

Group 5—Electronics and Precision Instruments

ECCNs: 1571A, 1585A, 1586A, 1587A, and 1588A.

Group 6—Metals, Minerals and Their Manufacturers

ECCNs: 3608A, 3609A, 1672A, 1673A, 1674A, and 1675A.

Group 7—Chemicals, Metalloids, Petroleum Products and Related Materials

ECCNs: 3709A and 1763A.

Group 9—Miscellaneous

ECCNs: 2901A and 2913A.

E. The "GLV \$ Value Limit"

paragraph for ECCN 1118A (Commodity Group 1) and ECCN 2603A (Commodity Group 6) is revised to read "GLV \$ Value Limit: \$3,000 for Australia, Japan, New Zealand, and members of NATO (except that there is no limit on exports to Canada); \$0 for all other destinations."

F. The "GLV \$ Value Limit"

paragraph for ECCN 3362A (Commodity Group 3) and ECCNs 3605A and 3607A (Commodity Group 6) is revised to read "GLV \$ Value Limit: \$500 for Country Groups T & V, except \$0 for the People's Republic of China; \$0 for all other destinations."

G. The "GLV \$ Value Limit"

paragraph for ECCN 4431B (Commodity Group 4) is revised to read "GLV \$ Value Limit: \$5,000 for Country Groups T & V; \$0 for all other destinations."

H. The "GLV \$ Value Limit"

paragraph for ECCN 1516A (Commodity Group 5) is revised to read "GLV \$ Value Limit: \$2,000 to Australia, Japan, New Zealand, and members of NATO; \$0 for all other destinations."

I. The "GLV \$ Value Limit" paragraph for ECCN 1529A (Commodity Group 5) is revised to read "GLV \$ Value Limit: \$5,000 for all items in paragraph (b) (6) to Country Groups T & V, except \$0 to the People's Republic of China; \$3,000 for all other items to Country Groups T & V, except \$0 to the People's Republic of China; \$0 for all items to all other destinations."

J. The "GLV \$ Value Limit" paragraph for ECCN 1570A (Commodity Group 5) is revised to read "GLV \$ Value Limit: \$750 for Country Groups T & V, except \$0 for the People's Republic of China; \$0 for all other destinations."

K. The "GLV \$ Value Limit"

paragraph for ECCN 4585B (Commodity Group 5) is revised to read "GLV \$ Value Limit: \$1,500 for Country Groups T & V; \$0 for all other destinations."

L. The "GLV \$ Value Limit"

paragraph for ECCN 4601B (Commodity Group 6) is revised to read "GLV \$ Value Limit: \$5,000 for Country Groups T & V; \$1,000 for Country Group Q; \$0 for all other destinations."

M. The "GLV \$ Value Limit"

paragraph for ECCN 4720B (Commodity Group 7) is revised to read "GLV \$ Value Limit: \$500 for Country Groups T & V; \$200 for Country Group Q; \$0 for all other destinations."

N. The "GLV \$ Value Limit"

paragraph for ECCN 4721B (Commodity Group 7) is revised to read "GLV \$ Value Limit: \$5,000 for Country Groups T & V and Canada; \$0 for all other destinations."

O. The "GLV \$ Value Limit"

paragraph for ECCN 1733A (Commodity Group 7) is revised to read "GLV \$ Value Limit: \$0 for all items in subparagraphs (d)(1), (2), and (3) to all destinations; \$5,000 for all other items to Country Groups T & V, except \$0 to the People's Republic of China; \$0 for all items to all other destinations."

P. The "GLV \$ Value Limit"

paragraph for ECCN 4746B (Commodity Group 7) is revised to read "GLV \$ Value Limit: \$300 for Country Groups T & V; \$0 for all other destinations."

Q. The "GLV \$ Value Limit"

paragraph for ECCN 4754B (Commodity Group 7) is revised to read "GLV \$ Value Limit: \$3,000 for Country Groups T & V; \$1,000 for Country Group Q; \$0 for all other destinations."

R. The "GLV \$ Value Limit"

paragraph for ECCN 4755B (Commodity Group 7) is revised to read "GLV \$ Value Limit: \$3,000 for Country Groups T & V; \$200 for Country Group Q; \$0 for all other destinations."

Dated: September 16, 1988.

Michael E. Zacharia,

Assistant Secretary for Export Administration.

[FR Doc. 88-21532 Filed 9-20-88; 8:45 am]

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DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****18 CFR Part 4**

[Docket Nos. RM88-21-000, RM86-5-000, RM86-5-001; Order No. 503]

Amendment to Regulations Governing Exemption of Small Hydroelectric Power Projects of 5 Megawatts or Less

Issued: September 15, 1988.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations governing

exemption of small hydroelectric power projects of 5 megawatts (MW) or less by removing regulations that implemented the natural water feature exemption in section 408(b) of the Public Utility Regulatory Policies Act of 1978 (PURPA). These regulations were invalidated by the United States Court of Appeals for the Ninth Circuit in its *Tulalip Tribes of Washington v. FERC* (Tulalip decision), and they do not represent (and have not since the Tulalip decision) Commission practice with regard to natural water feature exemptions. In addition, the final rule grants in part, denies in part, and dismisses in part, a petition for rulemaking filed by the California Save Our Streams Council (CSOS). In so doing, the Commission also terminates Docket Nos. RM86-5-000 and RMS86-5-001.

EFFECTIVE DATE: October 21, 1988.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

In addition to publishing the full text of this document in the *Federal Register*, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 1000 at the Commission's Headquarters, 825 North Capitol Street, NE., Washington, DC 20426.

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Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon and Charles A. Trabandt.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is amending

its regulations governing exemption of small hydroelectric power projects of 5 megawatts (MW) or less. Specifically, the Commission is removing regulations that implemented the natural water feature exemption in section 408(b) of the Public Utility Regulatory Policies Act of 1978 (PURPA). These regulations were invalidated by the Ninth Circuit Court of Appeals in its *Tulalip Tribes of Washington v. FERC (Tulalip)* decision.¹ The regulations do not represent (and have not since the *Tulalip* decision) Commission practice with regard to natural water feature exemptions. In addition, the final rule grants in part, denies in part, and dismisses in part, a petition for rulemaking filed by the California Save Our Streams Council (CSOS).²

II. Background

The Energy Security Act of 1980³ amended sections 405 and 408 of PURPA to authorize the Commission to exempt certain small hydroelectric power projects from Part I of the Federal Power Act.⁴ Section 408(b) of PURPA provides that the definition of small hydroelectric power project includes:

any project which utilizes or proposes to utilize natural water features for the generation of electricity, without the need for any dam or impoundment, in a manner which (as determined by the Commission) will achieve the purposes of this title and will do so without any adverse effect upon such natural water features.⁵

The Commission originally implemented the natural water feature exemption in section 408(b) of PURPA on a case-by-case basis.⁶ In 1982, after two years of experience with case-specific exemption procedures, the Commission amended its regulations by rule (Order No. 255) to provide specific guidance on what constitutes a natural water feature project.⁷

A. Order No. 255 and the Tulalip Decision

In Order No. 255 the Commission defined small hydroelectric power project as any project that:

- (i) Would utilize for the generation of electricity a natural water feature, such as a natural lake, waterfall, or the gradient of a natural stream, without the need for a dam and man-made impoundment;
- (ii) Would not retain water behind any structure for the purpose of a storage and release operation; and
- (iii) Except as otherwise permitted under § 4.103(d)(2) [waiver provision], would contain a diversion or intake structure that:
 - (A) Is not higher than two times the diameter of the penstock or intake pipeline, not to exceed ten feet in total height, as measured from the lowest point of the natural streambed at the downstream toe of the structure to the normal water surface level retained by the structure assuming a no-spill condition;

(B) Does not retain more than two acre-feet (2467 cubic meters) of water behind the diversion or intake structure;

(C) Does not increase the existing naturally occurring hydraulic head of the natural water feature more than five (5) percent.⁸

This definition of a natural water feature was challenged in, and § 4.102(1)(iii) (A) and (B) were invalidated by, the U.S. Court of Appeals for the Ninth Circuit in the *Tulalip* decision.⁹ The Ninth Circuit held that these provisions violated the plain meaning of section 408(b) of PURPA. Section 408(b) authorizes natural water feature exemptions for projects that can generate electricity "without the need for any dam or impoundment." The Ninth Circuit found that the Commission, by defining natural water feature to include structures up to ten feet in height that retain up to two acre-feet of water, authorized exemptions for structures that were within the plain meaning of "any dam or impoundment."

The Ninth Circuit also addressed the definition of "dam" in § 4.102(a) for exemption purposes. The Commission defined "dam" (for the purpose of the provisions governing exemption of small hydroelectric power projects) as "any structure for impounding water which is usable for electric power generation, if the impoundment supplies all, or the substantial part of, the total hydroelectric pressure (head) developed

for such generation."¹⁰ The Ninth Circuit quoted this definition and then noted the overlap between the definition of dam and the provisions implementing natural water feature exemptions. The Court stated:

* * * in its final rule the Commission defined "dam" to exclude "dams" which are built only to divert rather than to create hydroelectric pressure. 18 CFR 4.102(a) (1983). In conjunction with this definition of "dam," the final rule authorizes exemptions for projects that utilize a "diversion structure" no higher than ten feet and which "retains" no more than two acre-feet of water. 18 CFR 4.102(1)(2)(iii) (A) and (B).

In view of the overlap between the definition of dam and the invalid height and water retention provisions, the Commission considered the definition of dam to have been invalidated by the Ninth Circuit.¹¹

B. The Commission's Response to the Tulalip Decision

The *Tulalip* decision was issued on May 10, 1984. On July 18, 1984, the Commission issued four orders¹² that sought to resolve the status of issued and applied-for natural water feature exemptions in light of the *Tulalip* decision.¹³ The *Eagle Power*, *Snowbird*, and *Forward Power* orders are briefly summarized below. For the purposes of this proceeding, the most important of the July 18, 1984 orders is the *Pigeon Cove* order because it explains how the Commission decided to implement section 408(b) of PURPA after the *Tulalip* decision.

1. The Eagle Power Order

Eagle Power was concerned with projects for which exemptions had been issued and that were in various stages of construction.¹⁴ The Commission grappled with the retroactive effect of the *Tulalip* decision on such projects. The Commission allowed projects that were under construction as of May 10, 1984, to proceed under their existing exemptions. For those projects that were

¹ 732 F.2d 1451 (9th Cir. 1984).

² In so doing, the Commission also terminates Docket Nos. RM86-5-000 and RM86-5-001.

³ Pub. L. 96-294, 94 Stat. 611.

⁴ 16 U.S.C. 791a-825r (1982).

⁵ 16 U.S.C. 2708(b) (1982).

⁶ Exemption From All or Part of Part I of the Federal Power Act of Small Hydroelectric Power Projects With An Installed Capacity of Five Megawatts or Less, Order No. 106, 45 FR 76,115 (Nov. 18, 1980) FERC Stats. & Regs. [Regulations Preambles 1977-1981] § 30,204 (Nov. 7, 1980).

⁷ Amendments to Regulations Governing Case-by-Case Exemption From All or Part of Part I of the Federal Power Act for Small Hydroelectric Power Projects With An Installed Capacity of 5 Megawatts or Less, Order No. 255, 47 FR 38506 (Sept. 1, 1982), FERC Stats. & Regs. [Regulations Preambles 1982-1985] § 30,387 (Aug. 27, 1982).

⁸ 18 CFR 4.102(1)(iii) (A), (B) (1983), 47 FR 38506 at p. 38512. Section 4.102(1) was redesignated in Order No. 413 (discussed *infra*) as § 4.30(b)(27). See, Application for License, Permit, and Exemption From Licensing for Water Power Projects, Order No. 413, 50 FR 11,858 (Mar. 25, 1985), FERC Stats. & Regs. [Regulations Preambles 1982-1985] § 30,362 (Mar. 20, 1985).

⁹ See 18 CFR 4.102(a)(1)(iii) (A), (B) (1983).

¹⁰ See 18 CFR 4.102(a) (1983). This definition was promulgated by the Commission in Order No. 255, *supra* note 7.

¹¹ See, *Pigeon Cove Power Co.*, 30 FERC ¶ 61,253 at p. 61,501-52. The invalidated definition of dam in § 4.102(a) was redesignated as § 4.30(b)(4)(iii) in 1985. See Order No. 413, *supra* note 8.

¹² *Eagle Power Co., et al.*, 28 FERC ¶ 61,061 (1984) (*Eagle Power*); *Snowbird, Ltd., et al.*, 28 FERC ¶ 61,062 (1984) (*Snowbird*); *Forward Power and Energy Co., et al.*, 28 FERC ¶ 61,063 (1984); *Pigeon Cove Power Co.*, 28 FERC ¶ 61,064 (1984) (*Pigeon Cove*).

¹³ The Commission's review of exemption projects included exemptions issued on a case-by-case basis prior to August 27, 1982, the date on which the regulations invalidated by *Tulalip* were promulgated. See Order No. 255, *supra* note 7.

