Defense Nuclear Agency

DNA001, 8Z—Defense Nuclear Agency, Attn.: OAAM, Washington, DC 20305–1000

DNA002, ON—Hqtrs. Field Command, Defense Nuclear Agency, Attn.: Office of Procurement, Kirtland AFB, NM 87115–5000

DNA004—Defense Nuclear Agency, Armed Forces Radiobiology Research Institute, Bethesda, MD 20814–5145

Miscellaneous Defense Activities

MDA902—American Forces Radio and Television Service, 10888 La Tuna Canyon Road, Sun Valley, CA 91352–2058

MDA903, F7—Defense Supply Service—Washington, Room 1D245, The Pentagon, Washington, DC 20310–5200

MDA904, BE—Maryland Procurement Office, Attn.: P&P Directorate, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000

MDA905, B4—Uniformed Services, University of the Health Sciences, 4301 Jones Bridge Road, Bethesda, MD 20814–4799

MDA906—Office for the Civilian Health & Medical Program of the Uniformed Services (CHAMPUS), Aurora, CO 80045–6900

MDA907—P&C Office, Menwith Hill Station, APO, New York, NY 09210

MDA908, F3—Virginia Contracting Activity, P.O. Box 46353, Washington, DC 20050–6563

MDA946—Procurement & Contracting Office, Attn.: DOD/OSD/WHS, Rm 1D198, The Pentagon, Washington, DC 20310–1155

MDA970—Defense Test & Evaluation Support Agency, 4308 Carlisle N.E., Suite 101, Albuquerque, NM 87107

MDA972, WS—DARPA Contract Management Office, 1400 Wilson Blvd., Arlington, VA 22209–2309

Strategic Defense Initiative Organization

SDI084—Strategic Defense Initiative Organization, Attn.: SDIO/CP, Washington, DC 20301–7100

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

RIN 1018–AA93

Migratory Bird Permits; Permit Exceptions for Captive-Reared Mallards

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule finalizes the Fish and Wildlife Service's (Service) proposal to require the use of nontoxic shot on game preserves, in field trials and during bona fide dog training activities when taking captive-reared mallards. This action is being taken to correct the regulatory anomaly that, heretofore, has allowed lead shot to be used for taking captive-reared mallards in nontoxic (steel) shot zones. The effective date of this requirement has been delayed until the 1990–91 hunting season.

EFFECTIVE DATE: September 1, 1990.

FOR FURTHER INFORMATION CONTACT: Dr. Byron K. Williams, Acting Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Room 634, Arlington Square, 4401 Fairfax Drive, Arlington, Virginia 22203, or write Director (FWS/MBMO), Mail Stop 634-Arlington Square, 18th & C Streets NW., Washington, DC 20240 (703/358–1714).

SUPPLEMENTARY INFORMATION:

Background

In 1987, it was brought to the attention of the Service by several States that existing exemptions to take captive-reared mallards in nontoxic shot zones with lead shot are inconsistent with the goal of the Service to eliminate lead poisoning in waterfowl and bald eagles. These situations exist because the provisions of this part 21 (§ 21.13) are specifically exempted from the provisions of part 20. In the rule titled "Zones in which lead shot will be prohibited for the taking of waterfowl, coots and certain other species in the 1988–89 season" (52 FR 47428), the Service proposed that § 21.13, Permit exceptions for captive-reared mallards, be changed to make it subject to the requirements of § 20.108 of part 20, Nontoxic shot zones. The proposed rule schedule would have required shooting preserves within existing nontoxic shot zones to convert simultaneously in the 1988–89 season. Other shooting preserves would have been required to convert in the 1989–90, 1990–91 and 1991–92 seasons according to the appendix N schedule of the 1986 Supplemental Environmental Impact Statement on the Use of Lead Shot for Hunting Migratory Birds in the United States (SEIS).

This proposal was based on the knowledge that shooting preserve areas, including "tower shoot" operations, usually host wild waterfowl and raptors at one time or another; the birds are then exposed to the spent shot. Also, when lead shot is used to take captive-reared mallards during field trials or bona fide dog training activities, it results in the deposition of spent shot and potential lead exposure for wild migratory birds. Application of § 20.108 to shooting preserves and these other activities would eliminate additional sources of lead shot and potential lead poisoning mortality for waterfowl and other migratory birds. In fact, the 1986 SEIS did not anticipate waterfowl hunting lead shot enclaves continuing in existence. The nationwide strategy to convert totally to nontoxic shot to eliminate lead poisoning in migratory birds was implemented on the basis that *all* hunting of waterfowl, coots and certain other species would be done with nontoxic shot.

