, and type of agricultural business. Other information furnished by any such employing entity is derived from permanent records required to be kept by § 502.11. This information is the following:

(1) Replenishment agricultural worker's name, local address (including ZIP code), permanent address, INS Alien Registration Number, and social security account number;

(2) The date paid, the pay period covered by the report and the number of work-days (any day with at least four (4) hours of work) of employment performed by the replenishment agricultural worker in seasonal agricultural services during the pay period; and

(3) The crop worked and the tasks performed.

(c) Any such replenishment agricultural worker's employment may be reported using the WH501R, a pay stub reprinted for this use which also meets the requirements of MSPA. [Copies of the Form WH-501R can be obtained from the Departments of Labor and Agriculture and can be copied or reproduced.] Completion of the form will meet the requirements of these regulations and MSPA.

(d) Use of the WH501R is optional, and the requirements of this part will be met as long as the information specified in § 502.13(b) is provided to the worker at the time of each wage payment, and no less than twice per month.

(e) The employing entity shall keep a copy of each completed WH501R (or whatever form is used to report)

furnished to the replenishment agricultural worker for no less than five years.

§ 502.14 Accuracy of information furnished.

(a) If subject to MSPA, no employer shall knowingly provide false or misleading information on the terms, conditions or existence of agricultural employment required to be disclosed by MSPA (and 29 CFR Part 500) to any worker subject to MSPA.

(b) Any employer who is exempt under either MSPA section 4(a)(1) or 4(a)(2) shall not knowingly provide false or misleading information to a replenishment agricultural worker concerning the following terms, conditions, or existence of agricultural employment which are described in subsections (a), (b), or (c) of section 301 of MSPA:

(1) With respect to disclosures to workers when an offer of employment is made, at the place of recruitment, or any other time—

(i) The place of employment;

(ii) The wage rates to be paid;

(iii) The crops and kinds of activities on which the worker may be employed;

(iv) The period of employment;

(v) The transportation and any other employee benefit to be provided, if any, and any costs to be charged for each of them;

(vi) The existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment; and

(vii) The existence of any arrangements with any owner or agent of any establishment in the area of employment under which a farm labor contractor or an employer is to receive a commission or any other benefit resulting from any sales by such establishment to the workers;

(2) With respect to any poster at the place of employment, information regarding the rights and protections afforded such workers; and

(3) With respect to records preserved by the employer and provided to employee at time of wage payment—

(i) The basis on which wages are paid;

(ii) The number of piecework units earned, if paid on a piecework basis;

(iii) The number of hours worked per day;

(iv) The total pay period earnings;

(v) The specific sums withheld; and

(vi) The net pay.

§ 502.15 Discrimination prohibited.

(a) It is a violation of the Act and these regulations for any person to

intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any replenishment agricultural worker who has:

(1) Filed a complaint under or related to section 210A of the INA or this part;

(2) Instituted or caused to be instituted any proceedings related to section 210A of the INA or this part;

(3) Testified or is about to testify in any proceeding under or related to section 210A of the INA or this part; or

(4) Exercised or asserted on behalf of themselves or others any right or protection afforded by section 210A of the INA or this part;

(b) Any worker who believes, with just cause, that the worker has been discriminated against by any person in violation of this section may, no later than 180 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

§ 502.16 Prohibition on providing false information when reporting to a replenishment agricultural worker or to the Federal Government.

(a) Any person or entity who employs a reportable worker in seasonal agricultural services during the period beginning October 1, 1988, and ending September 30, 1992, shall not furnish a certificate required under these regulations containing false information to the Federal Government.

(b) Any person or entity who employs a replenishment agricultural worker during the period beginning October 1, 1989, and ending September 30, 1989, shall not furnish a certificate required under these regulations to the individual replenishment agricultural worker which contains false information.

(c) Information, statements and data submitted in compliance with provisions of the Act or these regulations are protected as follows: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry shall be subject to 18 U.S.C. 1001 and fined not more than \$10,000 or imprisoned not more than five years, or both.

§ 502.17 Equal Transportation Provision.

No person shall discriminate against any worker by failing to provide the same transportation arrangements or assistance (generally comparable in

expense and scope) as provided to a replenishment agricultural worker.

Subpart C—Enforcement

§ 502.20 Enforcement.

The investigations, inspections and law enforcement functions to carry out the provisions of section 210A of the INA, as provided in these regulations for enforcement by the Wage and Hour Division, pertain to

(a) The maintenance of records and the reporting to the Federal Government of those items required under §§ 502.11 and 502.12 of this part;

(b) The maintenance of records and the reporting to an individual replenishment agricultural worker of those items required under §§ 502.11 and 502.13 of this part;

(c) The truth of disclosures, whether in writing or not, of terms, conditions, or existence of agricultural employment offered to a replenishment agricultural worker under § 502.14 of this part;

(d) The anti-discrimination protections to any replenishment agricultural worker as required under § 502.15 of this part;

(e) The accuracy of information provided as required to a replenishment agricultural worker and the Federal Government under § 502.16 of this part; and

(f) The providing of the same transportation (comparable in expense and scope) to other workers as provided to a replenishment agricultural worker as required under § 502.17 of this part.

§ 502.21 General.

(a) Whenever the Secretary believes that the provisions of section 210A of the INA or these regulations have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(1) Petition any appropriate District Court of the United States for temporary or permanent injunctive relief to restrain violation of the provisions of the Act or this part by any person;

(2) Institute appropriate administrative proceedings, including the assessment of a civil money penalty against any person for a violation of the obligations of the Act or this part; or

(3) Refer any unpaid civil money penalty which has become a final and unappealable order of the Secretary or a final judgment of a court in favor of the Secretary to the Attorney General for recovery.

(b) The taking of any one of the actions referred to in paragraph (a) shall not be a bar to the concurrent taking of any other appropriate action.

§ 502.22 Representation of the Secretary.

(a) Except as provided in section 518(a) of Title 28, U.S. Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under section 210A of the Act.

(b) The Solicitor of Labor, through the authorized representatives, shall represent the Administrator and the Secretary in all administrative hearings under the provisions of section 210A of the Act and this part.

§ 502.23 Civil money penalty assessment.

(a) A civil money penalty in an amount not to exceed \$1,000 may be assessed for each violation of section 210A of the Act or this part.

(b) A civil money penalty may be assessed by the Administrator for:

(1) Failing to furnish any certificate as required under sections 502.12 and 502.13 of this part;

(2) Furnishing a false statement as prohibited in section 502.16 of this part;

(3) Failing to provide the same transportation to any worker as provided for a replenishment agricultural worker as required in section 502.17 of this part;

(4) Knowingly furnishing false or misleading information to a replenishment agricultural worker concerning the terms, conditions, or existence of agricultural employment as prohibited in section 502.14 of this part;

(5) Discriminating against a replenishment agricultural worker as prohibited in section 502.15 of this part;

(6) Failing to keep the records required by section 502.11 of this part;

(7) Failing to furnish records required to be kept under these regulations to Department of Labor officials upon request as required by section 502.11 of this part;

(8) Interfering with the performance of an investigation or inspection in the United States as prohibited in section 502.5 of this part; or

(9) Any other violation of the regulations in this part or section 210A(b)(2) or (f) of the Act.

(c) In determining the amount of penalty to be assessed for any violation outlined in paragraph (a) of this section, the Administrator shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations of the provisions of the Act or this part;

(2) The number of workers affected by the violation or violations;

(3) The seriousness of the violation or violations;

(4) Efforts made in good faith to comply with the provisions of the Act and the regulations in this part;

(5) Explanation by person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public interest and whether the person has previously violated the provisions of the Act; and

(7) The extent to which the worker suffered loss or damage.

§ 502.24 Enforcement of Wage and Hour investigative authority.

Section 502.4 of this part prescribes the investigation authority of the Wage and Hour Division for the purpose of enforcing section 210A of the Act and this part. The taking of any action to interfere with Department of Labor officials in the conduct of an investigation is prohibited by section 502.5 of this part and will subject such person or entity to such action as appropriate, including the assessment of civil money penalties, an injunction to bar interference with the investigation, and criminal penalties.

§ 502.25 Civil money penalties—payment and collection.

Where the assessment is directed in a final order by the Administrator, by an Administrative Law Judge, or by the Secretary, the amount of the penalty is immediately due and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator by certified check or by money order, made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred.

Subpart D—Administrative Proceedings

General

§ 502.30 Establishment of procedures and rules of practice.

This subpart codifies and establishes the procedures and rules of practice necessary for the administrative enforcement of the Act.

§ 502.31 Applicability of procedures and rules.

The procedures and rules contained in this subpart prescribe the administrative process necessary for a determination to impose an assessment of civil money penalties for violations of the Act or of these regulations. The "Rules of Practice and Procedure for Administrative

Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR Part 18 shall apply to this subpart, as provided in section § 502.38 of this part.

Procedures Relating to Hearing

§ 502.32 Written notice of determination required.

Whenever the Secretary determines to assess a civil money penalty for a violation of the Act or this part, the person against whom such penalty is assessed shall be notified in writing of such determination.

§ 502.33 Contents of notice.

The notice required by § 502.32 of this part shall:

(a) Set forth the determination of the Secretary and the reason or reasons therefore;

(b) Set forth a description of each violation and the amount assessed for each violation;

(c) Set forth the right to request a hearing on such determination;

(d) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Secretary shall become final and unappealable; and

(e) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 502.34 of this part.

§ 502.34 Request for hearing.

(a) Any person desiring to request an administrative hearing on a civil money penalty assessment pursuant to this part shall make such request in writing to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, no later than thirty (30) days after the service of the notice referred to in § 502.33 of this part.

(b) No particular form is prescribed for any request for hearing permitted by this subpart. However, any such request shall:

(1) Be typewritten or legibly written on size 8½" x 11" paper;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for hearing must be received by the Administrator at the address set forth in paragraph (a) of this section, within the time set forth in that paragraph. For the affected person's protection, if the request is by mail, it should be by certified mail, return receipt requested.

Rules of Practice

§ 502.38 General.

Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR Part 18 shall apply to administrative proceedings under this subpart.

§ 502.39 Service of determinations and computation of time.

(a) Service of a determination to assess a civil money penalty shall be made by personal service to the individual, officer of a corporation, or attorney of record or by mailing the determination to the last known address of the individual, officer, or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by addressee;

(b) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day; and

(c) When a determination is served on a party by mail, five (5) days shall be added to the prescribed period during which the party has the right to request a hearing on the determination.

§ 502.40 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with section 502.34 of this part.

§ 502.41 Designation of record.

(a) Each administrative proceeding instituted under the Act and this part shall be identified of record by a number preceded by the year and the letters "S/RAW".