¹⁴ *Eagle Power Co., et al.*, 28 FERC ¶ 61,061 (1984).

not under construction as of May 10, 1984, the Commission applied *Tulalip* retroactively and the exemptions for such projects were vacated.¹⁵ In order to minimize the burden on developers who had obtained their exemptions under the rules invalidated by *Tulalip*, the Commission afforded these former exemptees the opportunity to restore their applications with their original (one accepted) filing dates. The former exemptees were given 120 days to either convert their applications to license applications or to amend their applications to comply with the statutory definition of natural water feature as construed by the Ninth Circuit in *Tulalip*.

2. The Snowbird Order

In its *Snowbird* order, the Commission addressed exemption applications that were filed but not accepted for filing at the time of the *Tulalip* decision.¹⁶ The Commission dismissed all unaccepted applications as invalid. As with those projects that were not under construction in *Eagle Power*, the Commission afforded developers with applications that had been accepted for filing with an opportunity to either convert their applications to license applications or amend their applications to comply with *Tulalip*.

3. The Forward Power Order

The Commission's *Forward Power* order dealt with those projects that were constructed and operating at the time of the *Tulalip* decision.¹⁷ The Commission applied the Supreme Court's *Chevron* test for retroactive application of a new rule and did not apply *Tulalip* retroactively to exemption projects that were constructed and operating as of May 10, 1984.¹⁸

4. The Pigeon Cove Orders

In *Pigeon Cove I*, the Commission determined which issued exemptions and pending exemption applications used valid natural water features under the *Tulalip* decision.¹⁹ The Commission stated that the *Tulalip* decision "return[ed] the Commission to the statutory language [section 408(b) of PURPA] governing natural water feature

exemptions."²⁰ The Commission construed the statutory definition of a natural water feature exemption in section 408(b) of PURPA as a three-part test. A project may be exempted under section 408(b) if it uses a natural water feature to generate electricity that: (1) Does not need any dam or impoundment, (2) achieves the purposes of Title IV of PURPA, and (3) does so without any adverse effect upon such natural water features.

Regarding diversion structures, the Commission stated in *Pigeon Cove I* that:

The court in *Tulalip* pointed out that projects using natural water features such as a perched lake or water fall qualify under the statutory provision. However, virtually any system for generating electricity by passing water through a turbine, even if it uses water from a waterfall or perched lake, must have some means to move the water from the streambed or lake to the turbine. Thus, while the court clearly ruled out diversion structures that serve to dam or impound water, if the statutory provision is to have any meaning it must allow diversion devices that neither dam or impound water, so long as they also satisfy the other two criteria in Section 408(b).²¹

Including all forms of diversion structures within the definition of "dam" would eliminate natural water feature exemptions and would therefore thwart the Congressional intent of promoting small hydropower projects.²² The Commission applied the three-part test of section 408(b) and determined that 78 projects complied with the statutory definition of a natural water feature as construed by the Ninth Circuit in *Tulalip*.

Petitions for rehearing of *Pigeon Cove I* were filed, and on March 6, 1985, the Commission issued a second order (*Pigeon Cove II*).²³ Petitioners claimed that the Commission failed to articulate criteria for determining which projects were eligible for a natural water feature exemption. Petitioners contended that some projects could be considered eligible under *Pigeon Cove*, yet still be inconsistent with the limits put on natural water features in the *Tulalip* decision. The Commission disagreed

and adhered to its three-part test under section 408(b) of PURPA. In answering the petitioners' claims, the Commission explained further its interpretation of the first criterion of section 408(b) that the project generate electricity without the need for any dam or impoundment.

The Commission noted that, as a result of the *Tulalip* decision, projects using a perched lake or waterfall come within the first criteria in section 408(b). The Commission reiterated that even projects using perched lakes or waterfalls must have some structure for diverting water into a turbine in order to produce electricity, and that all diversion structures cannot be considered dams *per se*. The dictionary definitions of "dam" used in *Tulalip* generally described a structure that blocks the flow of water; therefore the Commission considered any raised structure spanning the entire width of a stream to be a dam and ineligible for exemption.

The question left unanswered in *Tulalip* was whether a diversion structure that did not span the entire width of a stream should be considered a dam. The Commission explained that a diversion structure that spans most of the width of a stream can effectively block natural flow depending on its size, displacement and design. The Commission stated, in its case-by-case review of the projects in *Pigeon Cove I*, that it considered such a project to be ineligible for exemption.

With respect to diversion structures that only partially cross the width of a stream, the Commission determined that such structures often do not significantly block the natural flow, particularly if the structure is located on the shallower side of the streambed so that the water mainly flows around the deeper side. Thus, some individual projects were deemed qualified for an exemption. The Commission noted that catch-basins imbedded in the streambed, and catch-basins, perforated pipes and small wing-walls located on the bank of a stream, essentially act as intakes through which water flows into a turbine and could, consequently, qualify for exemption.

Therefore, with regard to the first criterion of section 408(b) of PURPA (*i.e.*, that the project generate electricity without the need for any dam or impoundment), the Commission considered the following diversion structures to be ineligible for exemption: (1) Raised diversion structures that span the entire width of the stream, and (2) diversion structures that partially cross a stream and that significantly block the natural flow. For diversion structures that do not significantly block the

¹⁵ The Commission chose the beginning of physical construction activity as the line of demarcation for projects that were "under construction" as of May 10, 1984: 28 FERC at p. 61,114.

¹⁶ *Snowbird, Ltd., et al.*, 28 FERC ¶ 61,062 (1984).

¹⁷ *Forward Power and Energy Co., et al.*, 28 FERC ¶ 61,063 (1984).

¹⁸ See *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971).

¹⁹ 28 FERC ¶ 61,064 (1984).

²⁰ 28 FERC at p. 61,129.

²¹ 28 FERC at p. 61,129.

²² The Ninth Circuit clearly recognized in *Tulalip* that Congress sought to encourage and expedite small hydropower development but confined exemptions to sites requiring no new dam or impoundment.

²³ 30 FERC ¶ 61,253 (1985). Petitions for rehearing were also filed in the *Snowbird* and *Eagle Power* orders. The Commission considered these petitions in a separate order also issued on March 6, 1985. *Eagle Power Co., et al.*, 30 FERC ¶ 61,254 (1985) (*Eagle Power II*). A final order in this series was issued on June 18, 1985. *Eagle Power Co., et al.*, 31 FERC ¶ 61,314 (1985) (*Eagle Power III*).

natural flow, the Commission reviewed such projects on a case-by-case basis. Moreover, while *Tulalip* only dealt with the first criterion in section 408(b) of PURPA, the Commission indicated that even if a diversion structure was not a "dam or impoundment" (i.e., consistent with *Tulalip*), it still had to meet the remaining requirements of section 408(b) before it would be eligible for exemption (i.e., that the project will generate electricity in a manner consistent with PURPA and that it will do so without any adverse effect upon such natural water features). In addition, by focusing on diversion structures that do not significantly block the natural flow, the *Pigeon Cove* orders used an approach that was consistent with the definition of "dam" that was promulgated in 1980 in Order No. 106.²⁴

Thus, the Commission's response to the *Tulalip* decision was three-fold: (1) it returned to the statutory definition of a natural water feature, (2) it reviewed all issued and applied-for exemptions for consistency with that definition, and (3) with regard to future natural water feature exemption applications, it returned to a case-by-case approach as enunciated in the *Pigeon Cove* orders.

III. Discussion

A. Order No. 413 and the *Tulalip* Decision

The *Pigeon Cove II* order was issued on March 6, 1985. On March 20, 1985, the Commission issued a final rule in Docket No. RM83-56-000, Order No. 413.²⁵ Order No. 413 was a comprehensive rulemaking that made several changes in the Commission's hydroelectric licensing regulations. At the time Order No. 413 was issued, the Commission had responded to the *Tulalip* decision and had decided to implement the natural water feature exemption on a case-specific basis using the principles enunciated in the *Pigeon Cove* orders. Consequently, Order No. 413 would have been an appropriate proceeding in which to revoke the

regulations invalidated by the *Tulalip* decision.

However, the Commission did not, in Order No. 413, remove from its regulations the provisions invalidated by the *Tulalip* decision. Instead, the Commission redesignated these provisions as §§ 4.30(b)(4)(iii) and 4.30(b)(27)(iii)(C) (1) and (2). In referring to the provisions invalidated by *Tulalip*, the Commission noted that:

In a recent decision, [*Tulalip*] * * * the Ninth Circuit found certain provisions of § 4.102 to be invalid. Section 4.102 defines requirements for application for exemption from licensing for small hydroelectric power projects. As part of the reorganization, the final rule redesignates these provisions. However, by redesignating these provisions, the Commission is not reaffirming their validity. The Commission will respond to the Court's finding in a separate proceeding.^[26]

The fact that the provisions invalidated by the *Tulalip* decision have not been removed from the Commission's regulations is an oversight that the Commission is correcting in this rule. Consequently, the Commission is removing these provisions from its regulations and is revising §§ 4.30(b)(4)(iii), 4.30(b)(27) and 4.103(c).

B. Petition for Rulemaking by CSOS

On December 16, 1985, the Commission received a petition for rulemaking (Docket No. RM86-5-000) from California Save Our Streams Council (CSOS). CSOS requested that the Commission issue a notice of proposed rulemaking (NPR) that would: (a) Implement Executive Order No. 11991, and (b) limit the "natural water feature" exemptions in section 408(b) of PURPA to projects not involving off-stream diversions, such as water mills.

On January 12, 1988, the Commission received a second petition for rulemaking (Docket No. RM86-5-001) from CSOS entitled "Petition for Rehearing of De Facto Denial of Petition for Rulemaking, Suspension and Repeal of Rules, Revocation of Exemption from Licensing and Suspension of Exemptions from Licensing Pending Rehearing." In its January 12, 1988 filing, CSOS dropped its request to implement Executive Order No. 11991 but continued to claim that the following regulations are in excess of the Commission's power to

exempt projects from licensing under the FPA: §§ 4.30(b)(4), 4.30(b)(22), 4.103(c)(1) and 4.111(a)(1). CSOS requests the Commission to: (1) Grant rehearing of the alleged denial of the petition for rulemaking and adopt a rule defining natural water features to conform to statutory authority, (2) revoke case-specific exemptions issued under Order No. 413, (3) suspend and revoke the foregoing regulations, and (4) suspend the processing of pending applications for exemption without prejudice to convert to license applications. Except for removing the provisions invalidated by the *Tulalip* decision from its regulations, the Commission denies the petition for rulemaking filed by CSOS.

1. Executive Order No. 11991

Executive Order No. 11991 directed the Council on Environmental Quality (CEQ) to issue regulations implementing the National Environmental Policy Act of 1969 (NEPA).²⁷ The CEQ regulations implementing NEPA are contained in chapter 40 of the Code of Federal Regulations.²⁸ Section 1507.3(a) provides for all Federal agencies to adopt procedures to supplement the CEQ regulations implementing NEPA. On December 10, 1987, the Commission issued Order No. 486 (Docket No. RM87-15-000), which revised its regulations implementing NEPA.²⁹ Order No. 486 renders moot CSOS's request to implement Executive Order No. 11991. Accordingly, to that CSOS' petition for rulemaking is dismissed as moot.

2. Natural Water Feature Exemptions

CSOS states in its January 12, 1988 filing that "the Commission re-enacted definitions of 'natural water feature' virtually identical to those invalidated by *Tulalip*." However, as explained above, the Commission merely redesignated the provisions invalidated by the *Tulalip* decision in Order No. 413; it did not "re-enact" them and, by this order, we are formally deleting those provisions from the regulations. The Commission determines whether a project qualifies for a natural water feature exemption on a case-by-case basis using the criteria stated in the *Pigeon Cove* orders.

While CSOS characterizes Order No. 413 as "re-enacting" the provisions invalidated by the *Tulalip* decision,

²⁴ Order No. 106 defined "dam", for the purpose of the provisions governing exemption of small hydroelectric power projects, as "any structure for impounding water, including any diversion structure that is designed to obstruct all or substantially all of the flow of a natural body of water." Order No. 106, *supra* note 6, 45 FR at 76124. This definition of dam was used by the Commission from 1980 until 1982. On August 27, 1982, the Commission issued Order No. 235, *supra* note 7, which changed the definition to the definition that was subsequently invalidated in the *Tulalip* decision.

²⁵ Application for License, Permit, and Exemption From Licensing for Water Power Projects, Order No. 413, 50 FR 11658 (Mar. 25, 1985), FERC Stats. & Regs. [Regulations Preambles 1982-1985] ¶ 30362 (Mar. 20, 1985).

²⁶ 50 FR at 11659 n. 8. The Commission did not elaborate on whether the "separate proceeding" meant a future rulemaking or the *Pigeon Cove II* order issued two weeks before. In either event, the invalidated regulations have not been followed or enforced by the Commission since the *Tulalip* decision. The Commission implements section 408(d) of PURPA on a case-by-case basis using the approach stated in the *Pigeon Cove* orders.

²⁷ 42 U.S.C. 4321-4370a (1982).

²⁸ 40 CFR Part 1500-1508 (1987).

²⁹ Regulations Implementing the National Environmental Policy Act of 1969, Order No. 486, 52 FR 47897 (Dec. 17, 1987), III FERC Stat. & Regs. ¶ 30,783 (Dec. 10, 1987). CSOS had the opportunity to, and did, file separate comments in that proceeding (Docket No. RM87-15-000).