Because of the known interest and paucity of comments received when the proposed rule comment period closed on January 13, 1988, the Service published a clarification, correction and comment period reopening in the Federal Register on March 25, 1988 (53 FR 9781). The reopening notice clarified the Service proposal by pointing out the following:

- The section proposed to be revised deals only with captive-reared mallards that are taken under the permit requirements of the Federal regulations.
- This proposal would not change the existing regulations restricting hunting of any other captive-reared species, or use of other captive-reared species in dog trials or dog training. The subsection to which this amendment will be added begins "Captive-reared and properly marked mallard ducks * * * may be acquired * * * and disposed of by any person without a permit, subject to the following conditions * * *" (50 CFR 21.13, Permit exceptions for captive-reared mallards.)
- This regulation is not aimed at bona fide dog training or trials where it is apparent that no one is attempting to take migratory birds. While the words being amended might appear to relate to such trials, the section into which they fit related only to the taking of captive-reared mallards.
- The proposed revision is aimed at establishing a uniform zone requirement for requiring nontoxic shot to take waterfowl, thus eliminating the potential for wild waterfowl and bald eagles to be lead-poisoned from ingestion of lead shot. This regulatory change will ensure that when a county is phased-in for nontoxic shot use the "game farms" or bona fide dog training or field trial operations within that county that are shooting captive-reared mallards are phased-in at the same time.
- Among these other objectives, this proposal would provide regulatory

consistency across nontoxic shot zones and, therefore, consistency in enforcement.

Additionally, the Service pointed out that the taking of wild waterfowl on game preserves has been and will continue to be subject to the nontoxic shot requirement of the county(ies) in which they are located and other regulations of part 20. Likewise, any taking of wild waterfowl during dog training activities or during field trial operations remains subject to *all* Part 20 regulations.

Summary of Comments

Over the period December 14, 1987, to April 25, 1988, when the last comment period closed, approximately 103 letters of comment representing about 99 commentors were submitted specifically on the § 21.13 proposal. Of this number, 10 States provided 15 letters of comment, 82 letters were received from private individuals or owners on behalf of shooting preserves, 3 letters were received from public interest organizations and 3 from members of Congress. The States responding largely supported the proposal; virtually all of the other comments submitted were in opposition to the proposal.

State Comments

Of those potentially affected by this proposal, only 10 State wildlife management agencies provided written comments. Of the 10, only a single State totally opposed the proposal. Most, if not all, of the nonresponding States were contacted by phone to determine if the proposed rule had been received and to obtain oral comments. The States had been sent two separate mailings of the Service's intent to promulgate this rule. Those States not commenting are considered to have provided passive concurrence for the proposal. Written comments of State wildlife management agencies are as follows:

California

The California Department of Fish and Game (Department) advised that Licensed Domesticated Migratory Game Bird Shooting Clubs in that State are required to hunt in a prescribed manner that includes a prohibition against shooting over water. For this reason, the Department argues that no threat of lead poisoning exists for wild waterfowl and, therefore, the proposed regulation is inappropriate to such clubs in California.

Colorado

The Colorado Division of Wildlife (Division) provided general support for the proposal but noted what is perceived as a problem with its inflexibility. The Division agreed that steel shot for captive-reared mallards should become mandatory on areas where spent shot would be scattered in water or wetland areas, utilized by wild waterfowl, or even on adjacent upland areas, including croplands, where wild waterfowl normally feed. However, the Division cited situations where facilities are specifically constructed for field trial or tower-to-pond shooting of captive-reared mallards that are removed from wetlands utilized by wild waterfowl. The Division maintains that these areas that are seldom, if ever, utilized by wild waterfowl should be subject to a process that could provide exemptions to the steel shot requirement on site-by-site basis.