(b) The number, letter, and designation assigned to each such proceeding shall be clearly displayed on each pleading, motion, brief, or other formal document filed and docketed of record.

§ 502.42 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and this part shall be captioned in the name of the person requesting such hearing, and shall be styled as follows: In The Matter of —, Respondent.

(b) For the purposes of administrative proceedings under the Act and this part the "Secretary of Labor" shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing**§ 502.43 Referral to Administrative Law Judge.**

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 502.34 of this part, the Secretary, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by Order of Reference, promptly refer an authenticated copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under this part.

(b) A copy of the Order of Reference, together with a copy of this part, shall be served by counsel for the Secretary upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 502.44 Notice of docketing.

The Chief Administrative Law Judge shall promptly notify the parties of the docketing of each matter.

§ 502.45 Service upon attorneys for the Department of Labor—number of copies.

Two (2) copies of all pleadings and other documents required for any administrative proceeding provided by this part shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the

proceeding. Procedures Before Administrative Law Judge.

§ 502.46 Appearances; representation of the Department of Labor.

The Associate Solicitor, Division of Fair Labor Standards, and such other counsel as may be designated, shall represent the Department in any proceeding under this part.

§ 502.47 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the Administrative Law Judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such

agreement by issuing a decision based upon the agreed findings.

§ 502.48 Decision and Order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, as promptly as practicable after the expiration of the time set for filing proposed findings and related papers a decision on the issues referred by the Secretary.

(b) The decision of the Administrative Law Judge shall be limited to a determination whether the respondent has violated the Act or these regulations and the appropriateness of the remedy or remedies imposed by the Secretary. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision of the Administrative Law Judge, for purposes of the Equal Access to Justice Act (5 U.S.C. 504), shall be limited to determinations of attorney fees and/or other litigation expenses in adversary proceedings requested pursuant to section 502.34 of this part which involve the imposition of a civil money penalty assessed for a violation of the Act or this part.

(d) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may be to affirm, deny, reverse, or modify, in whole or in part, the determination of the Secretary. The reason or reasons for such order shall be stated in the decision.

(e) The Administrative Law Judge shall transmit to the Chief Administrative Law Judge the entire record including the decision. The Chief Administrative Law Judge shall serve copies of the decision on each of the parties.

(f) The decision when served shall constitute the final order of the Secretary unless the Secretary, pursuant to section 210A(f)(4) of the INA modifies or vacates the decision and order of the Administrative Law Judge.

(g) Except as provided in §§ 502.48 through 502.53 of this part, the administrative remedies available to the parties under the Act will be exhausted upon service of the decision of the Administrative Law Judge.

Modification or Vacation of Order of Administrative Law Judge

§ 502.49 Authority of the Secretary.

The Secretary may modify or vacate the Decision and Order of the Administrative Law Judge whenever the Secretary concludes that the Decision and Order:

- (a) Is inconsistent with a policy or precedent established by the Department of Labor;
- (b) Encompasses determinations not within the scope of the authority of the Administrative Law Judge; or
- (c) Awards attorney fees and/or other litigation expenses pursuant to the Equal Access to Justice Act which are unjustified or excessive, the Secretary may modify or vacate such Decision and Order; or
- (d) Otherwise warrants modifying or vacating.

§ 502.50 Procedures for initiating review.

- (a) Within twenty (20) days after the date of the decision of the Administrative Law Judge, the respondent, the Administrator, or any other party desiring review thereof, may file with the Secretary an original and two copies of a petition for issuance of a Notice of Intent as described under § 500.51. The petition shall be in writing and shall contain a concise and plain statement specifying the grounds on which review is sought. A copy of the Decision and Order of the Administrative Law Judge shall be attached to the petition.
- (b) Copies of the petition shall be served upon all parties to the proceeding and on the Chief Administrative Law Judge.

§ 502.51 Implementation by the Secretary.

- (a) Whenever, on the Secretary's own motion or upon acceptance of a party's petition, the Secretary believes that a Decision and Order may warrant modifying or vacating, the Secretary shall issue a Notice of Intent to modify or vacate the Decision and Order in question.
- (b) The Notice of Intent to Modify or Vacate a Decision and Order shall specify the issue or issues to be considered, the form in which submission shall be made (i.e., briefs, oral argument, etc.), and the time within which such presentation shall be

submitted. The Secretary shall closely limit the time within which the briefs must be filed or oral presentations made, so as to avoid unreasonable delay.

(c) The Notice of Intent shall be issued within thirty (30) days after the date of the Decision and Order in question.

(d) Service of the Notice of Intent shall be made upon each party to the proceeding, and upon the Chief Administrative Law Judge, in person or by certified mail.

§ 502.52 Filing and service.

(a) *Filing.* All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210.

(b) *Number of copies.* An original and two copies of all documents shall be filed.

(c) *Computation of time for delivery by mail.* Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, must be received by the Secretary either on or before the due date.

(d) *Manner and proof of service.* A copy of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service under this section shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address.

§ 502.53 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the Secretary's Notice of Intent to Modify or Vacate the Decision and Order of an Administrative Law Judge, the Chief Administrative Law Judge shall, within fifteen (15) days, index, certify and forward a copy of the complete hearing record to the Secretary.

§ 502.54 Final decision of the Secretary.

(a) The Secretary's final Decision and Order shall be issued within 120 days from the Notice of intent granting the petition, and shall be served upon all parties and the Chief Administrative Law Judge, in person or by certified mail.

(b) Upon receipt of an Order of the Secretary modifying or vacating the Decision and Order of an Administrative Law Judge, the Chief

Administrative Law Judge shall substitute such Order for the Decision and Order of the Administrative Law Judge.

§ 502.55 Stay pending decision of the Secretary.

(a) The filing of a petition seeking review by the Secretary of a Decision and Order of an Administrative Law Judge, pursuant to § 502.50 does not stop the running of the thirty-day time limit in which respondent may file an appeal to obtain a review in the United States District Court of an administrative order, under section 210A of the INA, as provided in section 503(b)(c) of the MSPA, unless the Secretary issues a Notice of Intent pursuant to § 502.51.

(b) In the event a respondent has filed a notice of appeal of the Administrative Law Judge's Decision and Order in a United States District Court prior to receipt of the Secretary's Notice of Intent, the Secretary shall seek a stay of proceedings in such United States District Court.

(c) Where the Secretary has issued a Notice of Intent, the time for filing an appeal of a Decision and Order issued under this part, shall commence from the date of the issuance of the Secretary's final decision, as provided in § 502.54.

Record

§ 502.56 Retention of official record.

The official record of every completed administrative hearing provided by this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

§ 502.57 Certification of official record.

Upon receipt of timely notice of appeal to a United States District Court of a decision and Order issued under this part, the Chief Administrative Law Judge shall promptly certify and file with the appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

Editorial Note.—The Department presents forms in the Appendix which satisfy certain disclosure and recordkeeping aspects of the Act and the regulations. These forms, however, will not appear in the Code of Federal Regulations.

BILLING CODE 4510-27-M

INSTRUCTIONS FOR COMPLETION OF FORM ESA-92
(For further details, refer to Regulations, 29 CFR Part 502)

The authority for this certification to the Federal Government is contained in Section 210A of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603. This form is to report employment information of certain workers employed in seasonal agricultural services. This information is used to identify labor shortages and, if necessary, to replenish the work force for this type of employment. A worker whose employment is to be reported is identified by Immigration and Naturalization Service (INS) as an individual with an Alien Registration Number (if applicable, submitted by the employee on the Form I-9) in the A 90000000 series and performing work in Seasonal Agricultural Services.

Performing work in "Seasonal Agricultural Services" means performing field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities as defined in regulation 7 CFR part 1d. For purposes of this regulation only, "seasonal agricultural services" also includes field work performed in the following "contested crops": hay, sod, and sugar cane. The requirement of reporting these commodities does not constitute evidence that they are eligible commodities for purposes of the SAW program. The reporting requirements will enable the Federal Government and the replenishment agricultural worker to obtain needed data in the event that it is later decided that these commodities are SAW eligible.

"Field work" is defined as work performed on agricultural land for the purpose of planting, cultural practices, cultivating, growing, harvesting, drying, processing, or packing any fruits, vegetables, or other perishable commodities*. These activities have to be performed on agricultural land in order to produce fruits, vegetables, and other perishable commodities*, as opposed to those activities that occur in a processing plant or packinghouse not on agricultural lands. Thus, drying, processing, or packing of fruits, vegetables, and other perishable commodities in the field and the "on the field" loading of transportation vehicles are included. Operations using a machine, such as a picker or a tractor, to perform these activities on agricultural lands are included. Supervising any of these activities shall be considered performing the activities.

"Agricultural lands" means any land, cave, or structure, such as a greenhouse, except packinghouses or canneries, used for the purpose of performing field work.

*Fruits and vegetables of every kind and other perishable commodities INCLUDE the following:
All fruits and vegetables, including (but not limited to) berries, melons, tree fruits and nuts, table vegetables; also corn and small grains, cotton, soybeans; other perishable commodities are limited to Christmas trees, cut flowers, herbs, hops, horticultural specialties (field grown, containerized, and greenhouse produced nursery crops), spanish reeds (arundo donax), spices, sugar beets, and tobacco, as defined in 7 CFR Part 1d.

Examples of other commodities which are EXCLUDED are:
Animal aquacultural products, birds, dairy products, earthworms, fish including oysters and shellfish, flax, forest products, fur bearing animals and rabbits, honey, horses and other equines, livestock of all kinds including animal specialties, millet, milo, poultry and poultry products, sorghum, wildlife and wool.

"Contested crops" INCLUDE hay, sod, and sugar cane. Reports must be filed on field work performed by reportable workers in these crops.

INSTRUCTIONS FOR COMPLETION OF FORM ESA-92 (CONTINUED)

This form is to certify employment information of certain workers employed in seasonal agricultural services in which the employer is required to provide to the Federal Government.

- ITEM 1. Indicate the fiscal year for which the information is submitted.
- ITEM 2. Indicate the quarter for which the information is submitted.
- ITEM 3. Enter the complete legal name, address, and telephone number (including area code) of the employer.
- ITEM 4. Enter the employer federal tax identification number.
- ITEM 5. Indicate in this space the crops (such as "cucumbers" or "wheat") in which the workers were employed.
- ITEM 6. With respect to each resident alien worker with an Alien Registration Number in the A 90000000 series who is employed in seasonal agricultural services at any time during the quarter reported, enter each worker's name, and INS alien registration number; the crop on which the worker was employed if hay, sod, or sugar cane; and the total number of work-days that each worker was employed in seasonal agricultural services. A "work-day" is defined as any day during which at least four (4) hours of work in seasonal agricultural services is performed. If one worker performs seasonal agricultural services for more than one employer on any one day, only one work-day will be counted.