CSOS's primary objection is with the approach to natural water feature exemptions taken by the Commission in the *Pigeon Cove* orders. CSOS believes that *Tulalip* decision requires all diversion structures to be ineligible for exemption as a natural water feature. CSOS contends that "the only non-retrofit projects eligible for exemption from licensing are natural water features such as a perched lake or paddle mill."³⁰ However, as discussed at length above, these issues were resolved in the *Pigeon Cove* orders.

CSOS could have pressed its claims by intervening in the *Pigeon Cove* proceedings. CSOS did not, however, intervene in the *Pigeon Cove* proceedings and it cannot collaterally attack those orders here.³¹ Section 405(d) of PURPA specifically gives the Commission the authority to exempt small hydroelectric power projects on either a generic basis by rule or on a case-by-case basis. The Commission returned to a case-by-case approach after the *Tulalip* decision. CSOS always has the option to intervene and state its position in any specific exemption application.

In its January 12, 1988 filing CSOS also states that the "Commission's rule 4.30 appropriately defines a dam as 'any structure for impounding or diverting water'."³² CSOS is paraphrasing the definition of dam in § 4.30(b)(4)(i) of the Commission's regulations that governs applications for a license of a major project at an existing dam. The Commission interprets CSOS statement as a request to define "dam," for exemption purposes, in the same manner (i.e., as "any structure for impounding or diverting water").

CSOS' proposed definition would have the effect of including all forms of diversion structures within the definition of "dam." This is a position that the Commission clearly rejected in both of the *Pigeon Cove* orders. The Commission determined therein that raised diversion structures that span the entire width of the stream or diversion structures that significantly block the natural flow (i.e., a diversion structure that either dams or impounds water) are ineligible for exemption. Diversion structures that do not significantly block

the natural flow may be eligible for exemption provided that they can satisfy the other two criteria in section 408(b) of PURPA.

CSOS has not raised any issues of fact, law or policy that were not considered in the *Pigeon Cove* orders or that persuade the Commission to alter the determinations made in those orders. The *Pigeon Cove* orders implement section 408(b) of PURPA in a manner consistent with the *Tulalip* decision, and consistent with the definition of dam that had been promulgated in the Commission's regulations in 1980 in Order No. 106. That definition was the product of a rulemaking proceeding, and was used by the Commission without objection until it was superseded in 1982 by the definition that the Ninth Circuit subsequently invalidated in *Tulalip*. By this final rule, in addition to formally deleting the regulatory provisions invalidated in *Tulalip*, we complete the process of restoring the *status quo ante* by formally reinstating in § 4.30(b)(4)(iii) of the regulations, the definition of dam that had been in the regulations before it was superseded by the definition invalidated in *Tulalip*.

3. Specific Requests of CSOS

CSOS requests that the Commission define natural water feature in a manner that "conform[s] to statutory authority."³³ The Commission does not have to define natural water feature to "conform to" statutory authority because it has already returned to the statutory language of section 408(b) of PURPA in the *Pigeon Cove* orders.

CSOS also wants the Commission to revoke all case-specific exemptions "issued under Order 413."³⁴ By this, the Commission assumes CSOS means all case-specific exemptions issued under the regulations that were invalidated by the *Tulalip* decision. In fact, the Commission has issued no case-specific exemptions under those regulations. The regulations have been invalid and of no effect since the *Tulalip* decision and they do not (and, since *Tulalip* did not) represent Commission practice with regard to natural water feature exemptions.

Finally, CSOS asks the Commission to suspend processing all exemption applications in order to convert applications to "license application[s]."³⁵ This request

illustrates that CSOS' primary objection is with the Commission's response to the *Tulalip* decision and the *Pigeon Cove* orders.³⁶ The Commission did, in fact, give developers the opportunity to convert issued and applied-for exemptions that were invalid under *Tulalip* to license applications in the *Eagle Power* and *Snowbird* orders.³⁷

In objecting to the provisions redesignated in Order No. 413, CSOS cites to §§ 4.30(b)(4) and 4.30(b)(22)(ii) of the Commission's regulations and not to the redesignated provisions (i.e., § 4.30(b)(27)(ii)(C) (1) and (2)). The Commission interprets CSOS' cite to § 4.30(b)(4) as a cite to § 4.30(b)(4)(iii). Section 4.30(b)(4)(iii) contains the invalid definition of "dam" that was redesignated in Order No. 413. To the extent CSOS's second filing objects to the invalid provisions in §§ 4.30(b)(4)(iii) and 4.30(b)(27)(ii)(C) (1) and (2), this order grants CSOS's request to revoke those regulations. As discussed above, this order also reinstates in § 4.30(b)(4)(iii) the original definition of dam. For the reasons discussed below, the Commission denies CSOS's request for relief with respect to §§ 4.30(b)(22)(ii) and 4.103(c)(1), and dismisses CSOS's request for relief with respect to 4.111(a)(1).

(i) *Section 4.30(b)(22)(ii)*. Section 4.30(b)(22)(ii) defines "project" for the purposes of an application for exemption of a small hydroelectric power project to include "any diversion structure other than a dam and any associated water conveyance facility, power plant, primary transmission line, and other appurtenant facility if a natural water feature other than a lake or similar natural impoundment is used for power generation." This definition of "project" was established by the Commission Order No. 106, which also separately defined "small hydroelectric power project."³⁸

The preamble to Order No. 106 indicates an intent to define "project" more narrowly than the definition of "project" in section (3)(11) of the FPA.³⁹

³⁰ See cited *supra* note 10.

³¹ The *Pigeon Cove I* order only applied to those exemptions that utilized valid natural water features in light of *Tulalip*.

³² Exemption from All or Part of Part I of the Federal Power Act of Small Hydroelectric Power Projects With An Installed Capacity of Five Megawatts or Less. 45 FR 76115 (Nov. 18, 1980) FERC Stats. & Regs. [Regulations Preambles 1977-1981] ¶ 30.204 (Nov. 7, 1980).

³³ Section 3(11) of the FPA defines "project" as a complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of

Continued

³⁰ January 12, 1988 filing of CSOS, p. 2.

³¹ The Commission notes that the claims of CSOS in its petition for rulemaking and the claims of petitioners' in the *Pigeon Cove II* rehearing order are substantially similar and that these issues have been decided. The Commission also notes that CSOS did not participate in any of the rulemaking proceedings that led to the final rules in Order No. 106 (1980), Order No. 255 (1982) and Order No. 413 (1985).

³² January 12, 1988 filing of CSOS, p. 1.

³³ January 12, 1988 filing of CSOS p. 2.

³⁴ *Id.*

³⁵ *Id.*

Under section (3)(11) of the FPA, a "complete unit of development" might include more than one impoundment and a series of hydraulically coordinated dams. Therefore, a narrower definition of project was adopted to exclude all dams, impoundments and powerhouses in a large coordinated unit of development. "Small hydroelectric power project" was separately defined as either a project that would use the water power potential of an existing dam to generate electricity or a project that would generate electricity using a natural water feature without the need for a dam or man-made impoundment.

CSOS's reasons for objecting to § 4.30(b)(22)(ii) are not clear. Section 4.30(b)(22)(ii) was not affected by the *Tulalip* decision. Section 4.30(b)(22)(ii) was promulgated in Order No. 106 in 1980. The regulations that were invalidated by the *Tulalip* decision were promulgated in 1982 in Order No. 255 and Order No. 255 did not amend the definition of project in § 4.30(b)(22)(ii). CSOS has not articulated any reason for objecting to § 4.30(b)(22)(ii), and we do not perceive any reason to amend or revoke it. Accordingly, CSOS' request to revoke the regulation is denied.

(ii) Section 4.103(c)(1). CSOS alleges that § 4.103(c)(1) is invalid under the FPA. Section 4.103(c)(1) provides for waiver of the provisions in §§ 4.102 through 4.107 of the Commission's regulations (i.e., the regulations governing case-specific exemptions from licensing). Section 4.103(c)(1) is well within the Commission's authority under sections 405 and 408 of PURPA. We construe CSOS' intent as objecting to the second paragraph in § 4.103(c), which allows an applicant to receive a waiver of the regulations that were invalidated by the *Tulalip* decision.⁴⁰ Again, to the extent CSOS is requesting revocation of §§ 4.103(c)(2) and not § 4.103(c)(1), our order today grants CSOS's request. These regulations do not and have not represented Commission practice since the *Pigeon Cove* orders.

(iii) Section 4.111(a)(1). Finally, CSOS requests that the Commission revoke

§ 4.111(a)(1) of its regulations. This request is moot, and therefore is dismissed. Section 4.111 was removed from the Commission's regulations on October 20, 1987.⁴¹

IV. Environmental Statement

Commission regulations require that an environmental assessment or an environmental impact statement must be prepared for any Commission action that may have a significant adverse effect on the human environment.⁴² The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.⁴³ No environmental consideration is necessary for the promulgation of a rule that is clarifying, corrective, or procedural or that does not substantially change the effect of legislation or regulations being amended.⁴⁴ This final rule is corrective in nature. The rule simply removes invalid, outdated provisions from the Commission's regulations.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)⁴⁵ requires rulemakings to either contain a description and analysis of the impact the rule will have on small entities or certify that the rule will not have a significant economic impact on a substantial number of small entities. This final rule will have no economic impact on small entities. The rule merely revokes invalid regulations that have not represented Commission practice since 1984.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)⁴⁶ and the Office of Management and Budget's (OMB) regulations⁴⁷ require that OMB approve certain information collection requirements imposed by agency rule. This final rule does not impose any information collection requirements.

⁴¹ See, Exemption from Licensing Requirements of Part I of the Federal Power Act of a Category of Small Hydroelectric Power Projects with an Installed Capacity of 5 Megawatts or less, 52 FR 39628 (Oct. 23, 1987); III FERC Stats. & Regs. ¶ 30,771 (Oct. 20, 1987).

⁴² Regulations Implementing Nation Environmental Policy Act, 52 FR 47,897 (Dec. 17, 1987), III FERC Stats. & Regs. ¶ 30,783 (Dec. 10, 1987).

⁴³ 18 CFR 380.4 (1987).

⁴⁴ 18 CFR 380.4(a)(2)(ii) (1987).

⁴⁵ 5 U.S.C. 601-612 (1982).

⁴⁶ 44 U.S.C. 3501-3520 (1982).

⁴⁷ 5 CFR 1320.13 (1987).

VII. Notice and Comment and Effective Date

The Administrative Procedure Act (APA)⁴⁸ requires rulemakings to be published in the *Federal Register*. The APA also mandates that an opportunity for comment be provided when an agency promulgates regulations. Notice and Comment are not required under the APA when the "agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."⁴⁹ The Commission finds that notice and comment are unnecessary for this rulemaking. The Commission is merely removing certain provisions from its regulations that are invalid and have been of no effect since the *Tulalip* decision. This rule is effective October 21, 1988.

List of Subjects in 18 CFR Part 4

Electric power, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends Part 4, Chapter I, Title 18, Code of Federal Regulations, as set forth below.

By the Commission.

Lois D. Cashell,

Secretary.

PART 4—LICENSES, PERMITS, EXEMPTIONS AND DETERMINATION OF PROJECT COSTS

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

Authority: Federal Power Act, 16 U.S.C. 791a-825r, as amended by the Electric Consumers Protection Act of 1986, Pub. L. 99-495; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601-2645 (1982); Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1982); E.O. 12009, 3 CFR 1978 Comp., p. 142.

2. In § 4.30, paragraphs (b)(4)(iii) and (b)(27) are revised to read as follows:

§ 4.30 Applicability and definitions.

* * * * *

(b) * * *

(4) * * *

(iii) "Dam," for the purposes of provisions governing application for exemption of a small hydroelectric power project, means any structure for impounding water, including any diversion structure that is designed to obstruct all or substantially all of the flow of a natural body of water.

* * * * *

⁴⁸ 5 U.S.C. 551-559 (1982).

⁴⁹ 5 U.S.C. 553(b)(3) (1982).

said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

16 U.S.C. 796 (1982).

⁴⁰ That is, the height and water retention limitations in §§ 4.30(b)(27)(ii)(c)(1),(2).

(27) "Small hydroelectric power project" means any project in which capacity will be installed or increased after the date of notice of exemption or application under Subpart K of this chapter, which will have a total installed capacity of not more than 5 MW, and which:

(i) Would utilize for electric power generation the water power potential of an existing dam that is not owned or operated by the United States or by an instrumentality of the Federal Government, including the Tennessee Valley Authority; or

(ii)(A) Would utilize for the generation of electricity a natural water feature, such as a natural lake, waterfall, or the gradient of a natural stream, without the need for a dam or man-made impoundment; and

(B) Would not retain water behind any structure for the purpose of a storage and release operation.

3. In § 4.103, paragraph (c) is revised to read as follows:

§ 4.103 General provisions for case-specific exemption.

(c) *Waiver.* In applying for case-specific exemption from licensing, a qualified exemption applicant may petition under § 385.207 of this chapter for waiver of any specific provision of §§ 4.102 through 4.107. The Commission will grant a waiver only if consistent with section 408 of the Energy Security Act of 1980.

[FR Doc. 88-21562 Filed 9-20-88; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[PP 8F3611/R977; FRL-3450-9]

Pesticide Tolerance for Metolachlor

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes a tolerance for combined residues of the herbicide metolachlor and its metabolites in or on nongrass animal feeds (forage, fodder, straw, and hay) groups. This regulation to establish the maximum permissible level for residues of the herbicide in or on the raw agricultural commodities (RACs) was requested by the Ciba-Geigy Corp.