Delaware

The Delaware Division of Fish and Wildlife (Division) stated that nontoxic shot and other applicable Federal regulations should apply to the taking of all waterfowl whether in a "game farm" environment, a regulated shooting area, or elsewhere, because there is a potential to expose wild waterfowl to lead poisoning in most of these areas. However, the Division did not support requiring nontoxic shot for dog training and during field trials outside of wetlands habitat because these areas are open to other forms of hunting where lead is customarily used.

Florida

The Florida Game and Fresh Water Fish Commission supported the proposal, without qualification, to require nontoxic shot for taking captive-reared mallards.

Indiana

The Indiana Department of Natural Resources, Division of Fish and Wildlife (Division) noted a nonobjection to the proposal to require the use of nontoxic shot for taking captive-reared mallards. The Division noted that pen-reared mallards are shot over water and whether it is a pen-reared or wild duck makes no difference in respect to lead being deposited in a wetland.

Kansas

The Kansas Department of Wildlife and Parks (Department) responded that it supports the proposal to require the use of nontoxic shot to take captive-reared mallards. The Department noted that nontoxic shot rules should apply equally to all hunting of waterfowl as a deposit of lead occurs whether fired at wild or captive-reared waterfowl.

Maryland

The Maryland Department of Natural Resources responded that it strongly supports the proposed rule and cited as reasons for doing so: the decoy effect of captive-reared mallards that increases the risk to wild waterfowl—ducks and geese; public relations problems with regard to allowing a segment of the hunting community to use lead shot while others are required to use nontoxic shot; law enforcement problems associated with identifying where nontoxic shot is or is not required; and the problem of continuing exposure of bald eagles to waterfowl containing embedded and/or consumed lead shot.

Minnesota

The Minnesota Department of Natural Resources responded that it favors the requirement to use nontoxic shot for taking captive-reared mallards on shooting preserves and similarly affected areas.

New York

The New York Department of Environmental Conservation (Department) advised that few, if any, of shooting preserve operators in New York were aware of this proposed rule until they were contacted by the State in the second comment period. Thus, the Department requested that "tower shoot" operations be exempted from having to shoot nontoxic shot for 1988–89 only, in order to avert financial problems related to inventories of lead shot that were purchased in anticipation of needs this current season.

Texas

The Texas Parks and Wildlife Department (Department) requested a delay on implementation of this rule until the last year of the nationwide phase-in. This delay of implementation was requested to allow acquisition of specific information concerning the use and impact of lead shot on shooting resorts in Texas.

Issues identified in this group of official State comments, such as deferral of the effective date, exemptions for "tower shoots," etc., are addressed later in this rule, with those of the general public.

Other Comments

As set out above, 88 letters of comment were received from individuals and organizations other than State wildlife management agencies. Public interest organizations submitting comments on the proposals to require nontoxic shot for taking captive-reared

mallards on shooting preserves are the International Shooting and Hunting Alliance (ISHA), the National Rifle Association (NRA), the National Wildlife Federation (NWF) and the Wildlife Legislative Fund of America (WLFA); the NWF supported, and the others opposed, the proposal.

The ISHA stated that the proposal justification is not supported by even a "* * * minimum of factual data or biological information." The ISHA disagreed with the manner in which the justification for the strategy to phase out lead shot nationwide was applied to this proposal because the conditions for lead poisoning to impact wild waterfowl, as set out by the Bellrose Report, are not met. Too, the ISHA submits that the Service abandoned the logical and justifiable "hot spot" approach in considering the use of nontoxic shot "* * * because of ease of law enforcement, unwillingness to allocate personnel and funds to ascertain geographical areas where nontoxic shot was necessary and, quite obviously, bowing to political pressure from the anti-sportsmen community." The ISHA also stated that, despite the disclaimer, no one would be able to use captive-reared mallards for field trials or dog training as "taking" does, in fact, take place. This group also requested a public hearing to provide a record upon which to act.

The NRA is opposed to the proposed rule and urged that private shooting preserves continue to be exempted from the nontoxic shot requirements. The NRA stated that application of nontoxic shot requirements to shooting preserves may result in fewer captive-reared waterfowl being produced and released without any potential for lead poisoning impacts on waterfowl and/or bald eagles. The NRA also stated that many shooting preserves are not visited by wild waterfowl at any time and, thus, lead shot use does not pose a threat to wild waterfowl and/or bald eagles. Lastly, this group stated that in all likelihood less excise taxes and permit fees will be collected because many thousands of captive-reared mallards are raised and harvested than would otherwise be the case if nontoxic shot was required, which would ultimately work to the detriment of the resource.