THIS FORM MUST BE SIGNED AND DATED BY THE REPORTING EMPLOYER OR A DESIGNATED REPRESENTATIVE OF THE EMPLOYER. NOTE: STATEMENTS SUBMITTED IN COMPLIANCE WITH THIS ACT ARE SUBJECT TO 18 U.S.C. 1001.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

Failure to accurately complete and mail this form within the time period specified in regulation 29 CFR 502 will be in violation of the Immigration and Nationality Act as amended by IRCA. The penalties imposed are contained in the statute and regulation 29 CFR 502.

Public reporting burden for this collection of information is estimated to average 20 1/2 minutes per response, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Management, Department of Labor, Room N-1301, 200 Constitution Ave., NW., Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

APPENDIX B—WAGE STATEMENT, WH-501R

Employee _____ Social Security No. _____

Permanent Address _____ INS Alien Registration No. A _____

Date of Report: _____ Workweek Ending (Month, day, year) _____

Day/Date	Sun/	Mon/	Tues/	Wed/	Thurs/	Fri/	Sat/	Total Hours Worked in Week	Number Of Work-Days (At least 4 hrs worked each day)
Starting Time									
Quitting Time									
Hours Worked									
Crop/Task									
Units Done									
Rate of Pay (Hourly or Piece Rate)									
Daily Pay									
Employer	Any information which pertains to "work days" for the person named above is provided in accordance with section 210A of the Immigration and Nationality Act. See reverse for instructions.								
Address									
Social Security Employer I.D. No.									

ITEMIZED DEDUCTIONS	Total Deductions	Net Pay (Amount Due Employee)	Date Paid:
FICA			
Federal Tax			
State Tax			
Rent			
Food			
Transportation			
Other			
Total Gross Pay			

Form WH-501R

Properly filled out, this optional form will satisfy the requirements of sections 201(d)(2) and (c)(2) of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and will also satisfy the requirements of section 210A of the Immigration and Nationality Act (INA).

PAYROLL INFORMATION: Enter the month, day and year on which the employee's payroll workweek ends. Enter the calendar date of the day worked. Enter the time work started and ended each day. Enter the total time actually worked each day. Subtract bonafide meal periods. Crop/Task - Units done - Enter the kind of work (such as picking oranges per bin). Enter the number of units produced if the employee is paid on a piece work or task basis. Enter the hourly or piece rate of pay. Enter the amount of the daily pay computed at the hourly and/or piece rate.

NUMBER OF WORK-DAYS: For resident alien workers with INS registration number (a series that INS will announce at a later date) and performing work in seasonal agricultural services, enter the number of days that the worker worked at least four (4) hours.

ITEMIZED DEDUCTIONS: In addition to FICA (Social Security), federal tax, state, tax, and rent, food, and transportation deductions (if any), enter any other deductions and identify the purpose of each other deduction. Total Deductions - Enter total deductions in right column and then transfer to left. Subtract total deductions from total Gross Pay - Enter the result as Net Pay (Amount Due Employee). Enter date worker is paid.

Public reporting burden for this collection of information under both MSPA and the INA is estimated to average 2 minutes per response in addition to that incurred in the normal course of business, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Management, Department of Labor, Room N-1301, 200 Constitution Ave., NW., Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

**Environmental
Protection
Agency
Federal Register**

Tuesday
July 19, 1988

Part VI

**Environmental
Protection Agency**

40 CFR Part 761

Polychlorinated Biphenyls in Electrical
Transformers; Final Rule

**ENVIRONMENTAL PROTECTION
AGENCY**
40 CFR Part 761
[OPTS-62035G; FRL 3366-6]
**Polychlorinated Biphenyls in Electrical
Transformers**
AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA issued a proposed rule, published in the *Federal Register* of August 21, 1987 (52 FR 31738) which proposed amendments to the rules governing the use of polychlorinated biphenyls (PCBs) in transformers. Among other things, this document finalizes those amendments which are related to the installation of PCB Transformers for emergency or reclassification situations and, with modification, the use of an alternative label on PCB Transformer locations. It also modifies some existing enhanced electrical protection requirements on lower secondary voltage network transformers, and sets guidelines for bringing PCB Transformers previously assumed to be PCB-contaminated transformers into compliance with all applicable regulations. This document reflects changes made in response to comments on the proposed rule.

DATE: In accordance with 40 CFR 23.5 (50 FR 7271), this rule shall be promulgated for purposes of judicial review at 1 p.m. Eastern Daylight Time on August 2, 1988. These amendments shall be effective September 1, 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 Street SW., Washington, DC 20460, (202-554-1404), TDD-(202-554-0551).

SUPPLEMENTARY INFORMATION: Section 6(e) of the Toxic Substances Control Act (TSCA) generally prohibits the use of PCBs after January 1, 1978. The statute does, however, set forth two exceptions under which EPA may, by rule, allow a particular use of PCBs to continue. Under section 6(e)(2) of TSCA, EPA may allow PCBs to be used in a totally enclosed manner. TSCA also allows EPA to authorize the use of PCBs in a manner other than a totally enclosed manner if the Agency finds that the use "will not present an unreasonable risk of injury to health or the environment."

Public reporting burden for this collection of information is estimated to average 188 minutes per response, including time for reviewing

instructions, searching for existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

I. Background

EPA promulgated a rule, which was published in the *Federal Register* of May 31, 1979 (44 FR 31514), to implement section 6(e) (2) and (3) of TSCA under 40 CFR Part 761. The rule, among other things, designated all intact, nonleaking capacitors, electromagnets, and transformers, other than railroad transformers, as "totally enclosed," thus permitting their use without specific authorizations or conditions. The Environmental Defense Fund (EDF) petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review a number of provisions of the rule, including the portion of the rule that designated all intact and nonleaking capacitors, electromagnets, and transformers as "totally enclosed" (*Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 636 F.2d 1267).

On October 30, 1980, the court, among other things, decided that there was insufficient evidence in the record to support the Agency's classification of transformers, capacitors, and electromagnets as totally enclosed. The court invalidated this portion of the rule and remanded the rule to EPA for further action.

As a consequence of the October 1980 decision, EPA undertook a number of rulemaking actions. One such rule was published in the *Federal Register* of August 25, 1982 (47 FR 37342) (hereafter, "PCB Electrical Use Rule"). This rule authorized, among other things, the continued use, until October 1, 1985, of PCB Transformers (electrical transformers containing greater than 500 ppm PCBs) in facilities involved in the handling of food or feed items, and authorized for the remainder of their useful life, the use of all other categories of non-railroad electrical transformers containing or contaminated with PCBs. In the PCB Electrical Use Rule, EPA made a determination that authorizing the use of these transformers for the remainder of their useful life (subject to certain conditions) did not present an

unreasonable risk to public health or the environment. EPA's August 1982 decision to allow the continued use of electrical transformers containing PCBs was based on the reported low frequency of leaks and spills of PCBs from this equipment compared to the high costs associated with replacing this equipment with substitute transformers or requiring secondary containment to limit the spread of spilled materials. EPA determined that the most cost-effective means for reducing the risks posed by leaks and spills of PCBs from these transformers was to require routine inspections, repairs, and cleanup.

After promulgation of the PCB Electrical Use Rule, additional information came to EPA's attention which indicated that fires involving transformers that contain PCBs may occur more frequently than previously expected. Thus, EPA subsequently undertook an evaluation of the fire-related risks posed by the continued use of transformers that contain PCBs, and the costs and benefits of measures designed to reduce those risks. EPA issued a proposed rule, published in the *Federal Register* of October 11, 1984 (49 FR 39966), which contained EPA's determination that PCB Transformer fires (fires involving transformers containing greater than 500 parts per million (ppm) PCBs), particularly those fires which occur in or near commercial buildings, do present risks to human health and the environment. EPA reached this determination after considering the toxicity of materials which can be formed and released during fires involving this equipment, as well as the potential for human and environmental exposures to these materials from a single incident, and the expected frequency of incidents over the remaining useful life of this equipment.

The Agency issued a final rule, published in the *Federal Register* of July 17, 1985 (50 FR 29170) (hereafter, the "PCB Transformer Fires Rule") that amended the PCB Electrical Use Rule. The PCB Transformer Fires Rule placed additional restrictions and conditions on the use of PCB Transformers, particularly PCB Transformers located in or near commercial buildings. Among other provisions, EPA banned the further installation of PCB Transformers in or near commercial buildings, required the removal of PCB Transformers that posed particularly high fire-related risks, and required the installation of enhanced electrical protection on all other PCB Transformers located in or near commercial buildings.

After the promulgation of the PCB Transformer Fires Rule, Mississippi Power Company (hereafter, "Mississippi Power") filed a petition for review of the rule. In the context of settlement negotiations, EPA agreed to issue, for publication in the *Federal Register*, a notice of interpretation and to propose to amend portions of the PCB Transformer Fires Rule.

EPA issued a Notice of Interpretation of the PCB Transformer Fires Rule, published in the *Federal Register* of December 31, 1986 (51 FR 47241), that clarified several provisions of the regulations governing the use of electrical transformers containing PCBs. The questions concerned: (1) The PCB Transformer registration requirements; (2) the requirement for the removal of stored combustibles near PCB Transformers; (3) the requirement for the reporting of fire-related incidents to the National Response Center; (4) the definition of commercial building; (5) the status of mineral oil transformers which are found to contain over 500 ppm PCBs; (6) the ban on the installation of PCB Transformers in or near commercial buildings; and (7) the requirement for the labeling of the exterior of PCB Transformer locations.

Mississippi Power also raised additional, more substantive issues regarding EPA's ban on the installation of PCB Transformers, the requirements for enhanced electrical protection of lower secondary voltage network PCB Transformers, and the requirement for the labeling of the exterior of PCB Transformer locations. First, Mississippi Power questioned whether EPA had intended to ban the installation of PCB Transformers in emergency situations (where no other non-PCB substitute is available) and the installation of retrofilled PCB Transformers when installed for purposes of reclassification. Further, Mississippi Power asked EPA to reconsider the requirement for enhanced electrical protection of lower secondary voltage network PCB Transformers because of space constraints in sidewalk vaults, lack of suitable (i.e., waterproof) fuse enclosures, and Mississippi Power's belief that the cost of fuse installation is two to four times higher than EPA originally estimated. Finally, Mississippi Power asked that EPA allow the use of alternative labels on PCB Transformer locations, when such labeling occurred voluntarily prior to the effective date of the PCB Transformer Fires Rule.

EPA evaluated the additional information submitted by Mississippi Power in the context of settlement negotiations and decided that the new

information warranted a reconsideration of certain of the Agency's previous determinations. This rule presents the results of the Agency's further evaluations and finalizes, with some modification, the proposed amendments to the requirements of the PCB Transformer Fires Rule.