EFFECTIVE DATE: September 21, 1988.

ADDRESS: Written objections may be submitted to the: Hearing Clerk (A-110),

Environmental Protection Agency, Room 3708, 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT:

Richard F. Mountfort, Product Manager (PM) 23, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, Room 237, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703) 557-1830.

SUPPLEMENTARY INFORMATION: A notice was published in the Federal Register on May 25, 1988 (53 FR 18897) that Ciba-Geigy Corporation, P.O. Box 11422, Greensboro, NC 27409, had filed a petition (8F3611) with EPA. This petition proposed that 40 CFR 180.368(b) be amended by establishing tolerances for combined residues of the herbicide metolachlor [2-chloro-N-(2-ethyl-6-methylphenyl)-N-(2-methoxy-1-methylethyl)acetamide] and its metabolites, determined as the derivatives 2-[(2-ethyl-6-methylphenyl)amino]-1-propanol and 4-(2-ethyl-6-methylphenyl)-2-hydroxy-5-methyl-3-morpholinone, each expressed as the parent compound in or on the RACs nongrass animal feeds group at 3.0 parts per million (ppm) when present therein as a result of application to the growing crops listed in 40 CFR 180.368(a). No comments were received in response to the notice of filing.

The data submitted in the petition and all other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerance is sought.

The data considered in support of the tolerance include:

1. A 90-day dog feeding study with a no-observed-effect level (NOEL) of 500 ppm (12.5 milligrams/kilogram (mg/kg)).

2. A 6-month dog feeding study with a NOEL of 100 ppm (2.5 mg/kg).

3. A rat teratology study with no teratogenicity and fetotoxicity at the highest dose tested (HDT) of 360 mg/kg.

4. A rabbit teratology study with a maternal NOEL of 120 mg/kg and no teratogenicity and fetotoxicity at the HDT of 360 mg/kg.

5. A two-generation rat reproduction study with a reproductive NOEL of 300 ppm (15 mg/kg) and a lowest-effect level (LEL) of 1,000 ppm (50 mg/kg).

6. A mouse dominant-lethal study negative for mutagenic effects.

7. An Ames mutagenicity assay, negative for mutagenic effects, and a 2-year mouse oncogenicity study with no observed oncogenic potential at 30, 1,000, and 3,000 ppm (428 mg/kg, HDT).

8. A repeated 2-year mouse oncogenicity study with no observed

oncogenic potential at the same dose levels as the original study.

9. A 2-year chronic feeding/oncogenicity study in the rat (IBT validated, core supplementary) at dietary doses of 0, 30, 300, and 3,000 ppm with a statistically significant increase in primary liver neoplasms in females at the high-dose group (3,000 ppm).

10. A repeated 2-year chronic feeding/oncogenicity study in the rat conducted at the same dietary doses as the original study with a systemic NOEL of 300 ppm (15 mg/kg), a systemic LEL of 3,000 ppm (testicular atrophy), and a statistically significant increased incidence of neoplastic liver nodules and proliferative hepatic lesions in females in the high-dose group (3,000 ppm).

The Agency has concluded that the available data constitute limited evidence for carcinogenicity of metolachlor. Metolachlor is, therefore, tentatively classified as a Category C carcinogen (limited evidence of carcinogenicity in animals) based on the following considerations:

1. The oncogenic responses observed in rats were confined to the high-dose females at one site (liver).

2. The proliferative liver lesions observed in rats were primarily benign (neoplastic nodules in 6 of 60 animals) rather than hepatocellular carcinomas (1 of 60 animals). There was no apparent difference in the time-to-occurrence of the lesions (almost all liver tumors were observed at terminal sacrifice).

3. Metolachlor was not oncogenic to mice under the conditions of the 2-year mouse oncogenicity studies.

4. An Ames mutagenicity assay and a dominant lethal study were negative for mutagenic effects.

The Agency has evaluated oncogenic risk resulting from dietary exposure to residues of metolachlor based on the rat studies. Assuming 100 percent of the crops are treated, the "worst case" dietary risk is calculated to be 3×10^{-6} for existing tolerances. Tolerances previously established under 40 CFR 180.368(a) are adequate to cover residues that would result in meat, milk, poultry and eggs; therefore, there is no incremental increase in risk from establishing tolerances for the nongrass animal feeds group.

Tolerances have previously been established for residues of metolachlor ranging from 0.02 ppm in meat, milk, poultry, and eggs to 30.0 ppm in peanut forage and hay. Based on the rat chronic feeding study with a NOEL of 300 ppm (15 mg/kg/day) for nononcogenic effects and using a hundred-fold safety factor, the acceptable daily intake is 0.15 mg/kg/day. The maximum permitted intake

for a 60-kg human is calculated to be 9 mg/day.

The theoretical maximal residue contribution (TMRC) for existing tolerances is 0.001256 mg/kg/day for the total U.S. population. The proposed use will not contribute to the TMRC.

The nature of the residues is adequately understood and an adequate analytical method, gas chromatography, is available for enforcement purposes. Analytical enforcement methods are currently available in the Pesticide Analytical Manuals Volumes I and II. There are presently no actions pending against the continued registration of this chemical.

Based on the information cited above, the Agency has determined that the establishment of the tolerances for residues of the pesticide in or on the commodities will protect the public health. Therefore, the tolerances are established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the *Federal Register*, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the *Federal Register* of May 4, 1981 (46 FR 24950).

(Sec. 408(d)(2), 68 Stat. 512 (21 U.S.C. 346(d)(2)))

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests.

Dated: September 9, 1988.

Douglas D. Camp,

Director, Office of Pesticide Programs.

Therefore, 40 CFR Part 180 is amended as follows:

PART 180—[AMENDED]

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

2. Section 180.368(b) is amended by adding and alphabetically inserting the commodity nongrass animal feeds group, to read as follows:

§ 180.368 Metolachlor; tolerances for residues.

(b) * * *

Commodities	Parts per million
Nongrass animal feeds (forage, fodder, straw, and hay) group.....	3.0

[FR Doc. 88-21506 Filed 9-20-88; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 400 and 430

45 CFR Parts 201, 204, 205, 211, 212, 213, and 282

[BERC-433-FC]

Medicaid Program; State Plans and Grants to States

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rules with comment period.

SUMMARY: These regulations amend Medicaid regulations to incorporate the applicable provisions of 45 CFR Parts 201, 204, 205, and 213. The intent is two-fold—

- To update and simplify the existing regulations, as they apply to the Medicaid program, to reflect current organizational and staff titles (e.g., "HCFA" instead of "SRS" or "the Service"; "Regional Administrator" instead of "Regional Medicaid Director"), and minor procedural changes.

- To incorporate the revised regulations in 42 CFR Part 430 so that users of Medicaid regulations need not search in Title 45 for these provisions.

These regulations also amend regulations at 45 CFR Parts 201, 204, 205, 211, 212, 213, and 282 relating to federally assisted State public assistance programs to make

nomenclature and other technical changes to reflect changes in organization and delegations of authority.

DATES: *Effective Date:* These regulations are effective October 21, 1988.

Comment Date: We will consider comments received by November 21, 1988, from anyone who considers that, in the process of redesignating these rules, we have, inadvertently made substantive changes.

ADDRESSES: Address comments in writing to: Health Care Financing Administration, Department of Health and Human Services, Attention: BERC-433-FC, P.O. Box 26676, Baltimore, Maryland 21207.

If you comment on information collection requirements, please send a copy of those comments directly to: Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503. Attention: Allison Herron.

If you prefer, you may deliver your comments to one of the following addresses:

Room 309-G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC, or, Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland.

In commenting, please refer to file code BERC-433-FC. Comments will be available for public inspection as they are received, beginning approximately three weeks from today, in Room 309-G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (phone: 202-245-7890).

FOR FURTHER INFORMATION CONTACT: Luisa V. Iglesias, (202) 245-0383.

SUPPLEMENTARY INFORMATION:

Background

45 CFR Part 201 was published in 1970 when the Social and Rehabilitation Service (SRS) was a major component of the Department, responsible for all the Federally assisted State public assistance programs. Accordingly, the provisions of 45 CFR Part 201 applied to the financial assistance programs under titles I, IV-A, X, XIV, and XVI of the Social Security Act and to the medical assistance program (Medicaid) under title XIX of that Act.

Under the Secretary's Executive Order of March 8, 1977, the Department was extensively reorganized. The SRS ceased to exist and HCFA was created and assigned responsibility for

Medicaid, Medicare (the Federal health insurance program previously administered by the Social Security Administration), and the Professional Standards Review program which was transferred from the Public Health Service component of the Department.

The regulations for the HCFA programs were scattered among three different CFR titles as follows:

Title 20—Employees' Benefits

Chapter III—Social Security Administration

(Medicare regulations)

Title 42—Public Health

(Professional Standards Review regulations)

Title 45—Public Welfare

Chapter II—Social and Rehabilitation Service

(Medicaid regulations)

On September 30, 1977, a new Chapter IV—Health Care Financing Administration, was established in Title 42 and most of the regulations pertaining to the three HCFA programs were transferred to the new chapter. 45 CFR Parts 201, 204, 205, and 213 could not be "transferred" because they also applied to the financial assistance programs and, in part, to the social services programs under title XX of the Act. Early attempts to segregate regulations for Medicaid and/or social services foundered primarily on the issue of how much uniformity of language could and should be retained in setting up the 3 sets of regulations. With the perspective gained since the 1977 reorganization, we are now ready to set forth in 42 CFR Chapter IV the title 45 content that pertains to Medicaid.

Purpose and Scope

These regulations have a twofold purpose:

1. To update and simplify the existing regulations, as they apply to the Medicaid program, to reflect current organizational and staff titles (e.g. "HCFA" instead of "SRS" or "the Service"; "Regional Administrator" instead of "Regional Medicaid Director"); and minor procedural changes.

2. To incorporate the revised regulations in 42 CFR Part 430 so that users of Medicaid regulations need not search in Title 45 for these provisions.

The regulations transferred to Part 430 are based on various provisions of the Social Security Act. Section 1901 of the Act requires an approved State plan for any State seeking Federal financial participation (FFP) in the operation of a

medical assistance program under title XIX. Section 1902 of the Act specifies the required content of the State plan. Section 1904 of the Act authorizes the Secretary to withhold FFP, prospectively, after notice and opportunity for a hearing, if the State plan is changed so as not to comply with, or is not administered in accordance with, the requirements of section 1902.

Sections 1116(a)(1) and 1915(f) of the Act authorize the Secretary to approve or disapprove a State plan or State plan amendments submitted by a State. Section 1116(a)(2) gives States the right to a reconsideration of the Secretary's determination to disapprove a State plan or State plan amendment through administrative hearings. Under the provisions of section 1116(a)(3), States also are entitled to file for judicial review by the appropriate U.S. Court of Appeals of a final determination to disapprove a State plan or State plan amendment and of a final determination to withhold payments because the State plan no longer complies with, or is not administered in accordance with section 1902.

Section 1116(c) of the Act authorizes denial or withholding of FFP based on the Secretary's initial determination even if there is a reconsideration pending. However, this section provides for restitution in lump sum of any funds the Secretary subsequently determines were withheld or otherwise denied based on an incorrect determination.

Section 1116(d) of the Act gives States the right to appeal (to the Departmental Grant Appeals Board) a disallowance for amounts the State has expended and claimed on its expenditure report for FFP.

Since the Medicaid provisions will now appear in 42 CFR Part 430, certain technical changes—removal of all references to Medicaid and Medicaid staff—had to be made in 45 CFR Parts 201, 204, and 205.

We have taken advantage of this opportunity to update the Title 45 rules to reflect changes in organization and delegations of authority for the financial assistance programs under titles I, IV-A, X, XIV, and XVI (AABD) of the Social Security Act. A notice published in the *Federal Register* on April 4, 1986 at 51 FR 11641 established the Family Support Administration and transferred responsibility for these financial assistance programs from the Social Security Administration. A notice published in the *Federal Register* on October 6, 1986 at 51 FR 35561 set forth the details of organization, functions, and delegations of authority of the new Family Support Administration.

The nomenclature changes now being made in the Title 45 rules reflect some changes made in 1977, as well as those discussed above in 1986. In 45 CFR 204.4, it was necessary also to correct outdated cross-references and to reflect removal of content from cited regulations.

Provisions of the Medicaid Regulations

The new Subpart B of Part 430 describes the State plan and specifies its format, content, and purpose; and sets forth the policies and procedures that apply to the submittal, review, and approval or disapproval of State plans and plan amendments, the right to administrative review, and the effective dates of State plans or plan amendments.

The rules have always required that State plans and State plan amendments be submitted for review by the Governor "or his designee" (45 CFR 201.3(a)).

Section 430.12(b) makes clear that—

- Submission is not required if the Governor designates the head of the Medicaid agency; and

- The rule does not apply to preprinted State plan amendments that are developed by HCFA and that provide no options for the States.

The new Subpart C describes the grants process and sets forth the policies and procedures that pertain to the following:

- Program reviews and audits.
- Withholding of Federal funds when the State's plan or its practice under the plan fails to comply with Federal requirements.
- The right to judicial review of plan disapproval or withholding of funds.
- Deferral of claims for FFP.
- Disallowance of claims for FFP.
- Repayment of Federal funds by installments.

The new Subpart D sets forth the policies and procedures for hearings on the issue of whether a State's Medicaid plan, or proposed plan amendments, or its practice under the plan, meet or continue to meet Federal requirements.

Waiver of Proposed Rulemaking

These rules make no substantive changes in current regulations. The changes they make are technical (to update the content and procedures) or editorial (to simplify and clarify the language). Transfer of the rules to 42 CFR Chapter IV makes it easier for users of the Medicaid regulations to locate these provisions and to relate them to other Medicaid rules.

Conforming changes to the regulations under Title 45 reflect organizational changes and delegations of authority

only. Under these circumstances, we find that there is good cause to waive proposed rulemaking procedures and issue the regulations in final form. However, as indicated under "COMMENT DATE", we will consider any comments received within 60 days of publication, from anyone who believes that, in the process of updating, clarifying, and renumbering these rules, we have inadvertently made substantive changes. Although we cannot acknowledge or respond to individual comments, if we make changes in these rules, we will discuss the comments in the preamble to the revised rules.

Regulatory Impact Statement

Executive Order 12291

Executive Order 12291 requires agencies to prepare and publish a regulatory impact analysis for any regulation that is likely to have an annual economic impact of \$100 million or more, cause a major increase in costs or prices, or meet other thresholds specified in section 1(b) of the order.

Since these rules merely update and redesignate provisions that are currently in effect without substantive change, we anticipate very slight if any economic impact. Accordingly, an impact analysis is not required.

Regulatory Flexibility Act

We customarily prepare and publish a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (5 U.S.C. 601-612) for any regulation that will have "a significant economic impact on a substantial number of small entities". A small entity is defined as a small business, a nonprofit enterprise, or a governmental jurisdiction (such as a county, city, or township) with a population of less than 50,000.

We have determined, and the Secretary certifies, that since these rules contain no substantive changes, they will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

Section 430.30 of this final rule contains information collection requirements that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, with control numbers 0938-0067 and 0938-0101. If you comment on these requirements, please send a copy of those comments directly to OMB at the address specified above under "Addresses".

List of Subjects

42 CFR Part 400

Reporting and recordkeeping requirements.

42 CFR Part 430

Grant programs—health, Medicaid.

DERIVATION TABLE

New Section	Source Section
(42 CFR Ch. IV).	(45 CFR Ch. II).
430.10.....	201.2.
430.12(a).....	204.2.
430.12(b).....	201.3(a) and 204.1.
430.12(c).....	201.3 introductory statement, 204.2, and 205.5(a).
430.14.....	201.3(b).
430.15(a).....	201.3(d).
430.15(b).....	201.3(c) first sentence.
430.15(c).....	201.3(c) second sentence.
430.16(a).....	201.3 (e) and (f).
430.16(b).....	201.3(c) third sentence.
430.18(a).....	201.4 first sentence.
430.18(b).....	201.4 second and third sentences.
430.18(c).....	201.4 fourth sentence.
430.18(d).....	201.4 fifth sentence.
430.18(e).....	201.4 sixth sentence.
430.20.....	201.3(g) and 205.5(b).
430.30(a).....	201.5 introductory statement.
430.30(b).....	201.5(a) (1) and (2).
430.30(c).....	201.5(a)(3).
430.30(d).....	201.5 (b), (c) and (d).
430.30(e).....	201.5(e).
430.32(a).....	201.10(a).
430.32(b).....	201.10(b).
430.32(c).....	201.13(b).
430.33 (a) and (b).....	201.12.
430.33(c).....	201.13.
430.35 (a)-(c).....	201.6 (a), (c), and (d).
430.35(d).....	201.6(e).
430.38.....	201.7.
430.40.....	201.15(c).
430.42.....	201.14 (b), (c) and (e) and 204.4.
430.45.....	201.14(a).
430.48.....	201.66.
430.60.....	213.1.
430.62.....	213.2.
430.63.....	213.5.
430.64.....	213.4.
430.66.....	213.21.
430.70.....	213.11.
430.72.....	213.12 and 213.13.
430.74.....	213.14.
430.76.....	213.15.
430.80.....	213.22.
430.83.....	213.23.
430.86.....	213.23a.
430.88.....	213.24 and 213.25.
430.90.....	213.26.
430.92.....	213.27.
430.94.....	213.28.
430.96.....	213.29.
430.100.....	213.31.
430.102.....	213.32 (a), (b), and (d).
430.104.....	213.32(c) and 213.33.

The Code of Federal Regulations is amended as set forth below:

A. 42 CFR Chapter IV is amended as follows:

PART 400—INTRODUCTION; DEFINITIONS

1. The authority citation for Part 400 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh) and 44 U.S.C. Chapter 35.

§400.310 [Amended]

2. Section 400.310 is amended by adding, in numerical order, the following entries:

430.30.....0938-0067
430.30.....0938-0101

3. Part 430 is revised to read as follows:

PART 430—GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

Subpart A—Introduction; General Provisions

Sec.

430.0 Program description.
430.1 Scope of Subchapter C.
430.2 Other applicable Federal regulations.
430.3 Appeals under Medicaid.

Subpart B—State Plans

430.10 The State plan.
430.12 Submittal of State plans and plan amendments.
430.14 Review of State plan material.
430.15 Basis and authority for action on State plan material.
430.16 Timing and notice of action on State plan material.
430.18 Administrative review of action on State plan material.
430.20 Effective dates of State plans and plan amendments.

Subpart C—Grants; Reviews and Audits; Withholding for Failure To Comply; Deferral and Disallowance of Claims; Reduction of Federal Medicaid Payments

430.30 Grants procedures.
430.32 Program reviews.
430.33 Audits.
430.35 Withholding of payment for failure to comply with Federal requirements.
430.38 Judicial review.
430.40 Deferral of claims for FFP.
430.42 Disallowance of claims for FFP.
430.45 Reduction of Federal Medicaid payments.
430.48 Repayment of Federal funds by installments.

Subpart D—Hearings on Conformity of State Medicaid Plans and Practice to Federal Requirements

430.60 Scope.
430.62 Records to be public.
430.63 Filing and service of papers.
430.64 Suspension of rules.
430.66 Designation of presiding officer for hearing.
430.70 Notice of hearing or opportunity for hearing.
430.72 Time and place of hearing.
430.74 Issues at hearing.

- 430.76 Parties to the hearing.
- 430.80 Authority of the presiding officer.
- 430.83 Rights of parties.
- 430.86 Discovery.
- 430.88 Evidence.
- 430.90 Exclusion from hearing for misconduct.
- 430.92 Un-sponsored written material.
- 430.94 Official transcript.
- 430.96 Record for decision.
- 430.100 Posthearing briefs.
- 430.102 Decisions following hearing.
- 430.104 Decisions that affect FFP.

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart A—Introduction; General Provisions

§ 430.0 Program description.

Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services.

§ 430.1 Scope of Subchapter C.

The regulations in Subchapter C set forth State plan requirements, standards, procedures, and conditions for obtaining Federal financial participation (FFP). Each part (or subpart of section) in the subchapter describes the specific statutory basis for the regulation. However, where the basis is the Secretary's general authority to issue regulations for any program under the Act (section 1102 of the Act), or his general authority to prescribe State plan requirements needed for proper and efficient administration of the plan (section 1902(a)(4)), those statutory provisions are simply cited without further description.

§ 430.2 Other applicable Federal regulations.

Other regulations applicable to State Medicaid programs include the following:

- (a) 5 CFR Part 900, Subpart F, Administration of the Standards for a Merit System of Personnel Administration.
- (b) The following HHS Regulations in 45 CFR Subtitle A:

Part 16—Department Grant Appeals Process.
Part 74—Administration of Grants.

Part 80—Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health and Human Services: Effectuation of Title VI of the Civil Rights Act of 1964.

Part 81—Practice and Procedure for Hearings Under 45 CFR Part 80.

Part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance.

Part 95—General Administration—grant programs (public assistance and Medical assistance).

§ 430.3 Appeals under Medicaid.

Three distinct types of disputes may arise under Medicaid.

(a) *Compliance with Federal requirements.* Disputes that pertain to whether a State's plan or proposed plan amendments, or its practice under the plan meet or continue to meet Federal requirements are subject to the hearing provisions of Subpart D of this part.

(b) *FFP in Medicaid expenditures.* Disputes that pertain to disallowances of FFP in Medicaid expenditures (mandatory grants) are heard by the Departmental Grants Appeals Board (the Board) in accordance with procedures set forth in 45 CFR Part 16.

(c) *Discretionary grants disputes.* Disputes pertaining to discretionary grants, such as grants for special demonstration projects under sections 1110 and 1115 of the Act, which may be awarded to a Medicaid agency, are also heard by the Board. 45 CFR Part 16, Appendix A, lists all the types of disputes that the Board hears.

Subpart B—State Plans

§ 430.10 The State plan.

The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for HCFA to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program.

§ 430.12 Submittal of State plans and plan amendments.

(a) *Format.* A State plan for Medicaid consists of preprinted material that covers the basic requirements, and individualized content that reflects the characteristics of the particular State's program.

(b) *Governor's review.*—(1) *Basic rules.* Except as provided in paragraph (b)(2) of this section—

(i) The Medicaid agency must submit the State plan and State plan amendments to the State Governor or his designee for review and comment before submitting them to the HCFA regional office.

(ii) The plan must provide that the Governor will be given a specific period of time to review State plan amendments, long-range program planning projections, and other periodic reports on the Medicaid program, excluding periodic statistical, budget and fiscal reports.

(iii) Any comments from the Governor must be submitted to HCFA with the plan or plan amendment.

(2) *Exceptions.* (i) Submission is not required if the Governor's designee is the head of the Medicaid agency.

(ii) Governor's review is not required for preprinted plan amendments that are developed by HCFA if they provide absolutely no options for the State.

(c) *Plan amendments.* (1) The plan must provide that it will be amended whenever necessary to reflect—

(i) Changes in Federal law, regulations policy interpretations, or court decisions; or

(ii) Material changes in State law, organization, or policy, or in the State's operation of the Medicaid program.

(2) Prompt submittal of amendments is necessary—

(i) So that HCFA can determine whether the plan continues to meet the requirements for approval; and

(ii) To ensure the availability of FFP in accordance with § 430.20.

§ 430.14 Review of State plan material.

HCFA regional staff reviews State plans and plan amendments, discusses any issues with the Medicaid agency, and consults with central office staff on questions regarding application of Federal policy.

§ 430.15 Basis and authority for action on State plan material.

(a) *Basis for action.* (1) Determinations as to whether State plans (including plan amendments and administrative practice under the plans) originally meet or continue to meet the requirements for approval are based on relevant Federal statutes and regulations.

(2) Guidelines are furnished to assist in the interpretation of the regulations.

(b) *Approval authority.* The Regional Administrator exercises delegated authority to approve the State plan and plan amendments on the basis of policy statements and precedents previously approved by the Administrator.

(c) *Disapproval authority.* (1) The Administrator retains authority for determining that proposed plan material is not approvable or that previously approved material no longer meets the requirements for approval.

(2) The Administrator does not make a final determination of disapproval without first consulting the Secretary.

§ 430.16 Timing and notice of action on State plan material.

(a) *Timing.* (1) A State plan or plan amendment will be considered approved unless HCFA, within 90 days after receipt of the plan or plan amendment in the regional office, sends the State—

(i) Written notice of disapproval; or

(ii) Written notice of any additional information it needs in order to make a final determination.

(2) If HCFA requests additional information, the 90-day period for HCFA action on the plan or plan amendment begins on the day it receives that information.

(b) *Notice of final determination.* (1) The Regional Administrator or the Administrator notifies the Medicaid agency of the approval of a State plan or plan amendment.

(2) Only the Administrator gives notice of disapproval of a State plan or plan amendment.

§ 430.18 Administrative review of action on State plan material.

(a) *Request for reconsideration.* Any State dissatisfied with the Administrator's action on plan material under § 430.15 may, within 60 days after receipt of the notice provided under § 430.16(b), request that the Administrator reconsider the issue of whether the plan or plan amendment conforms to the requirements for approval.

(b) *Notice and timing of hearing.* (1) Within 30 days after receipt of the request, the Administrator notifies the State of the time and place of the hearing.

(2) The hearing takes place not less than 30 days nor more than 60 days after the date of the notice, unless the State and the Administrator agree in writing on an earlier or later date.

(c) *Hearing procedures.* The hearing procedures are set forth in Subpart D of this part.

(d) *Decision.* A decision affirming, modifying, or reversing the Administrator's original determination is made in accordance with § 430.102.

(e) *Effect of hearing decision.* (1) Denial of Federal funds, if required by the Administrator's original determination, will not be delayed pending a hearing decision.

(2) However, if the Administrator determines that his or her original decision was incorrect, HCFA pays the State a lump sum equal to any funds incorrectly denied.

§ 430.20 Effective dates of State plans and plan amendments.

For purposes of FFP, the following rules apply:

(a) *New plans.* The effective date of a new plan—

(1) May not be earlier than the first day of the quarter in which an approvable plan is submitted to the regional office; and

(2) With respect to expenditures for medical assistance, may not be earlier than the first day on which the plan is in operation on a statewide basis.