EPA received 15 comments on the proposed rule, four of which were received after the close of the comment period, October 5, 1987. There were no requests for an informal hearing.

EPA has considered all the comments received in response to the proposed rule (as well as comments received after the close of the comment period) and has modified the final rule where appropriate. Some comments either did not address issues in the proposed amendments, misinterpreted a proposed requirement, or, in one case, raised an interpretive issue, outside the scope of this rule, that cannot be immediately resolved. This issue concerns enhanced electrical protection on radial and low secondary voltage network PCB Transformers. EPA considers the issue outside the scope of the rule because the rule addresses only issues agreed upon in the Settlement Agreement.

In order to reduce the fire-related risks posed by the use of PCB Transformers, the July 1985 Transformer Fires Rule required, among other things, enhanced electrical protection on all radial PCB Transformers and low secondary voltage network PCB Transformers in use in or near commercial buildings by October 1, 1990. The rule called for current-limiting fuses or other equivalent technology which detect high current faults and provide for complete deenergization of the transformer within certain time limitations before transformer rupture occurred. The August 1987 proposed amendment retained that requirement, but offered, as an option to this protection, transformer removal by October 1, 1993.

The interpretive issue raised by two comments suggests that complete deenergization of a faulted transformer is not necessary to achieve the Agency's goal, i.e., to prevent PCB Transformer rupture from a fire-related incident. The argument is that since most PCB Transformers are three-phased with a current-limiting fuse on each phase, and that since most faults are internal faults and limited to one phase, deenergization of the specific faulted phase would achieve the required level of protection against rupture. Thus, these comments maintain that it is not necessary to deenergize the entire transformer.

EPA does not currently have enough information to be certain whether partial deenergization (i.e., of the faulted phase) would suffice in all situations. That is, EPA is not able at this time to state that deenergization of the faulted phase is equivalent (in terms of protection against rupture) to total deenergization of the transformer. EPA suggests that the commentors provide supplementary information so that EPA may resolve this interpretive issue. If EPA finds that deenergization of the faulted phase is equivalent to complete deenergization, EPA will issue an interpretive notice stating so. In the meantime, EPA requires enhanced electrical protection to achieve complete deenergization of a faulted transformer as stated in the July 1985 final rule. EPA has prepared a support document for this rulemaking that responds to those comments that did not result in modification of the rule. This document, entitled "Response to Comments on the Proposed Amendment to the PCB Transformer Fires Proposed Rule, June 1988," is in the public record and is available for review and copying from 8 a.m. to 4 p.m. Monday through Friday, except legal holidays, in Rm. NE-G004, 401 M Street SW., Washington, DC 20460.

For a more detailed discussion of all the issues involved in this rulemaking, see the proposed rule, published at 52 FR 31738, August 21, 1987.

II. Summary Of The Final Rule

Under section 6(e)(2)(B) of TSCA, EPA can authorize a use of PCBs provided that the use "will not present an unreasonable risk of injury to health or the environment." EPA had determined that the use of PCB Transformers until October 1, 1985 in facilities involved in the handling of food and feed items and the use of all other categories of non-railroad electrical transformers containing or contaminated with PCBs for the remainder of their useful lives would not present an unreasonable risk of injury to health or the environment. However, EPA later determined that PCB Transformer fires (fires involving transformers containing greater than 500 ppm PCB), particularly fires which occur in or near commercial buildings, do pose risks to humans and the environment. EPA determined that the continued use of PCB Transformers without additional regulatory control measures would present an unreasonable risk of injury to health and the environment and thus, in the PCB Transformer Fires Rule, imposed further restrictions and conditions on the use of PCB Transformers.

The PCB Transformer Fires Rule required the marking of the exterior of PCB Transformer locations with the PCB identification label, and prohibited, among other things, the further installation of PCB Transformers (electrical transformers containing 500 ppm or greater PCBs) in or near commercial buildings. The PCB Transformer Fires Rule also placed conditions on the continued use of lower secondary voltage network PCB Transformers in or near commercial buildings by requiring that these transformers be equipped with enhanced electrical protection as of October 1, 1990. Enhanced electrical protection was required by EPA to avoid electrical failures leading to fire-related incidents.

Following promulgation of the PCB Transformer Fires Rule, Mississippi Power filed suit against EPA. In comments submitted in the context of settlement discussion, Mississippi Power asked EPA to consider: (1) Clarifying the current language of the requirements for enhanced electrical protection by substituting the word "rupture" for "failure"; (2) modifying the requirement for enhanced electrical protection of lower secondary voltage network transformers because of space constraints in existing sidewalk vault locations; (3) allowing the installation of PCB Transformers in certain circumstances, such as in emergency situations and for purposes of reclassification; (4) allowing the use of alternative labels in situations where such labeling was voluntarily initiated prior to the effective date of the PCB Transformer Fires Rule; and (5) establishing a specific schedule for bringing mineral oil transformers, which are tested and found to contain 500 ppm or greater PCBs, into compliance with applicable requirements.

After reviewing the new information submitted by Mississippi Power and others, and considering their requests for amendments to the PCB Transformer Fires Rule, EPA determined that the issues raised by Mississippi Power and others warranted further Agency consideration and, therefore, proposed certain amendments to the PCB Transformer Fires Rule. In this document, EPA is amending the regulations that ban the further installation of PCB Transformers in or near commercial buildings and impose certain requirements for enhanced electrical protection, as of October 1, 1990, on lower secondary voltage network PCB Transformers.

EPA is also amending the regulations to allow: (a) The installation of PCB

Transformers in emergency situations (when no other non-PCB substitute is available); (b) the installation of retrofilled PCB Transformers for purposes of reclassification; and (c) the use of an alternative label to mark the exterior of certain PCB Transformer locations provided the labeling program meets certain specific requirements. The amendment will also offer owners of lower secondary voltage network PCB Transformers located in or near commercial buildings the option of enhanced electrical protection by October 1, 1990 (as is currently required), or removal by October 1, 1993. Further, EPA is prohibiting the use of lower secondary voltage network PCB Transformers located in sidewalk vaults near commercial buildings as of October 1, 1993.

In the proposed rule, EPA used the term "to register" in connection with notifying fire personnel where PCB Transformers were located. This term was used because legally it means "to record formally and exactly." EPA's enforcement experience with 40 CFR 761.30(a)(1)(vi), however, has demonstrated that some persons have misinterpreted "to register" to allow informal, nonwritten actions in place of a formal written record. To avoid misinterpretation, EPA has made it clear that it interprets this term to mean to inform or notify in writing.

Finally, EPA is amending 40 CFR 761.30(a)(1) (iv) and (v), by deleting the words "failure" and "failures" and substituting the words "rupture" and "ruptures" to avoid ambiguity in the language, and is requiring a specific schedule for bringing mineral oil transformers, found to contain 500 ppm or greater PCBs, into compliance with the applicable regulations.

III. Discussion Of The Final Rule

A. Installation Of PCB Transformers

The PCB Transformer Fires Rule banned the installation of PCB Transformers in or near commercial buildings after October 1, 1985. In the August 21, 1987 proposed rule, EPA proposed to allow the installation of PCB Transformers in or near commercial buildings in two situations that EPA believes warrant special consideration. The first is in emergency situations, where neither a non-PCB Transformer nor PCB-Contaminated transformer is currently available to replace a failed PCB Transformer, and immediate replacement is necessary to continue electrical service to the entity or entities served by the transformer. The second is for purposes of reclassification, so that a retrofilled transformer may accrue the

necessary in-service use time to allow reclassification of the unit. As discussed in the proposed rule (52 FR 31742), EPA believes installation of PCB Transformers for these two uses, under the conditions specified, will not present an unreasonable risk to human health or the environment. These provisions, as modified, are in § 761.30(a)(1)(iii) of the final rule.

In order to ensure consistent treatment to those owners who installed PCB Transformers in emergency situations or for reclassification purposes between October 1, 1985 and September 1, 1988, EPA has added § 761.30(a)(1)(iii)(D) to the final rule. Those owners must notify the appropriate Regional Administrator of such installations within 30 days after the effective date of the rule.

1. *Emergency installation.* In the proposed rule, EPA solicited comments on the availability of non-PCB Transformers for use in emergency situations and the ability of power companies to purchase and receive non-PCB Transformers quickly for use in emergency situations. This information was requested since various electric power companies had indicated replacement non-PCB Transformers were not readily available. EPA received a comment confirming their non-availability; therefore, EPA assumes that non-PCB Transformers or PCB-Contaminated transformers are typically neither readily available for installation nor can they be quickly acquired. The final rule retains the proposed provisions on installation of PCB Transformers in emergency and reclassification situations in § 761.30(a)(1)(iii)(A).

The proposed rule required documentation to support an "Emergency Situation" in accordance with the definition in § 761.3. There was no comment on maintaining documentation. For compliance monitoring purposes, EPA is adding to the final rule the requirement that documentation be completed 30 days after installation and be maintained at the owner's facility. The documentation required to show an "Emergency Situation" is set forth in the final rule in § 761.30(a)(1)(iii)(B)(1) through (v).

EPA received a comment on the proposed amendment as to whether a PCB Transformer installed in an emergency situation could then be subsequently reclassified to non-PCB or PCB-Contaminated transformer status. EPA's response is that a transformer, originally installed in an emergency situation, can be subsequently reclassified if the reclassification to non-

PCB or PCB-Contaminated status is completed within the 1 year allowed for a transformer originally installed in an emergency situation or by October 1, 1990, whichever is earlier. If the transformer cannot be reclassified in 1 year or by October 1, 1990, whichever is earlier, the transformer must be removed from service since it was originally installed in an "Emergency Situation" as defined in § 761.3. In the final rule, this requirement is in § 761.30(a)(1)(iii)(B)(3).

2. Installation for reclassification purposes. Although the current regulation prohibits the replacement of a failed PCB Transformer with another PCB Transformer in or near a commercial building, EPA believes that retrofitting and reclassification should be available as a viable option for this equipment. EPA has typically encouraged retrofitting and reclassification and believes that the benefits of reclassification in certain situations approach the benefits of PCB Transformer replacement.

Thus, EPA reconsidered its determination to ban further installation of PCB Transformers as of October 1, 1985 and proposed extending the effective date to allow the installation until October 1, 1990 of retrofilled PCB Transformers so that these units may accrue the necessary in-service use time to allow for reclassification. The final rule requires documentation of the installation of PCB Transformers for reclassification purposes to be maintained on the owner's premises in § 761.30(a)(1)(iii)(C)(1) (i) through (iv).