(b) *Plan amendment.* (1) For a plan amendment that provides additional services to individuals eligible under the approved plan, or makes additional groups eligible for services provided under the approved plan, the effective date is determined in accordance with paragraph (a) of this section.

(2) For other plan amendments, the effective date may be a date requested by the State if HCFA approves it.

Subpart C—Grants; Reviews and Audits; Withholding for Failure To Comply; Deferral and Disallowance of Claims; Reduction of Federal Medicaid Payments

§ 430.30 Grants procedures.

(a) *General provisions.* (1) Once HCFA has approved a State plan, it makes quarterly grant awards to the State to cover the Federal share of expenditures for services, training, and administration.

(2) The amount of the quarterly grant is determined on the basis of information submitted by the State agency (in quarterly estimate and quarterly expenditure reports) and other pertinent documents.

(b) *Quarterly estimates.* The Medicaid agency must submit Form HCFA-25 (Medicaid Program Budget Report; Quarterly Distribution of Funding Requirements) to the central office (with a copy to the regional office) 45 days before the beginning of each quarter.

(c) *Expenditure reports.* (1) The State must submit Form HCFA-64 (Quarterly Medicaid Statement of Expenditures for the Medical Assistance Program) to the central office (with a copy to the regional office) not later than 30 days after the end of each quarter.

(2) This report is the State's accounting of actual recorded expenditures. The disposition of Federal

funds may not be reported on the basis of estimates.

(d) *Grant award.*—(1) *Computation by HCFA.* Regional office staff analyzes the State's estimates and sends a recommendation to the central office. Central office staff considers the State's estimates, the regional office recommendations and any other relevant information, including any adjustments to be made under paragraph (d)(2) of this section, and computes the grant.

(2) *Content of award.* The grant award computation form shows the estimate of expenditures for the ensuing quarter, and the amounts by which that estimate is increased or decreased because of an underestimate or overestimate for prior quarters, or for any of the following reasons:

(i) Penalty reductions imposed by law.

(ii) Accounting adjustments.

(iii) Deferrals or disallowances.

(iv) Interest assessments.

(v) Mandated adjustments such as those required by section 1914 of the Act.

(3) *Effect of award.* The grant award authorizes the State to draw Federal funds as needed to pay the Federal share of disbursements.

(4) *Drawing procedure.* The draw is through a commercial bank and the Federal Reserve system against a continuing letter of credit certified to the Secretary of the Treasury in favor of the State payee. (The letter of credit payment system was established in accordance with Treasury Department regulations—Circular No. 1075.)

(e) *General administrative requirements.* With the following exceptions, the provisions of 45 CFR Part 74, which establish uniform administrative requirements and cost principles, apply to all grants made to States under this subpart:

45 CFR Part 74

Subpart C—Matching and Cost Sharing

Subpart I—Financial Report Requirements

§ 430.32 Program reviews.

(a) *Review of State and local administration.* In order to determine whether the State is complying with the Federal requirements and the provisions of its plan, HCFA reviews State and local administration through analysis of the state's policies and procedures, on-site review of selected aspects of agency operation, and examination of samples of individual case records.

(b) *Quality control program.* The State itself is required to carry out a continuing quality control program as set forth in Part 431, Subpart P, of this chapter.

(c) *Action on review findings.* If Federal or State reviews reveal serious problems with respect to compliance with any Federal requirement, the State must correct its practice accordingly.

§ 430.33 Audits.

(a) *Purpose.* The Department's Office of Inspector General (OIG) periodically audits State operations in order to determine whether:

(1) The program is being operated in a cost-efficient manner; and

(2) Funds are being properly expended for the purposes for which they were appropriated under Federal and State law and regulations.

(b) *Reports.* (1) The OIG releases audit reports simultaneously to State officials and the Department's program officials.

(2) The reports set forth OIG opinion and recommendations regarding the practices it reviewed, and the allowability of the costs it audited.

(3) Cognizant officials of the Department make final determinations on all audit findings.

(c) *Action on audit exceptions—(1) Concurrence or clearance.* The State agency has the opportunity of concurring in the exceptions or submitting additional facts that support clearance of the exceptions.

(2) *Appeal.* Any exceptions that are not disposed of under paragraph (c)(1) of this section are included in a disallowance letter that constitutes the Department's final decision unless the State requests reconsideration by the Grant Appeals Board. (Specific rules are set forth in § 430.42.)

(3) *Adjustment.* If the decision by the Board requires an adjustment of FFP, either upward or downward, a subsequent grant award promptly reflects the amount of increase or decrease.

§ 430.35 Withholding of payment for failure to comply with Federal requirements.

(a) *Basis for withholding.* HCFA withholds payments to the State, in whole or in part, only if, after given the agency reasonable notice and opportunity for a hearing in accordance with Subpart D of this part, the Administrator finds—

(1) That the plan no longer complies with the provisions of section 1902 of the Act; or

(2) That in the administration of the plan there is failure to comply substantially with any of those provisions.

(Hearings under Subpart D are generally not called until a reasonable effort has been made to resolve the issues through

conferences and discussions. These may be continued even if a date and place have been set for the hearing.)

(b) *Noncompliance of the plan.* A question of noncompliance of a State plan may arise from an unapprovable change in the approved State plan or the failure of the State to change its approved plan to conform to a new Federal requirement for approval of State plans.

(c) *Noncompliance in practice.* A question of noncompliance in practice may arise from the State's failure to actually comply with a Federal requirement, regardless of whether the plan itself complies with that requirement.

(d) *Notice and implementation of withholding.* If the Administrator makes a finding of noncompliance under paragraph (a) of this section, the following rules apply:

(1) The Administrator notifies the State:

(i) That no further payments will be made to the State (or that payments will be made only for those portions or aspects of the program that are not affected by the noncompliance); and

(ii) That the total or partial withholding will continue until the Administrator is satisfied that the State's plan and practice are, and will continue to be, in compliance with Federal requirements.

(2) HCFA withholds payments, in whole or in part, until the Administrator is satisfied regarding the State's compliance.

§ 430.38 Judicial review.

(a) *Right to judicial review.* Any State dissatisfied with the Administrator's final determination on approvability of plan material (§ 430.18) or compliance with Federal requirements (§ 430.35) has a right to judicial review.

(b) *Petition for review.* (1) The State must file a petition for review with the U.S. Court of Appeals for the circuit in which the State is located, within 60 days after it is notified of the determination.

(2) The clerk of the court will file a copy of the petition with the Administrator and the Administrator will file in the court the record of the proceedings on which the determination was based.

(c) *Court action.* (1) The court is bound by the Administrator's findings of fact if they are supported by substantial evidence.

(2) The court has jurisdiction to affirm the Administrator's decision, to set it aside in whole or in part, or, for good cause, to remand the case for additional evidence.

(d) *Response to remand.* (1) If the court remands the case, the Administrator may make new or modified findings of fact and may modify his or her previous determination.

(2) The Administrator will certify to the court the transcript and record of the further proceedings.

(e) *Review by the Supreme Court.* The judgment of the appeals court is subject to review by the U.S. Supreme Court upon certiorari or certification, as provided in 28 U.S.C. 1254.

§ 430.40 Deferral of claims for FFP.

(a) *Requirements for deferral.* Payment of a claim or any portion of a claim for FFP is deferred only if—

(1) The Regional Administrator or the Administrator questions its allowability and needs additional information in order to resolve the question; and

(2) HCFA takes action to defer the claim (by excluding the claimed amount from the grant award) within 60 days after the receipt of a Quarterly Statement of Expenditures (prepared in accordance with HCFA instructions) that includes that claim.

(b) *Notice of deferral and State's responsibility.* (1) Within 15 days of the action described in paragraph (a)(2) of this section, the Regional Administrator sends the State a written notice of deferral that—

(i) Identifies the type and amount of the deferred claim and specifies the reason for deferral; and

(ii) Requests the State to make available all the documents and materials the regional office then believes are necessary to determine the allowability of the claim.

(2) It is the responsibility of the State to establish the allowability of a deferred claim.

(c) *Handling of documents and materials.* (1) Within 60 days (or within 120 days if the State requests an extension) after receipt of the notice of deferral, the State must make available to the regional office, in readily reviewable form, all requested documents and materials except any that it identifies as not being available.

(2) Regional office staff usually initiates review within 30 days after receipt of the documents and materials.

(3) If the Regional Administrator finds that the materials are not in readily reviewable form or that additional information is needed, he or she promptly notifies the State that it has 15 days to submit the readily reviewable or additional materials.

(4) If the State does not provide the necessary materials within 15 days, the

Regional Administrator disallows the claim.

(5) The Regional Administrator has 90 days, after all documentation is available in readily reviewable form, to determine the allowability of the claim.

(6) If the Regional Administrator cannot complete review of the material within 90 days, HCFA pays the claim, subject to a later determination of allowability.

(d) *Effect of decision to pay a deferred claim.* Payment of a deferred claim under paragraph (c)(6) of this section does not preclude a subsequent disallowance based on the results of an audit or financial review. (If there is a subsequent disallowance, the State may request reconsideration as provided in paragraph (e)(2) of this section.)

(e) *Notice and effect of decision on allowability.* (1) The Regional Administrator or the Administrator gives the State written notice of his or her decision to pay or disallow a deferred claim.

(2) If the decision is to disallow, the notice informs the State of its right to reconsideration in accordance with 45 CFR Part 16.

§ 430.42 Disallowance of claims for FFP.

(a) *Notice of disallowance and of right to reconsideration.* When the Regional Administrator or the Administrator determines that a claim or portion of claim is not allowable, he or she promptly sends the State a disallowance letter that includes the following, as appropriate:

(1) The date or dates on which the State's claim for FFP was made.

(2) The time period during which the expenditures in question were made or claimed to have been made.

(3) The date and amount of any payment or notice of deferral.

(4) A statement of the amount of FFP claimed, allowed, and disallowed and the manner in which these amounts were computed.

(5) Findings of fact on which the disallowance determination is based or a reference to other documents previously furnished to the State or included with the notice (such as a report of a financial review or audit) which contain the findings of fact on which the disallowance determination is based.

(6) Pertinent citations to the law, regulations, guides and instructions supporting the action taken.

(7) A request that the State make appropriate adjustment in a subsequent expenditure report.

(8) Notice of the State's right to request reconsideration of the

disallowance and the time allowed to make the request.

(9) A statement indicating that the disallowance letter is the Department's final decision unless the State requests reconsideration under paragraph (b)(2) of this section.

(b) *Reconsideration of FFP disallowance.* (1) The Departmental Grant Appeals Board reviews disallowances of FFP under title XIX.

(2) A State that wishes to request reconsideration must submit the request to the Chairperson, Departmental Grants Appeals Board, within 30 days after receipt of the disallowance letter, and include—

(i) A copy of the disallowance letter;

(ii) A statement of the amount in dispute; and

(iii) A brief statement of why the disallowance is wrong.

(c) *Reconsideration procedures.* The reconsideration procedures are those set forth in 45 CFR Part 16 for Medicaid and for many other programs administered by the Department.

(d) *Implementation of decisions.* If the reconsideration decision requires an adjustment of FFP, either upward or downward, a subsequent grant award promptly reflects the amount of increase or decrease.

§ 430.45 Reduction of Federal Medicaid payments.

(a) *Methods of reduction.* HCFA may reduce Medicaid payments to a State as required under the Act by reducing—

(1) The Federal Medical Assistance Percentage;

(2) The amount of State expenditures subject to FFP;

(3) The rates of FFP; or

(4) The amount otherwise payable to the State.

(b) *Right to reconsideration.* A state that receives written final notice of a reduction under paragraph (a) of this section has a right to reconsideration. The provisions of § 430.42 (b) and (c) apply.

(c) *Other applicable rules.* Other rules regarding reduction of Medicaid payments are set forth in Parts 433 and 447 of this chapter.

§ 430.48 Repayment of Federal funds by installments.

(a) *Basic conditions.* When Federal payments have been made for claims that are later found to be unallowable, the State may repay the Federal Funds by installments if the following conditions are met:

(1) The amount to be repaid exceeds 2½ percent of the estimated or actual annual State share for the Medicaid program; and

(2) The State has given the Regional Administrator written notice, before total repayment was due, of its intent to repay by installments.

(b) *Annual State share determination.* HCFA determines whether the amount to be repaid exceeds 2½ percent of the annual State share as follows:

(1) If the Medicaid program is ongoing, HCFA uses the annual *estimated* State share of Medicaid expenditures. This is the sum of the estimated State shares for four consecutive quarters, beginning with the quarter in which the first installment is to be paid, as shown on the State's latest HCFA-25 form.

(2) If the Medicaid program has been terminated by Federal law or by the State, HCFA uses the *actual* State share. The actual State share is that shown on the State's Statement of Expenditures reports for the last four quarters before the program was terminated.

(c) *Repayment amounts, schedules, and procedures.*—(1) *Repayment amount.* The repayment amount may not include any amount previously approved for installment repayment.