EPA solicited comments on the time needed to achieve reclassification. EPA received comments that reclassification to a non-PCB or PCB-Contaminated transformer can take as long as 3 years. However, EPA believes that 18 months provide sufficient time to reclassify a retrofilled PCB Transformer to a non-PCB or, at least, a PCB-Contaminated status and added that time period to the final rule in § 761.30(a)(1)(iii)(C)(2). EPA believes that the benefits of allowing the use of a PCB Transformer for this very limited time outweigh the potential risks involved. Allowing a retrofilled PCB Transformer to be placed in service for reclassification purposes encourages owners of PCB Transformers to reclassify these units and is consistent with the intent of the rule, which is to phase out gradually the use of PCB Transformers.

Thus, EPA is allowing the installation of retrofilled PCB Transformers until October 1, 1990; however, their in-service time is limited to 18 months after installation or until October 1, 1990, whichever is earlier, to achieve

reclassification to a non-PCB or PCB-Contaminated status. Therefore, for practical purposes, a PCB Transformer would have to be installed for reclassification purposes with enough time allowed for it to reach at least the PCB-Contaminated status by October 1, 1990.

EPA has also decided to allow this requirement to apply retroactively to October 1, 1985, for installation of PCB Transformers for emergency and reclassification purposes which has already taken place. Therefore, EPA has provided for these situations in § 761.30(a)(1)(iii)(D) of the final rule. However, those owners who installed PCB Transformers between October 1, 1985, and September 1, 1988, must provide the Regional Administrator, within 30 days after the effective date of this rule, a notice in writing that the PCB Transformer was installed for reclassification purposes. Information to be provided for compliance monitoring purposes includes (1) The date of installation; (2) the type of transformer installed; (3) the PCB concentration, if known, at the time of installation; and (4) the reclassification schedule. These requirements were added in the final rule under § 761.30(a)(1)(iii)(D).

EPA recognizes that there are differences between the installation for reclassification purposes of a retrofilled mineral oil PCB transformer and an "askarel" PCB Transformer. Since installation of a retrofilled mineral oil PCB transformer would not present an unreasonable risk, EPA proposed that a retrofilled mineral oil PCB transformer could be installed indefinitely after October 1, 1990 for reclassification purposes. Its reclassification to a PCB-Contaminated transformer or a non-PCB transformer status would then be determined by testing its PCB concentration 3 months after its installation for reclassification. There were no comments on this proposal and the provisions are retained in § 761.30(a)(1)(iii)(C)(2)(i) and (iii)(C)(2)(ii) of the final rule.

B. Failure vs. Rupture

EPA proposed amending the language in § 761.30(a)(1)(iv), (iv)(A), and (v), by deleting the words "failure" and "failures", and substituting the words "rupture" and "ruptures". The preamble explained the need for this change was to avoid ambiguity; the final rule includes the amendment.

C. Alternative Labeling

EPA proposed to allow the use of an alternative label (other than that required under the current regulation) for marking PCB Transformer

locations—vault doors, machinery room doors, fences, hallways, or means of access, other than grates, and manhole covers. While EPA is interested in a consistent nationwide labeling system, EPA believes that those who voluntarily initiated labeling programs after consultation with local emergency response organizations should not be required to incur the additional expense associated with relabeling. There were no comments on this issue; however, internal EPA review and reevaluation resulted in some minor modifications to the proposal. When EPA proposed to allow the use of alternative marks, the Agency intended to limit this use to situations where a company can demonstrate that a local fire department knows and recognizes the alternative. For purposes of clarity for this rule, EPA intends that recognizing an alternative mark means to be able to identify it and know its meaning. Implicit in recognizing the use of the mark is the necessity that the local fire department has accepted the use of the mark, i.e., taken steps to make personnel aware of the mark by incorporating it into a formal or informal program used to make essential information available to fire department personnel. Thus, EPA is modifying the final rule to require that the company show specifically that the local fire department accepted the use of the mark by incorporating it into its training program. The use of the term "accept" in the final rule does not require any showing that the fire department has approved the mark, only that it has incorporated the use of the mark into its response procedures and training.

Alternative labeling, including the notification provisions, is retained in the final rule in § 761.40. Implicit in the proposed notification to the Regional Administrator was the authority to reject the alternative labeling if it is not substantiated as required. The final rule makes this authority explicit in § 761.40(j)(2)(iv). Also, to facilitate compliance monitoring and enforcement, the final rule requires documentation from the fire department with primary jurisdiction indicating the unit is aware of the alternative mark, accepts its use, and has incorporated it into its training materials. The final rule does require the Regional Administrator either to approve or disapprove in writing the use of an alternative label within 30 days of receipt of the documentation of a program.

D. Electrical Protection

EPA proposed to amend the electrical protection requirements on lower

secondary voltage network PCB Transformers. For lower secondary voltage network PCB Transformers located in sidewalk vaults near commercial buildings, EPA proposed requiring the removal of these transformers by October 1, 1993. (See discussion in Unit III.E. below.) For all other lower secondary voltage network PCB Transformers in or near commercial buildings, the proposed rule offered owners an option to the current requirement for enhanced electrical protection by October 1, 1990. This option is the removal of this equipment by October 1, 1993, provided that EPA is notified of the pending removal by no later than October 1, 1990. In short, EPA proposed to give owners of lower secondary voltage network PCB Transformers located in or near commercial buildings (in other than sidewalk vault locations) the option of implementing risk reduction measures on a shorter schedule, by complying with the current requirement to install enhanced electrical protection by October 1, 1990, or by removing the PCB Transformers by October 1, 1993. As discussed in the proposed rule (52 FR 31743), EPA believes that neither of these options will present an unreasonable risk to human health or the environment. EPA also proposed to require those owners who choose to remove this equipment by October 1, 1993, to register in writing those transformers with the EPA Regional Administrator in the appropriate region by October 1, 1990. This would provide the Regional Administrator with the information needed to facilitate compliance monitoring efforts. There were no comments on this provision and the final rule incorporates it in § 761.30(a)(1)(iv)(C).

E. Phaseout of Lower Secondary Voltage Network PCB Transformers in Sidewalk Vaults

Under the current PCB regulations, as of October 1, 1990, EPA prohibits the use of all network PCB Transformers with higher secondary voltages, while requiring enhanced electrical protection on the remaining commercial PCB Transformers, including all radial and lower secondary voltage network PCB Transformer.

EPA proposed requiring that owners of lower secondary voltage network PCB Transformers located in sidewalk vaults near commercial buildings remove those transformers from service by October 1, 1993. In the proposed rule, EPA did not give those owners the option available to owners of lower secondary voltage network PCB Transformers located outside of a sidewalk vault, either to

remove these transformers from service or to install enhanced electrical protection.

While EPA recognizes that allowing the use of this equipment until October 1, 1993 (an additional 3 years), without installing enhanced electrical protection poses some risk, EPA believes that phaseout of an additional class of transformers above those currently required to be phased out, further minimizes the risk of fire-related events involving PCB Transformers. EPA continues to prefer the regulatory option of transformer removal because it completely eliminates PCB Transformer fire-related risk, as well as the risks posed by leaks and spills of PCBs from these transformers. Thus, although there is some risk in allowing additional time to phase out this equipment, EPA believes the benefits of removing these PCB-containing transformers from service, thus eliminating any potential risk of PCB exposure, outweighs the risks incurred by allowing the use of these transformers for an additional 3 years. Further, EPA has determined that requiring phaseout of those transformers in sidewalk vaults would be practical since owners of this equipment express an interest in removing rather than installing enhanced electrical protection and EPA has already determined that for this type of equipment some risk reduction measure must be implemented.

There was no comment on the proposed amendment of the date for removal of these transformers and the provision remains in the final rule in § 761.30(a)(1)(iv)(B).

F. Discovery of a PCB Transformer

EPA proposed that in the event a mineral oil transformer, assumed to contain less than 500 ppm of PCBs under § 761.3, is determined through testing to be contaminated at 500 ppm or greater, efforts must be initiated immediately to bring the transformer into compliance in accordance with Part 761. The proposed rule contained a schedule for achieving such compliance and solicited comments on the time frames.

Two comments asked for a clarification regarding compliance with the recordkeeping and reporting requirements, specifically, whether records and reports had to be developed for the transformer while it was assumed to be below 500 ppm. It is not EPA's intention to require owners to develop records retroactively relating to the newly discovered PCB Transformer. EPA is requiring that, after discovering that a mineral oil transformer is a PCB Transformer (and transformer that contains 500 ppm PCB or greater), the

owner of the transformer comply with the schedule for bringing the transformer into compliance.

Comments indicated that anywhere from 2 to 15 days would allow ample time to purchase and affix labels to transformers, vault doors, machinery room doors, fences, hallways or other means of access to the PCB Transformer. Therefore, EPA is implementing in the final rule a 7-day period to mark the newly discovered PCB Transformer and transformer locations with the appropriate label, in § 761.30(a)(1)(xv) (B) and (C).

Comments received on the proposed rule agreed with EPA that 30 days was a reasonable amount of time to complete the written registration of the newly discovered PCB Transformer with appropriate fire response personnel and building owners. Therefore, in § 761.3(a)(1)(xv)(D) the final rule allows 30 days after the transformer is tested and found to contain greater than 500 ppm PCBs to register the transformer.

No other comments were received on the proposed schedule, and the final rule incorporates the other provisions as proposed.

G. Other Changes

Three other minor changes were made to the proposed rule for the purpose of clarification. The first is the addition of the definition of "Retrofit" to § 761.3 to make clear that it means the draining and refilling of a transformer. The second is in paragraph (2) of the definition "Emergency Situation" under § 761.3 which has been changed to indicate that immediate replacement must be necessary for continued service to "power users" rather than "utility customers." The third is in § 761.40(j)(3) where paragraph (j)(1) is referenced to indicate clearly the locations where the marking labels must be placed.

Finally, one comment indicated there could be confusion where phase-out of a PCB Transformer is required and reclassification has been achieved. EPA agrees that a PCB Transformer that has been retrofitted and reclassified to PCB-Contaminated or non-PCB status in accordance with the TSCA regulations meets the requirement for phase-out of a PCB Transformer.

IV. The Record For This Rule

A. Previous Rulemaking Record

(1) Official rulemaking record from "Polychlorinated Biphenyls in Electrical Transformers" Final Rule, published in the *Federal Register* of July 17, 1985 (50 FR 29170).

(2) Official Record from "Notice of Interpretation of Transformer Fires Regulations," published in the *Federal Register* of December 31, 1986 (51 FR 47241).

(3) Official Record from "Polychlorinated Biphenyls in Electrical Transformers" Proposed Rule, published in the *Federal Register* of August 21, 1987 (52 FR 31738). FR 31738).

B. Support Documents

(4) USEPA, OPTS, EED, Putnam, Hayes and Bartlett, Inc. "Evaluation of the Sufficiency of Current and Projected PCB Disposal Capacity To Meet Demand Requirements," July 1986.