(2) *Repayment schedule.* The number of quarters allowed for repayment is determined on the basis of the ratio of the repayment amount to the annual State share of Medicaid expenditures. The higher the ratio of the total repayment amount is to the annual State share, the greater the number of quarters allowed, as follows:

Total repayment amount as percentage of State share of annual expenditures for Medicaid	Number of quarters to make repayment
2.5 pct. or less.....	1
Greater than 2.5, but not greater than 5.....	2
Greater than 5, but not greater than 7.5.....	3
Greater than 7.5, but not greater than 10.....	4
Greater than 10, but not greater than 15.....	5
Greater than 15, but not greater than 20.....	6
Greater than 20, but not greater than 25.....	7
Greater than 25, but not greater than 30.....	8
Greater than 30, but not greater than 47.5.....	9
Greater than 47.5, but not greater than 65.....	10
Greater than 65, but not greater than 82.5.....	11
Greater than 82.5, but not greater than 100.....	12

(3) *Quarterly repayment amounts.* The quarterly repayment amounts for each of the quarters in the repayment schedule may not be less than the following percentages of the estimated

State share of the annual expenditures for Medicaid:

For each of the following quarters	Repayment installment may not be less than these percentages
1 to 4.....	2.5
5 to 8.....	5.0
9 to 12.....	17.5

(4) *Extended schedule.* The repayment schedule may be extended beyond 12 quarterly installments if the total repayment amount exceeds 100% of the estimated State share of annual expenditures. In these circumstances, paragraph (c)(2) of this section is followed for repayment of the amount equal to 100 percent of the annual State share. The remaining amount of the repayment is in quarterly amounts equal to not less than 17.5 percent of the estimated State share of annual expenditures.

(5) *Repayment process.* Repayment is accomplished through adjustment in the quarterly grants over the period covered by the repayment schedule.

If the State chooses to repay amounts representing higher percentages during the early quarters, any corresponding reduction in required minimum percentages is applied first to the last scheduled payment, then to the next to the last payment, and so forth as necessary.

(6) *Offsetting of retroactive claims.* The amount of a retroactive claim to be paid a State will be offset against any amounts to be, or already being, repaid by the State in installments. Under this provision of the State may choose to:

(i) Suspend payments until the retroactive claim due the State has, in fact, been offset; or

(ii) Continue payments until the reduced amount of its debt (remaining after the offset), has been paid in full. This second option would result in a shorter payment period.

A retroactive claim for the purpose of this regulation is a claim applicable to any period ending 12 months or more before the beginning of the quarter in which HCFA would pay that claim.

Subpart D—Hearings on Conformity of State Medicaid Plan and Practice to Federal Requirements

§ 430.60 Scope.

(a) This subpart sets forth the rules for hearings to States that appeal a decision to disapprove State plan material (under

§ 430.18) or to withhold Federal funds (under § 430.35), because the State plan or State practice in the Medicaid program is not in compliance with Federal requirements.

(b) Nothing in this subpart is intended to preclude or limit negotiations between HCFA and the State, whether before, during, or after the hearing to resolve the issues that are, or otherwise would be, considered at the hearing. Such negotiations and resolution of issues are not part of the hearing, and are not governed by the rules in this subpart except as expressly provided.

§ 430.62 Records to be public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the HCFA Docket Clerk. Inquiries may be made to the Docket Clerk, Hearing Staff, Bureau of Eligibility, Reimbursement and Coverage, 300 East High Rise, 6325 Security Boulevard, Baltimore, Maryland, 21207. Telephone: (301) 594-8261.

§ 430.63 Filing and service of papers.

(a) *Filing.* All papers in the proceedings are filed with the HCFA Docket Clerk, in an original and two copies. Originals only of exhibits and transcripts of testimony need be filed.

(b) *Service.* All papers in the proceedings are served on all parties by personal delivery or by mail. Service on the party's designated attorney is considered service upon the party.

§ 430.64 Suspension of rules.

Upon notice to all parties, the Administrator or the presiding officer may modify or waive any rule in this subpart upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

§ 430.66 Designation of presiding officer for hearing.

(a) The presiding officer at a hearing is the Administrator or his designee.

(b) The designation of the presiding officer is in writing. A copy of the designation is served on all parties.

§ 430.70 Notice of hearing or opportunity for hearing.

The Administrator mails the State a notice of hearing or opportunity for hearing that—

(a) Specifies the time and place for the hearing;

(b) Specifies the issues that will be considered;

(c) Identifies the presiding officer; and

(d) Is published in the Federal Register.

§ 430.72 Time and place of hearing.

(a) *Time.* The hearing is scheduled not less than 30 nor more than 60 days after the date of notice to the State. The scheduled date may be changed by written agreement between HCFA and the State.

(b) *Place.* The hearing is conducted in the city in which the HCFA regional office is located or in another place fixed by the presiding officer in light of the circumstances of the case, with due regard for the convenience and necessity of the parties or their representatives.

§ 430.74 Issues at hearing.

The list of issues specified in the notice of hearing may be augmented or reduced as provided in this section.

(a) *Additional issues.* (1) Before a hearing under § 430.35, the Administrator may send written notice to the State listing additional issues to be considered at the hearing. That notice is published in the Federal Register.

(2) If the notice of additional issues is furnished to the State less than 20 days before the scheduled hearing date, postponement is granted if requested by the State of any other party. The new date may be 20 days after the date of the notice, or a later date agreed to by the presiding officer.

(b) *New or modified issues.* If, as a result of negotiations between HCFA and the State, the submittal of plan amendment, a change in the State program, or other actions by the State, any issue is resolved in whole or in part, but new or modified issues are presented, as specified by the presiding officer, the hearing proceeds on the new or modified issues.

(c) *Issues removed from consideration.*—(1) *Basis for removal.* If at any time before, during, or after the hearing, the presiding officer finds that the State has come into compliance with Federal requirements on any issue or part of an issue, he or she removes the appropriate issue or part of an issue from consideration. If all issues are removed, the hearing is terminated.

(2) *Notice to parties.* Before removing any issue or part of an issue from consideration, the presiding officer provides all parties other than HCFA and the State with—

(i) A statement of the intent to remove and the reasons for removal; and

(ii) A copy of the proposed State plan provision on which HCFA and the State have agreed.

(3) *Opportunity for written comment.* The notified parties have 15 days to submit, for consideration by the

presiding officer, and for the record, their views as to, or any information bearing upon, the merits of the proposed plan provision and the merits of the reasons for removing the issue from consideration.

(d) *Remaining issues.* The issues considered at the hearing are limited to those issues of which the State is notified as provided in § 430.70 and paragraph (a) of this section, and new or modified issues described in paragraph (b) of this section. They do not include issues or parts of issues removed in accordance with paragraph (c) of this section.

§ 430.76 Parties to the hearing.

(a) *HCFA and the State.* HCFA and the State are parties to the hearing.

(b) *Other individuals.*—(1) *Basis for participation.* Other individuals or groups may be recognized as parties if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute.

(2) *Petition for participation.* Any individual or group wishing to participate as a party must, within 15 days after notice of hearing is published in the *Federal Register*, file with the HCFA Docket Clerk, a petition that concisely states—

- (i) Petitioner's interest in the proceeding;
- (ii) Who will appear for petitioner;
- (iii) The issues on which petitioner wishes to participate; and
- (iv) Whether petitioner intends to present witnesses.

The petitioner must also serve a copy of the petition on each party of record at that time.

(3) *Comments on petition.* Any party may, within 5 days of receipt of the copy of the petition, file comments on it.

(4) *Action on petition.* (i) The presiding officer promptly determines whether each petitioner has the requisite interest in the proceedings and approves or denies participation accordingly.

(ii) If petitions are made by more than one individual or group with common interests, the presiding officer may—

- (A) Request all those petitioners to designate a single representative; or
- (B) Recognize one or more of those petitioners to represent all of them.

(iii) The presiding officer gives each petitioner written notice of the decision and, if the decision is to deny, briefly states the grounds for denial.

(c) *Amicus curiae (friend of the court).*—(1) *Petition for participation.* Any person or organization that wishes to participate as amicus curiae must,

before the hearing begins, file with the HCFA Docket Clerk, a petition that concisely states—

- (i) The petitioners' interest in the hearing;
- (ii) Who will represent the petitioner; and
- (iii) The issues on which the petitioner intends to present argument.

(2) *Action on amicus curiae petition.* The presiding officer may grant the petition if he or she finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the issues.

(3) *Nature of amicus participation.* An amicus curiae is not a party to the hearing but may participate by—

- (i) Submitting a written statement of position to the presiding officer before the beginning of the hearing;
- (ii) Presenting a brief oral statement at the hearing, at the point in the proceedings specified by the presiding officer; and
- (iii) Submitting a brief or written statement when the parties submit briefs.

The amicus curiae must serve copies of any briefs or written statements on all parties.

§ 430.80 Authority of the presiding officer.

(a) The presiding officer has the duty to conduct a fair hearing, to avoid delay, maintain order, and make a record of the proceedings. He or she has the authority necessary to accomplish those ends, including but not limited to authority to take the following actions:

- (1) Change the date, time, and place of the hearing after due notice to the parties. This includes authority to postpone or adjourn the hearing in whole or in part. In a hearing on disapproval of a State plan, or State plan amendments, changes in the date of the hearing are subject to the time limits imposed by section 1116(a)(2) of the Act.
- (2) Hold conferences to settle or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the issues.
- (3) Regulate participation of parties and amici curiae and require parties and amici curiae to state their position with respect to the various issues in the proceeding.
- (4) Administer oaths and affirmations.
- (5) Rule on motions and other procedural items, including issuance of protective orders or other relief to a party against whom discovery is sought.
- (6) Regulate the course of the hearing and conduct of counsel.
- (7) Examine witnesses.

(8) Receive, rule on, exclude or limit evidence or discovery.

(9) Fix the time for filing motions, petitions, briefs, or other items.

(10) If the presiding officer is the Administrator, make a final decision.

(11) If the presiding officer is a designee of the Administrator, certify the entire record including recommended findings and proposed decision to the Administrator.

(12) Take any action authorized by the rules in this subpart or in conformance with the provisions of 5 U.S.C. 551 through 559.

(b) The presiding officer does not have authority to compel by subpoena the production of witnesses, papers, or other evidence.

(c) If the presiding officer is a designee of the Administrator, his or her authority pertains to the issues of compliance by a State with Federal requirements, and does not extend to the question of whether, in case of any noncompliance, Federal payments will be denied in respect to the entire State plan or only for certain categories under, or parts of, the State plan affected by the noncompliance.

§ 430.83 Rights of parties.

All parties may:

(a) Appear by counsel or other authorized representative, in all hearing proceedings.

(b) Participate in any prehearing conference held by the presiding officer.

(c) Agree to stipulations as to facts which will be made a part of the record.

(d) Make opening statements at the hearing.

(e) Present relevant evidence on the issues at the hearing.

(f) Present witnesses who then must be available for cross-examination by all other parties.

(g) Present oral arguments at the hearing.

(h) Submit written briefs, proposed findings of fact, and proposed conclusions of law, after the hearing.

§ 430.86 Discovery.

HCFA and any party named in the notice issued under § 430.70 has the right to conduct discovery (including depositions) against opposing parties. Rules 26–37 of the Federal Rules of Civil Procedure apply to such proceedings; there will be no fixed rule on priority of discovery. Upon written motion, the presiding officer promptly rules upon any objection to discovery action initiated under this section. The presiding officer also has the power to grant a protective order or relief to any party against whom discovery is sought

and to restrict or control discovery so as to prevent undue delay in the conduct of the hearing. Upon the failure of any party to make discovery, the presiding officer may issue any order and impose any sanction (other than contempt orders) authorized by Rule 37 of the Federal Rules of Civil Procedure.

§ 430.88 Evidence.

(a) *Evidentiary purpose.* The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues involved in the proceeding. Argument is not received in evidence. It must be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, concerning the party's position and what he or she intends to prove, may be made at hearings.

(b) *Testimony.* Testimony is given orally under oath or affirmation by witnesses at the hearing. Witnesses are available at the hearing for cross-examination by all parties.

(c) *Stipulations and exhibits.* Two or more parties may agree to stipulations of fact. Those stipulations, and any exhibit proposed by any party, are exchanged before the hearing if the presiding officer so requires.

(d) *Rules of evidence.* (1) Technical rules of evidence do not apply to hearings conducted under this subpart. However, rules or principles designed to ensure production of the most credible evidence available and to subject testimony to test by cross-examination are applied by the presiding officer when reasonably necessary.

(2) A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his or her direct examination.

(3) The presiding officer may exclude irrelevant, immaterial, or unduly repetitious evidence.

(4) All documents and other evidence offered or taken for the record are open to examination by the parties and an opportunity is given to refute facts and arguments advanced on either side of the issues.

§ 430.90 Exclusion from hearing for misconduct.

The presiding officer may immediately exclude from the hearing any person who—

(a) Uses disrespectful, disorderly, or contemptuous language or engages in contemptuous behavior;

(b) Refuses to comply with directions; or

(c) Uses dilatory tactics.

§ 430.92 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing are placed in the correspondence section of the docket of the proceeding. These data are not considered part of the evidence or record in the hearing.

§ 430.94 Official transcript.

(a) *Filing.* The official transcripts of testimony, together with any stipulations, briefs, or memoranda of law, are filed with HCFA.

(b) *Availability of transcripts.* HCFA designates an official reporter for each hearing. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not in excess of the maximum rates fixed by the contract between HCFA and the reporter.

(c) *Correction of transcript.* Upon notice to all parties, the presiding officer may authorize corrections that affect substantive matters in the transcript.

§ 430.96 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision constitute the exclusive record for decision.

§ 430.100 Posthearing briefs.

The presiding officer fixes the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law. The presiding officer may also permit reply briefs.

§ 430.102 Decisions following hearing.

(a) *Administrator presides.* If the presiding officer is the Administrator, he or she issues the hearing decision within 60 days after expiration of the period for submission of posthearing briefs.

(b) *Administrator's designee presides.* If the presiding officer is other than the Administrator, the procedure is as follows:

(1) Upon expiration of the period allowed for submission of posthearing briefs, the presiding officer certifies the entire record, including his or her recommended findings and proposed decision, to the Administrator. The Administrator serves a copy of the recommended findings and proposed decision upon all parties and amici, if any.

(2) Any party may, within 20 days, file with the Administrator exceptions to the recommended findings and proposed decision and a supporting brief or statement.

(3) The Administrator reviews the recommended decision and, within 60 days of its issuance, issues his or her own decision.

(c) *Effect of Administrator's decision.* The decision of the Administrator under this section is the final decision of the Secretary and constitutes "final agency action" within the meaning of 5 U.S.C. 704 and a "final determination" within the meaning of section 1116(a)(3) of the Act and § 430.38. The Administrator's decision is promptly served on all parties and amici.

§ 430.104 Decisions that affect FFP.

(a) *Scope of decisions.* If the Administrator concludes that withholding of FFP is necessary because a State is out of compliance with Federal requirements, in accordance with § 430.35, the decision also specifies—

(1) Whether no further payments will be made to the State or whether payments will be limited to parts of the program not affected by the noncompliance; and

(2) The effective date of the decision to withhold.

(b) *Consultation.* The Administrator may ask the parties for recommendations or briefs or may hold conferences of the parties on the question of further payments to the State.

(c) *Effective date of decision.* The effective date of a decision to withhold Federal funds will not be earlier than the date of the Administrator's decision and will not be later than the first day of the next calendar quarter. The provisions of this section may not be waived under § 430.64.

B. In 45 CFR Chapter II, the following technical conforming changes are made:

PART 201—[AMENDED]

§ 201.1 [Amended]

a. In paragraphs (c) and (i), "Social and Rehabilitation Service" is changed to "Family Support Administration".

b. Paragraph (e) is revised to read as follows: (e) "Administration" means the Family Support Administration.

c. Paragraph (f) is revised to read as follows: (f) "Regional Administrator" means the Regional Administrator of the Family Support Administration.

d. In paragraph (h), "VI" is removed, and "XVI, or XIX" is changed to "or XVI (AABD)".

§ 201.2 [Amended]

The term "Service" is changed to "Administration".

§ 201.3 [Amended]

a. In the introductory text, in the first sentence "services to aged blind or disabled (title VI)" is removed; "or" is inserted immediately after "(Title XIV)"; and "or medical assistance (Title XIX)" is removed.

b. In paragraphs (c), (e), and (f), the phrase "or with respect to the medical assistance program under title XIX, Regional Medicaid Director" is removed.

c. The term "Service" is changed to "Administration", and the term "Commissioner" is changed to "Administrator", wherever they appear.

§ 201.4 [Amended]

a. The term "Commissioner" is changed to "Administrator".

b. In the first sentence, the phrase "or with respect to the medical assistance program under title XIX, Regional Medicaid Director" is removed.

§ 201.5 [Amended]

a. In the introductory text, the third sentence, beginning "Progressive reductions * * *" is removed.

b. In paragraph (a)(1), in the third sentence, "Social and Rehabilitation Service" is changed to "Family Support Administration", and the phrase "Attention: Finance Division, Washington, D.C. 20201" is removed.

§ 201.6 [Amended]

a. In paragraph (a)(1), "602," is removed, and "1602, or 1902" is changed to "or 1902".

b. In paragraph (b), "VI" is removed, and "(AABD)" is inserted immediately after "XVI".

c. In paragraph (c), "Service" is changed to "Administration".

§ 201.10 [Amended]

In paragraph (a), the term "Service" is changed to "Administration".

§ 201.13 [Amended]

In paragraph (a), in the fourth sentence, "Service" is changed to "Administration".

§ 201.14 [Amended]

a. The term "Commissioner", wherever it appears, is changed to "Administrator".

b. In paragraph (a), introductory text, "VI" and "XIX," are removed.

c. Paragraphs (a)(4) and (a)(5) are removed and reserved.

d. In paragraph (a)(6), "603," and "1903," are removed.

e. In paragraph (b)(1), the phrase "or with respect to the medical assistance program under title XIX, the Administrator, Health Care Financing Administration or his designee," is removed.

f. In paragraphs (c)(1) and (d), "or with respect to the medical assistance program under title XIX, Regional Medicaid Director" is removed whenever it appears.

§ 201.15 [Amended]

a. The term "Commissioner", wherever it appears, is changed to "Administrator".

b. In paragraph (a), "or XIX" is removed and "XVI," is changed to "or XVI (AABD)".

c. In paragraph (c)(1), the phrase "or with respect to the medical assistance program under title XIX, the Administrator, Health Care Financing Administration, or his designee (hereinafter collectively referred to as the Administrator)" and in paragraph (c)(5) the phrase "or Regional Medicaid Director" are removed, and in paragraph (c)(1), the last word is changed from "Service" to "Administration".

§ 201.66 [Amended]

a. In paragraph (a), "XVI, (AABD), or XIX" is changed to "or XVI (AABD)".

b. In paragraph (a)(2), "Regional Commissioner" is changed to "Regional Administrator".

c. In paragraph (b)(2), "SRS-OA-25", wherever it appears, is changed to "State Agency Statement of Financial Plan for AFDC".

d. In paragraph (b)(3), "(SRS-OA-41)" is removed.

e. In paragraph (b)(7)(ii), in the concluding paragraph, "Service" is changed to "Administration".

PART 204—GENERAL ADMINISTRATION—STATE PLANS AND GRANT APPEALS

The part heading for Part 204 is revised to read as set forth above.

§ 204.1 [Amended]

a. The number "VI," is removed.

b. The phrase "XVI, or XIX" is changed to "or XVI (AABD)".

c. The term "Social and Rehabilitation Service" is changed to "Family Support Administration".

§ 204.2 [Amended]

The term "Social and Rehabilitation Service" is changed to "Family support Administration". The term "Service", wherever it appears, is changed to "Administration".

§ 204.4 [Amended]

a. In paragraph (a), the parenthetical cross-reference "(as set forth in § 16.5(a)(1) through (4) of this title)" is changed to "(as set forth in Part 16, Appendix A, section C of this title)"; the phrase "after the effective date of this section," is removed; and "Social and

Rehabilitation Service" is changed to "Family Support Administration".

b. In paragraph (b)(1), introductory text, in the first sentence, the first cross-reference "in § 16.5(b)" is changed to "§ 16.3(b) and (c)"; the second cross-reference § 16.5(a)(1) through (4) of this title" is changed to "Part 16, Appendix A, section C of this title"; "Social and Rehabilitation Service" is changed to "Family Support Administration"; and the last four words "and may request consideration" are removed.

c. Paragraph (b)(1) (i) and (ii) are removed and the second sentence of paragraph (b)(1)(i) introductory text is amended by removing the colon at the end and adding "the Grant Appeals Officer grants an extension of time for good cause."

d. In paragraph (b)(2), the sentence beginning "Except in the case * * *" is revised to read: "The grantee shall attach to his submission a copy of the agency notification specified in § 16.3(b) of this title."

e. In the heading of paragraph (c), "Service" is changed to "Administration".

f. In paragraph (c)(1)(ii), the parenthetical statement "(or 45 days in the case of a determination described in the last sentence of § 16.5(b) of this title)" is removed.

PART 205—[AMENDED]

§ 205.5 [Amended]

In paragraph (a), "VI", is removed, and "XVI, or XIX" is changed to "or XVI (AABD)".

§ 205.10 [Amended]

In paragraph (a) introductory text, "(AABD)" is inserted immediately after "XVI".

§ 205.35 [Amended]

In the introductory text, "Social Security Administration (SSA)" is changed to "Family Support Administration (FSA)".

§ 205.37 [Amended]

a. In the section heading, the term "Social Security Administration (SSA)" is changed to "Family Support Administration (FSA)".

b. The initials "SSA", wherever they appear, are changed to "FSA".

§ 205.38 [Amended]

The initials "SSA", wherever they appear, are changed to "FSA".

§ 205.40 [Amended]

In paragraph (b) introductory text, "(AABD)" is inserted immediately after "XVI", "Commissioner", wherever it

appears, is changed to "Administrator", and in paragraph (b)(3) introductory text, "Commissioner's" is changed to "Administrator's".

§ 205.42 [Amended]

In paragraph (b), in the definition of "We," "us," or "our", "Social Security Administration" is changed to "Family Support Administration".

§ 205.43 [Amended]

In paragraph (b), in the definition of "We," "Social Security Administration" is changed to "Family Support Administration".

§ 205.44 [Amended]

In paragraph (b), in the definition of "We," "us," or "our", "Social Security Administration" is changed to "Family Support Administration".

§ 205.190 [Amended]

In paragraph (a)(2) introductory text, "SSA, OFA" is changed to "FSA, OFA".

PART 211—[AMENDED]

§ 211.1 [Amended]

In paragraph (d), "Social and Rehabilitation Service" is changed to "Family Support Administration".

PART 212—[AMENDED]

§ 212.1 [Amended]

a. Paragraph (d) is revised to read:
(d) The term "Administration" means the Family Support Administration, Department of Health and Human Services.

b. In paragraph (e), "Social and Rehabilitation Service" is changed to "Family Support Administration".

§ 212.4 [Amended]

The term "Service", wherever it appears, is changed to "Administration".

§ 212.5 [Amended]

The term "Service", wherever it appears, is changed to "Administration".

§ 212.6 [Amended]

The term "Service" is changed to "Administration".

PART 213—[AMENDED]

§ 213.2 [Amended]

The initials "SRS" are changed to "FSA".

§ 213.5 [Amended]

In paragraph (a), the initials "SRS" are changed to "FSA".

§ 213.15 [Amended]

In paragraphs (b)(2) and (c)(1), "SRS" is changed to "FSA".

PART 282—[AMENDED]

§ 282.30 [Amended]

The term "Fathers" is changed to "Parents".

(Catalog of Federal Domestic Assistance Programs No. 13.714, Medical Assistance Programs)

Dated: September 25, 1987.

William L. Roper,

Administrator, Health Care Financing Administration.

Approved: January 25, 1988.

Otis R. Bowen,

Secretary.

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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 507 and 552

[Acquisition Circular AC-87-1, Supplement No. 3]

Comparison of Retirement Costs Under OMB Circular A-76

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Cancellation of temporary regulation.

SUMMARY: This supplement cancels General Services Administration Acquisition Regulation, Acquisition Circular AC-87-1, that temporarily implemented the Office of Management and Budget (OMB) Transmittal Memorandum No. 4 which revised OMB Circular A-76 procedures for calculation and comparison of retirement costs.

EFFECTIVE DATE: The change in retirement costing procedures was effective July 13, 1988, and applies to all cost comparisons in process where the Government's in-house estimate had not been opened.

FOR FURTHER INFORMATION CONTACT: Ms. Shirley Scott, Office of GSA Acquisition Policy and Regulations, Washington, DC 20405 (202) 523-4765.

SUPPLEMENTARY INFORMATION: Public Law 100-366 amended the "Federal Employees' Retirement System Act of 1986" to require that employer paid retirement costs for the Federal

Retirement System and the contractor be included in the A-76 cost comparison process. Therefore, OMB's Circular A-76 transmittal Memorandum No. 4, which provided procedures for calculation and comparison of retirement costs, has been rescinded.

List of Subjects in 48 CFR Parts 507 and 552

Government procurement.

PARTS 507 AND 552—[AMENDED]

1. The authority citation for 48 CFR Parts 507 and 552 continues to read as follows:

Authority: 40 U.S.C. 486(c).

2. 48 CFR Parts 507 and 552 are amended by the following supplement to Acquisition Circular AC-87-1:

General Services Administration Acquisition Regulation—Acquisition Circular AC-87-1, Supplement No. 3

September 13, 1988.

To: All GSA contracting activities.

Subject: Comparison of retirement costs under OMB Circular A-76.

1. **Purpose.** This supplement cancels General Services Administration Acquisition Regulation Acquisition Circular AC-87-1 which provided for use of solicitation provision 552.207-71, Social Security (except Medicare) and Thrift/Profit Sharing Plan Contributions, in A-76 solicitations.

2. **Background.** Public Law 100-366 amended the "Federal Employees' Retirement System Act of 1986" to require that employer paid retirement costs for the Federal Employees Retirement System and the contractor be included in the A-76 cost comparison process. Therefore, the Office of Management and Budget's Circular A-76 Transmittal Memorandum No. 4, which provided procedures for calculation and comparison of retirement costs, has been rescinded.

3. **Effective date.** The change in retirement costing procedures was effective July 13, 1988, and applies to all cost comparisons in process where the Government's in-house cost estimate had not been opened before that date.

Richard H. Hopf, III,

Associate Administrator for Acquisition Policy.

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