(5) USEPA, EED, "Response to Comments on the Proposed Amendment to the PCB Transformer Fires, Rule," June 1988.

(6) Letters received from:

a. Kansas City Power and Light dated September 11, 1985.

b. Electric Power Board of Chattanooga dated October 3, 1985.

c. UNISON Transformer Services, Inc. dated March 24, 1988.

(7) Correspondence between EPA and the National Bureau of Standards:

a. Letter to Richard W. Bukowski, Center for Fire Research, Fire Science and Engineering Division, National Bureau of Standards, Gaithersburg, Maryland, dated March 29, 1988.

b. Response from Richard W. Bukowski, dated April 18, 1988.

(8) Reports from Resource Planning Corporation submitted to Utility Solid Waste Activities Group, dated January 6, and 8, and April 23, 1986.

(9) Telephone communications between:

a. Joseph Arcoleo of Jersey Central Power and Light Company and Thomas Simons, Office of Toxic Substances, EPA, on November 18, 1987, on the time between installation for reclassification of a PCB Transformer and actual retrofilling.

b. Joseph Willoughby of the General Services Administration and Thomas Simons, Office of Toxic Substances, EPA, on December 15, 1987, on deenergization of PCB Transformers through the use of current-limiting fuses.

10. Communication between Chicago Fire Department and Commonwealth Edison Co.:

a. Letter to H.A. Onishi, Commonwealth Edison Co., from John M. Eversole, Chicago Fire Department, dated February 14, 1984.

b. Letter to Louis T. Galante, Chicago Fire Department, from H.A. Onishi, Commonwealth Edison Co., dated September 23, 1985.

c. Letter to H.A. Onishi, Commonwealth Edison Co., from

Thomas D. Roche, Chicago Fire Department.

V. Regulatory Requirements

A. Executive Order 12291

Under Executive Order 12291, issued February 17, 1981, 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 amendment to the PCB Rule is not a "major rule" as that term is defined in section 1(b) of the Executive Order and therefore is not subject to the requirement that a regulatory impact analysis be prepared.

While the rule places some additional restrictions and conditions on the use of PCB Transformers, it is worth noting that this rule allows the continued use of PCBs in electrical transformers that would otherwise be prohibited by section 6(e) of TSCA. This rule avoids the severe disruption of electric service to the public and industry that would occur if the use of this equipment were immediately prohibited. It also avoids the economic impact that would result from a requirement to replace the equipment as soon as possible.

This rule was submitted to OMB as required by Executive Order 12291. There were no comments from OMB on the rule.

B. Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Administrator may certify that a rule will not, if promulgated, have a significant impact on a substantial number of small entities and, therefore, does not require a regulatory flexibility analysis.

In general this rule reduces the burden on small businesses that would otherwise be encountered if an immediate ban on PCB-containing transformers were to take effect. If an immediate ban on the use of PCBs in transformers were imposed, large costs would be incurred by all producers and users of electricity, including small businesses.

EPA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 et seq., authorizes the Director of OMB to review certain information collection requests by Federal agencies. EPA has determined that the recordkeeping and reporting requirements of this final rule constitute a "collection of information" as defined

in 44 U.S.C. 3502(4). The provisions of 40 CFR 761.30 authorize the continued use of electrical equipment under certain circumstances which require recordkeeping and reporting. EPA has clearance to collect information for this authorization under OMB control numbers 2070-0003 and 2070-0073. Under the normal OMB information collection review cycle, 2070-0003 and 2070-0073 are being consolidated, and the notification required in the options allowed under this amendment are included under the consolidated OMB control number 2070-0003 for the use authorization for PCB electrical equipment.

Public reporting burden for this collection of information is estimated to average 188 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

List of Subjects in 40 CFR Part 761

Environmental protection, Hazardous substances, Labeling, Polychlorinated biphenyls, Reporting and recordkeeping requirements.

Dated: July 6, 1988.

Lee M. Thomas,
Administrator.

Therefore 40 CFR Part 761 is amended as follows:

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

PART 761—[AMENDED]

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

2. In § 761.3 by adding the definitions of "emergency situation", "mineral oil PCB Transformer", "non-PCB Transformer", and "retrofill" alphabetically to read as follows:

§ 761.3 Definitions.

* * * * *

"Emergency Situation" for continuing use of a PCB Transformer exists when:

(1) Neither a non-PCB Transformer nor a PCB-Contaminated transformer is

currently in storage for reuse or readily available (i.e., available within 24 hours) for installation.

(2) Immediate replacement is necessary to continue service to power users.

* * * * *

"Mineral Oil PCB Transformer" means any transformer originally designed to contain mineral oil as the dielectric fluid and which has been tested and found to contain 500 ppm or greater PCBs.

* * * * *

"Non-PCB Transformer" means any transformer that contains less than 50 ppm PCB; except that any transformer that has been converted from a PCB Transformer or a PCB-Contaminated transformer cannot be classified as a non-PCB Transformer until reclassification has occurred, in accordance with the requirements of § 761.30(a)(2)(v).

* * * * *

"Retrofit" means to remove PCB or PCB-contaminated dielectric fluid and to replace it with either PCB, PCB-contaminated, or non-PCB dielectric fluid.

* * * * *

3. In § 761.30 by revising paragraphs (a)(1)(iii), (iv), and (v), by adding paragraph (a)(1)(xv), and by revising the OMB control number to read as follows:

§ 761.30 Authorizations.

(a) * * *

(1) * * *

(iii) Except as otherwise provided, as of October 1, 1985, the installation of PCB Transformers, which have been placed into storage for reuse or which have been removed from another location, in or near commercial buildings is prohibited.

(A) The installation of PCB Transformers on or after October 1, 1985, however, and their use thereafter, is permitted either in an emergency situation, as defined in § 761.3, or in situations where the transformer has been retrofilled and is being placed into service in order to qualify for reclassification under paragraph (a)(2)(v) of this section.

(B) Installation of a PCB Transformer in an emergency situation is permitted when done in accordance with the following:

(1) Documentation to support the reason for the emergency installation of a PCB Transformer must be maintained at the owner's facility and completed within 30 days after installation of the PCB Transformer. The documentation must include, but is not limited to:

(i) The type of transformer, i.e., radial, or lower or higher network, that requires replacement.

(ii) The type(s) of transformers, i.e., radial or lower or higher network, that must be used for replacement.

(iii) The date of transformer failure.

(iv) The date of subsequent replacement.

(v) The type of transformer, i.e., radial or lower or higher network, installed as a replacement.

(vi) A statement describing actions taken to locate a non-PCB or PCB-Contaminated transformer replacement.

(2) Such emergency installation is permitted until October 1, 1990, and the use of any PCB Transformer installed on such an emergency basis is permitted for 1 year from the date of installation or until October 1, 1990, whichever is earlier.

(3) PCB Transformers installed for emergency purposes may be subsequently reclassified; however, the transformer must be effectively reclassified to a non-PCB or PCB-Contaminated status within 1 year after installation or by October 1, 1990, whichever is earlier because the transformer was initially installed in an emergency situation.

(C) Installation of a retrofilled PCB Transformer for reclassification purposes is permitted when it is done in accordance with the following:

(1) Those who installed transformers for reclassification purposes must maintain on the owner's premises, completed within 30 days of installation, the following information:

(i) The date of installation.

(ii) The type of transformer, i.e., radial or lower or higher network, installed.

(iii) The PCB concentration, if known, at the time of installation.

(iv) The retrofit and reclassification schedule.

(2) For purposes of this paragraph, the installation of retrofilled PCB Transformers for purposes of reclassification under paragraph (a)(2)(v) of this section is permitted until October 1, 1990.

(i) However, the use of a retrofilled PCB Transformer installed for reclassification purposes is limited to 18 months after installation or until October 1, 1990, whichever is earlier.

(ii) Retrofilled mineral oil PCB Transformers may be installed for reclassification purposes indefinitely after October 1, 1990.

(iii) Once a retrofilled transformer has been installed for reclassification purposes, it must be tested 3 months after installation to ascertain the concentration of PCBs. If the PCB concentration is below 50 ppm, the

transformer can be reclassified as a non-PCB Transformer. If the PCB concentration is between 50 and 500 ppm, the transformer can be reclassified as a PCB-Contaminated transformer. If the PCB concentration remains at 500 ppm or greater, the entire process must either be repeated until the transformer has been reclassified to a non-PCB or PCB-Contaminated transformer in accordance with paragraph (a)(2)(v) of this section or the transformer must be removed from service.

(D) Owners who installed PCB Transformers in emergency situations or for reclassification purposes between October 1, 1985 and September 1, 1988, must notify the Regional Administrator in writing by October 3, 1988 of such installation. The notification for emergency installation must include the information in paragraph (a)(1)(iii)(B)(1)(i) through (vi) of this section. The notification for reclassification must include the information in paragraph (a)(1)(iii)(C)(1)(i) through (iv) of this section. All PCB Transformers installed in an emergency situation or installed for reclassification purposes are subject to the requirements of this Part 761.

(iv) As of October 1, 1990, all radial PCB Transformers, in use in or near commercial buildings, and lower secondary voltage network PCB Transformers not located in sidewalk vaults in or near commercial buildings (network transformers with secondary voltages below 480 volts) that have not been removed from service as provided in paragraph (a)(1)(v) of this section, must be equipped with electrical protection to avoid transformer ruptures caused by high current faults.

(A) Current-limiting fuses or other equivalent technology must be used to detect sustained high current faults and provide for complete deenergization of the transformer (within several hundredths of a second in the case of radial PCB Transformers and within tenths of a second in the case of lower secondary voltage network PCB Transformers), before transformer rupture occurs. The installation, setting, and maintenance of current-limiting fuses or other equivalent technology to avoid PCB Transformer ruptures from sustained high current faults must be completed in accordance with good engineering practices.

(B) All lower secondary voltage network PCB Transformers not located in sidewalk vaults (network transformers with secondary voltages below 480 volts), in use in or near commercial buildings, which have not been protected as specified in paragraph

(a)(1)(iv)(A) of this section by October 1, 1990, must be removed from service by October 1, 1993.

(C) As of October 1, 1990, owners of lower secondary voltage network PCB Transformers, in use in or near commercial buildings which have not been protected as specified in paragraph (a)(1)(iv)(A) of this section and which are not located in sidewalk vaults, must register in writing those transformers with the EPA Regional Administrator in the appropriate region. The information required to be provided in writing to the Regional Administrator includes:

(1) The specific location of the PCB Transformer(s).

(2) The address(es) of the building(s) and the physical location of the PCB Transformer(s) on the building site(s).

(3) The identification number(s) of the PCB Transformer(s).

(D) As of October 1, 1993, all lower secondary voltage network PCB Transformers located in sidewalk vaults (network transformers with secondary voltages below 480 volts) in use near commercial buildings must be removed from service.

(v) As of October 1, 1990, all radial PCB Transformers with higher secondary voltages (480 volts and above, including 480/277 volt systems) in use in or near commercial buildings must, in addition to the requirements of paragraph (a)(1)(iv)(A) of this section, be equipped with protection to avoid transformer ruptures caused by sustained low current faults.

(xv) In the event a mineral oil transformer, assumed to contain less than 500 ppm of PCBs as provided in § 761.3, is tested and found to be contaminated at 500 ppm or greater PCBs, it will be subject to all the requirements of this Part 761. In addition, efforts must be initiated immediately to bring the transformer into compliance in accordance with the following schedule:

(A) Report fire-related incidents, effective immediately after discovery.

(B) Mark the PCB transformer within 7 days after discovery.

(C) Mark the vault door, machinery room door, fence, hallway or other means of access to the PCB Transformer within 7 days after discovery.

(D) Register the PCB Transformer in writing with fire response personnel

with primary jurisdiction and with the building owner, within 30 days of discovery.

(E) Install electrical protective equipment on a radial PCB Transformer and a non-sidewalk vault, lower secondary voltage network PCB Transformer in or near a commercial building within 18 months of discovery or by October 1, 1990, whichever is later.

(F) Remove a non-sidewalk vault, lower secondary voltage network PCB Transformer in or near a commercial building, if electrical protective equipment is not installed, within 18 months of discovery or by October 1, 1993, whichever is later.

(G) Remove a lower secondary voltage network PCB Transformer located in a sidewalk vault in or near a commercial building, within 18 months of discovery or by October 1, 1993, whichever is later.

(H) Retrofill and reclassify a radial PCB Transformer or a lower or higher secondary voltage network PCB Transformer, located in other than a sidewalk vault in or near a commercial building, within 18 months or by October 1, 1990, whichever is later. This is an option in lieu of installing electrical protective equipment on a radial or lower secondary voltage network PCB Transformer located in other than a sidewalk vault or of removing a higher secondary voltage network PCB Transformer or a lower secondary voltage network PCB Transformer, located in a sidewalk vault, from service.

(I) Retrofill and reclassify a lower secondary voltage network PCB Transformer, located in a sidewalk vault, in or near a commercial building within 18 months or by October 1, 1993, whichever is later. This is an option in lieu of installing electrical protective equipment or removing the transformer from service.

(J) Retrofill and reclassify a higher secondary voltage network PCB Transformer, located in a sidewalk vault, in or near a commercial building within 18 months or by October 1, 1990, whichever is later. This is an option in lieu of other requirements.

(Approved by the Office of Management and Budget under control number 2070-0003; the recordkeeping requirements of paragraph (a)(1)(xii) were approved by

the Office of Management and Budget under control number 2070-0007)

4. In § 761.40 by revising paragraph (j) to read as follows:

§ 761.40 Marking requirements.

(j) PCB Transformer locations shall be marked as follows:

(1) Except as provided in paragraph (j)(2) of this section, as of December 1, 1985, the vault door, machinery room door, fence, hallway, or means of access, other than grates and manhole covers, to a PCB Transformer must be marked with the mark M_L as required by paragraph (a) of this section.

(2) A mark other than the M_L mark may be used provided all of the following conditions are met:

(i) The program using such an alternative mark was initiated prior to August 15, 1985, and can be substantiated with documentation.

(ii) Prior to August 15, 1985, coordination between the transformer owner and the primary fire department occurred, and the primary fire department knows, accepts, and recognizes what the alternative mark means, and that this can be substantiated with documentation.

(iii) The EPA Regional Administrator in the appropriate region is informed in writing of the use of the alternative mark by October 3, 1988 and is provided with documentation that the program began before August 15, 1985, and documentation that demonstrates that prior to that date the primary fire department knew, accepted and recognized the meaning of the mark, and included this information in firefighting training.

(iv) The Regional Administrator will either approve or disapprove in writing the use of an alternative mark within 30 days of receipt of the documentation of a program.

(3) Any mark placed in accordance with the requirements of this section must be placed in the locations described in paragraph (j)(1) of this section and in a manner that can be easily read by emergency response personnel fighting a fire involving this equipment.

[FR Doc. 88-16194 Filed 7-18-88; 8:45 am]

BILLING CODE 6560-50-M

Federal Register

Tuesday
July 19, 1988

Part VII

Department of Energy

**Final Decision on Inclusion of a Private
Property Near Naturita, CO, for Remedial
Action Under the Uranium Mill Tailings
Radiation Control Act of 1978; Notice**

DEPARTMENT OF ENERGY

Final Decision on Inclusion of a Private Property Near Naturita, CO, for Remedial Action Under the Uranium Mill Tailings Radiation Control Act of 1978 (Pub. L. 95-604)

AGENCY: Department of Energy.

ACTION: Program Information Notice: Final decision on inclusion of a private property near Naturita, Colorado, for remedial action under Section 101 of Pub. L. 95-604, the "Uranium Mill Tailings Radiation Control Act of 1978," enacted on November 8, 1978.

SUMMARY: The "Uranium Mill Tailings Radiation Control Act of 1978" (UMTRCA or the Act) authorized the Department of Energy (DOE or the Department) to conduct, in cooperation with interested states, Indian Tribes, and persons who own or control certain inactive mill tailings sites, a program of assessment and remedial action to stabilize and control the tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards at these sites and at nearby vicinity properties.

The DOE has been requested by the Hecla Mining Company (Hecla) to include Hecla's "Durita" property as a designated property for the purposes of remedial action under the Act. The "Durita" property is located approximately nine miles west of Naturita off Colorado Highway 90S.

On April 28, 1988, DOE published a notice in the *Federal Register* in which it proposed not to include the "Durita" property as either a production site or vicinity property for the purposes of remedial action under the Act. 53 FR 15273. The purpose of the notice was to solicit comments on DOE's proposed decision. Accordingly, comments were received from the State of Colorado (letter from the Office of the Attorney General, dated June 16, 1988, hereafter State Comments) and the Hecla Mining Company (Comments and Objections of Hecla Mining Company by Davis, Graham & Stubbs, Denver, Colorado, dated June 3, 1988, hereafter Hecla Comments). As set forth below, after considering the comments, the Department has decided that the "Durita" property is not a proper candidate for inclusion in the remedial action program under UMTRCA.

Background

The "Uranium Mill Tailings Radiation Control Act of 1978," Pub. L. 95-604, 42 U.S.C. 7901, *et seq.*, establishes a program to provide for the stabilization, disposal, and control of uranium mill

tailings in a safe and environmentally sound manner. Under Title I of the Act, the DOE is authorized to conduct remedial actions at certain inactive processing sites.

Section 101(6) of the Act defines two types of "processing sites." The first is an inactive "production site" defined as:

(A) any site, including the mill containing residual radioactive materials at which all or substantially all of the uranium was produced for sale to any Federal agency prior to January 1, 1971 under a contract with any Federal agency, * * * unless (i) such site was owned or controlled as of January 1, 1978, or is thereafter owned or controlled, by any Federal agency, or (ii) a license (issued by the [Nuclear Regulatory] Commission or its predecessor agency under the Atomic Energy Act of 1954 or by a State as permitted under section 274 of such Act) for the production at such site of any uranium or thorium product derived from ores is in effect on January 1, 1978, or is issued or renewed after such date. The second type is a "vicinity property" defined as: "(B) any other real property or improvement thereon which—(i) is in the vicinity of such [production] site, and (ii) is determined by the Secretary, in consultation with the Commission, to be contaminated with residual radioactive materials derived from such site.

Section 101(7) of the Act defines the term "residual radioactive material" to mean:

(A) waste (which the Secretary determines to be radioactive) in the form of tailings resulting from the processing of ores for the extraction of uranium and other valuable constituents of the ores, and (B) other waste (which the Secretary determines to be radioactive) at a processing site which relate (sic) to such processing, including any residual stock of unprocessed ores or low-grade materials.

Furthermore, section 101(8) of the Act defines "tailings" to mean:

The remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted.

Discussion

Before the passage of UMTRCA on November 8, 1978, Ranchers Exploration & Development Corporation (Ranchers), the predecessor-in-interest to the Hecla Mining Company, owned and controlled a quantity of uranium mill tailings at a site known as "Naturita," a previously active mill site also near Naturita, Colorado. Ranchers possessed the tailings under license Colo. 317-01S, issued on November 12, 1976, by the State of Colorado. On June 9, 1977, a new state license, Colo. 317-02S, was issued superseding the previous license and permitting Ranchers to "transport and process" uranium mill tailings. Amendments 1 (October 26, 1977), 2 (December 12, 1977), and 3 (May 4, 1978)

modify the license to authorize the excavation and transportation of uranium mill tailings from the old Naturita mill site to the new "Durita" processing site for the "production of natural uranium concentrate by leaching of uranium mill tailings."

It is the Department's view that the "Durita" site was operating as an active mill site under a valid state production license at the time UMTRCA was enacted, and that the site does not fit within the definition of an inactive "production site" under section 101(6)(A) of the Act as a site appropriate for remedial action because the uranium produced there was not produced for sale to any Federal agency prior to January 1, 1971.

Furthermore, with respect to such "[a]ctive operations" at the time of the Act's passage, Congress in section 115(a) has prohibited expenditures with respect to any site licensed by a state at which production of any uranium product takes place. It was Congress' intent that remedial action at licensed active mill sites be taken by the license holder pursuant to the license requirements under the supervision of the regulating agency, and not be taken under UMTRCA at taxpayer expense.

In addition, because "Durita" was a licensed active mill site, it does not fit within the definition of a vicinity property under section 101(6)(B). Any remaining materials at the "Durita" mill site are "derived" from the active production operation itself rather than from the inactive Naturita mill site. Once the uranium mill tailings were excavated and transported from the Naturita mill site to "Durita" for processing, they lost their characteristic as "residual radioactive materials." As set out above, that term means "waste in the form of tailings." Although the materials taken from the Naturita mill site to the "Durita" mill site were tailings, they were not "waste," since they were transported as a valuable industrial product for use in a profit making venture, i.e., the production of uranium for sale as yellow cake to private industry. Indeed, in 1978 and 1979, Ranchers had revenues of \$8,841,737 and \$12,491,067, respectively, from the leaching of uranium mill tailings. The inclusion of "Durita" as a vicinity property would thus seem contrary to Congress' intent that such vicinity properties not have been active mill sites themselves at the time of UMTRCA's passage.

Even assuming that the materials at the "Durita" mill site qualify as residual radioactive material derived from the Naturita site which Ranchers was

processing under license Colo. 317-02S for sale to a Federal agency, the site would still not be appropriate for designation. Section 101(6)(A)(ii) precludes designation where a license, issued by a state for the production of any uranium product from ores, is in effect on January 1, 1978. However, in the stipulation following section 101(6)(B)(ii) and pursuant to the procedures established in section 108(b), an exemption is provided where a license is issued for the reprocessing of residual radioactive materials (mill tailings) at a designated site. In this case, the uranium production at the "Durita" mill site using mill tailings from the Naturita site was undertaken prior to the designation of Naturita as a "processing site." Moreover, since neither Ranchers nor Hecla took any action to meet the requirements of section 108(b) after Naturita's designation, in the Department's view the exception would not apply.

DOE has given full and deliberative consideration to comments and objections to its Proposed Decision, and our responses to specific comments are set out below. These comments were instrumental in DOE's formulation of a final decision regarding whether to include the "Durita" property in the UMTRCA remedial action program. Accordingly, DOE has determined that the "Durita" property is neither a production site nor a vicinity property within the definition of a processing site under UMTRCA, and therefore is not appropriate for remedial action under the Act.

Response To Comments

In its comments and objections to DOE's proposed decision, Hecla responds:

[DOE's] rationale misconstrues the basic intent of Congress in enacting UMTRCA. Congress clearly directed DOE to perform remedial action on "residual radioactive material" (i.e., uranium tailings) that had been generated as a result of federally-induced uranium production programs in the period before 1971."

Hecla Comments, page 4.

Hecla asserts that relocating and reprocessing tailings from another site, one which qualifies for remedial action, should not change the government's obligation to perform remedial action at the new site, i.e., the Durita site. *Id.* at 5.

These comments exemplify the value of the notice and comment procedure adopted by DOE in this instance, because they succinctly identify the source of Hecla's basic misunderstanding of the statute authorizing DOE to take remedial action. Contrary to Hecla's belief,

Congress did not direct DOE simply to perform remedial action on "residual radioactive material", but to perform remedial action at qualified sites. Indeed, the Act instructs the Secretary to designate "processing sites within the United States which he determines requires (sic) remedial action to carry out the purposes of [Title I]." 42 U.S.C. 7901(b)(1) and 7912(a)(1). This determination is to be made against certain criteria set out in the Act. In the present case, the Secretary has determined that the designation of the Durita site would not carry out the purposes of the Act. In general, it is the Department's position that UMTRCA's purpose is to cleanup sites contaminated as a result of the production of uranium sold to the government. Durita is not such a site. Contrary to what appears to be Hecla's understanding, UMTRCA does not encompass the cleanup of all residual radioactive material at any location irrespective of the reasons the material came to be present at such location.

One of the criteria established in Title I for designating a site is that the candidate processing site be one "at which all or substantially all of the uranium was produced for sale to any Federal agency prior to January 1, 1971, under a contract with any Federal agency." 42 U.S.C. 7911(6)(A). The Durita property was not such a site since neither Hecla nor its predecessor produced uranium there for sale to a Federal agency before 1971. Indeed, the Durita property was only utilized to produce uranium to private industry after 1971. DOE's reading of the Act is consistent with the legislative history. For example, the House Committee on Interior and Insular Affairs, in discussing the characteristics of the sites deemed appropriate for remedial action under UMTRCA, stated that "[a]ll of them consist of tailings resulting from operations under Federal contracts," and that "the Secretary of Energy need not designate any sites to be included in the authorized program which are currently under active license, or which contain tailings from commercial production, unless it can be shown that the tailings hazard could in no way be remedied without such designation." H.R. Rep. No. 95-1480(I), August 11, 1978, reprinted in 1978 U.S. Code Cong. & Ad. News 7433, 7434-36.

Based on this analysis, it is the Department's view that once Hecla relocated and reprocessed the tailings from the Naturita site, it created a new site, one which does not meet the basic requirement of the Act, i.e., that a site qualified for remedial action under UMTRCA be one at which uranium was

produced for sale to a federal agency prior to January 1, 1971.

Hecla submitted a number of comments addressing the "licensed site exemption." Hecla Comments, pp. 5-9. This exemption is a proviso in section 101(6)(A)(ii). It forecloses designation of a site containing residual radioactive materials which is licensed by the Nuclear Regulatory Commission (NRC) or an agreement state on or after January 1, 1978. Durita is such a site, and DOE set out this exemption as an additional basis on which Durita would not qualify for remedial action.

First, Hecla submits that section 115's prohibition on the expenditure of UMTRCA funds on licensed sites does not apply to uranium production from residual radioactive materials. This misconstrues the statute. While section 115, on its face, appears to provide an exception for residual radioactive materials, a reading of this section in light of section 101(6) and the purpose of the statute leads DOE to conclude that Congress' intent was that the only active licensed sites containing residual radioactive material that are appropriate for remediation are ones complying with the provisions of section 108(b). This conclusion follows from a reading of the last sentence of section 101(6): "A license for the production of any uranium product from residual radioactive materials shall not be treated as a license for production from ores within the meaning of subparagraph (A)(ii) if such production is in accordance with section 108(b)." Hecla did not comply with the stipulations contained in section 108(b) for its Durita remilling operation.

Hecla also states that "Congress logically concluded that activities involving reprocessing of uranium tailings should not trigger the 'licensed site' exemption, because such reprocessing neither increases the government's cleanup burden nor alters the fact that the tailings meet Title I criteria." Hecla Comments, p. 6. This view ignores that Hecla has created an entirely new site at Durita which it has contaminated with radioactive materials, and which did not operate to produce uranium for any federal agency. Taken to its logical end, Hecla would have DOE, at taxpayer expense, cleanup after it in the wake of Hecla's industrial ventures at whatever sites it chooses to operate from. We do not believe the Act authorizes this.

Hecla further argues that the Durita site does not meet the licensed site exemption since its license was not issued pursuant to Section 274 of the Atomic Energy Act (AEA) because the

NRC did not have authority to delegate licensing of byproduct material to the States. Hecla Comments at p. 7. This argument fails to recognize the interrelation of the AEA and UMTRCA. Statutorily, a license within this particular exemption must be issued by the appropriate federal agency or by a State "as permitted under section 274 of the Act [42 USCS 2021]." 42 USCS 7911(6)(A)(1) (emphasis added). While the NRC did not have licensing authority over byproduct material until 1981, a State may have entered into an agreement with respect to byproduct material prior to 1981 "as permitted under section 274 of the Atomic Energy Act of 1954". 42 USCS 2021(h)(1), (2) (emphasis added). See also, 10 CFR 150.31(a). Thus, it is our position that Hecla's license with the State of Colorado was issued "as permitted" under section 274 of the AEA. In any event, Hecla's argument here is specious. The licensed site exemption only applies with respect to sites containing residual radioactive materials at which uranium was produced for sale to a federal agency prior to 1971. Durita, as noted earlier, is not such a site.

Hecla also disagrees that the prohibition of section 101(6)(A)(ii) applies to "tailings", since the word used in that exemption is "ores". *Id.*, p. 7. The Department has determined that the word ores should be read to encompass tailings which are reprocessed to extract their uranium value. This is consistent with one definition of ores: "a source from which a valuable matter is extracted." Webster's Ninth New Collegiate Dictionary at 831 (1983). This is also consistent with the stipulation following section 101(6)(B)(ii) which, the Department believes, allows the Secretary to treat a license for the production of uranium from residual radioactive material, including tailings, as a license for the production of uranium from ores.

Finally, Hecla asserts that the final sentence of section 108(b) "creates an uncertainty as to whether issuance of such a license to satisfy section 108(b) would alter the Title I status of a given site," and that the final sentence of

section 101(6) clarifies that "such licenses would not alter that site's Title I status." *Id.*, p. 8. We agree that the final sentence of section 101(6) makes clear that remilling pursuant to section 108(b) would not fall within the licensed site exemption. But Hecla's private remilling operation was not conducted or licensed pursuant to section 108(b), and the Act is silent as to these other types of licensed operations. Hecla argues that this silence does not imply that "any post-UMTRCA reprocessing of residual radioactive material which is not in accordance with section 108(b) automatically triggers the definitional exception in section 101(6)(A)(ii)." Hecla Comments, p. 8. No support for this statement is put forward, and the Department is aware of none. As discussed above, it is the Department's view that the licensed site exemption would apply to an operation such as Hecla's remilling at Durita. However, the exemption could not arise in any event since it only applies to sites at which uranium was produced for sale to a federal agency. It is undisputed that this was not the case with Durita's uranium reprocessing operation.

It is Hecla's position that its Durita site further qualifies as a vicinity property under UMTRCA. It states that "reprocessing of the tailings did not change their basic physical characteristic as Title I material." Hecla Comments, p. 9. This again points up Hecla's basic misunderstanding of the Act. The residual radioactive material at Naturita derived its "characteristic as Title I material" because of its presence at a Title I designated production site, not simply because the material itself was "Title I." Thus, it is a site qualified for designation under UMTRCA which defines the material, not vice versa. An otherwise non-qualifying and active licensed production site cannot qualify for remedial action under UMTRCA simply because its uranium resource base is material from a Title I inactive production site.

Hecla seeks to qualify its Durita production site as a vicinity property by asserting that its use of residual radioactive material for the extraction of uranium is no different than other private users of tailings in building

materials, fill material and other profit-making ways. *Id.*, p. 10. But these other uses utilized the tailings as a waste product suited to those particular activities, i.e., generally foundation material. Hecla, on the other hand, utilized the tailings for their inherent commercial value as a uranium resource for its remilling business. The former uses were unregulated and unlicensed because the material was generally thought to be harmless. Hecla's operation, on the other hand, was regulated by the State, and it required a license under which Hecla is to take remedial action, action which Congress said should not be taken under UMTRCA. H.R. Rep. 95-1480(I), *supra*. It is not tenable, in the view of DOE, to assert that these situations are the same. Indeed, Congress, in describing the characteristics of vicinity properties, referred to "structures and buildings located in the vicinity of such site which are contaminated with residual radioactive materials derived from such site." House Report No. 95-1480 (II), September 30, 1978, reprinted in 1978 U.S. Code Cong. & Ad. News 7462. The Durita property is not such a structure or building.

The State of Colorado, after reviewing the Notice of Proposed Decision, states that "we are in agreement with the proposed decision to exclude the Durita property from remedial action under UMTRCA for the reasons stated in the Notice." State Comments.

No other comments were received.

FOR FURTHER INFORMATION CONTACT:
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Issued in Washington, DC, July 13, 1988.

John E. Baublitz,
Acting Director, Office of Remedial Action and Waste Technology, Office of Nuclear Energy.

[FR Doc. 88-16351 Filed 7-18-88; 9:53 am]

BILLING CODE 6450-01-M