The NWF strongly supported the proposed rule, stating that "[t]here is no biological reason to assume that lead shot incidental to the covered activities would be any less susceptible to ingestion by waterfowl than shot spent pursuant to the taking of wild waterfowl." The NWF stated that, in this regard "* * * steel shot regulations correctly make no distinction between the taking of wild waterfowl in uplands or wetlands since there is no evidence to suggest that waterfowl or eagles are immune from the effects of ingested or embedded lead shot in upland locations." Further, the NWF stated that the line should logically be drawn around the target species rather than create an enforcement problem associated with attempting to make distinctions between "waterfowl habitat" and wetlands. Too, the NWF cited the anomaly with regard to the exception created for captive-reared mallards by § 21.13 and the unfair situation that further exempting shooting preserves would create for hunters that have no access to such areas and the responsibility that all hunters should share to "* * * pursue their sport in a manner that conserves America's waterfowl and endangered species for the enjoyment of future generations." Finally, the NWF stated that the proposal is viewed by that group as an important component of the nationwide conversion to steel shot.

The WLFA questioned the basis for the decision to effect a nationwide ban on the use of lead shot for waterfowl and coot hunting by the 1991–92 season, and reiterated their support for the "hot spot" approach to the lead poisoning problem. The WLFA then specifically protested the proposed rule on the grounds that it is being done for the convenience and ease of the Service, charging that it is an unwarranted intrusion on private activities and is being done at the expense of legitimate private interests. The WLFA asked that the requirement be eliminated.

The Service also received comments on the proposed rule from one member of the United States House of Representatives and two United States Senators.

The House member stated that the exemption for shooting preserves should be retained on the basis that the exposure of wild waterfowl to lead is minimal because of the limited amount of hunting that occurs on a limited number of shooting preserves. The House member also stated a common objection to nontoxic shot rules that there is still a great deal of controversy and argument in the scientific community regarding the actual overall effect of lead shot on the waterfowl population. Further, shooting preserves are not open to the general public and most of these birds are raised specifically for the purpose of sport hunting.

One Senator urged the Service to take a closer look at the proposed rule, and to leave intact the exemption for privately raised waterfowl on game farms on the basis that the proposal eliminates the exemption wholesale without any regard for the particular circumstances under which a game preserve shoots captive-reared mallards. Further, the Senator stated that some game preserves arrange their shoots such that no shooting occurs over water or where mallards feed, and that the proposal contained no factual data to support the assertion that the exemption should be eliminated.

The other Senator requested that an alternative be developed to preserve options for lead shot usage and to ensure that wild migratory waterfowl would be unlikely to ingest spent lead pellets.

Sixty-five of the letters received on this issue represent shooting preserve interests in the State of New York. Fourteen letters were received from a scattering of other States, including Illinois (1), Iowa (2), Louisiana (1), Minnesota (1), Missouri (1), South Carolina (2), Texas (4), Virginia (1) and Wisconsin (1). Three letters were received from the District of Columbia. Of the 65 New York letters, 16 are from members of the State legislature and offer two themes. One theme is that preserves not shooting over water areas do not expose migratory birds (waterfowl) to lead poisoning and should be exempted. The other theme is that States should be given regulatory authority to allow preserves exemptions on a case-by-case basis. Many, if not most, of the other New York responses and the 17 from the other States and the District also contain these two themes, and expand the bases for objection by citing other factors.

Although the exact manner in which the two themes are expressed varies somewhat from letter group to letter group, the following is representative of the comments received:

> * * * we hunt over dry land, are not part of the flyway and are never visited by migratory wild birds, it is hard to see how the application of the proposed amendment * * * would be consistent with the intent of the steel shot regulations.
>
> If the amendment is approved * * * we request that the states in which the affected hunting preserves exist be granted the authority to permit exceptions.

Other factors injected into the arguments against this requirement by those commenting vary considerably; some are not relevant to this proposed rulemaking and will not be addressed here because they have been responded to in earlier nontoxic shot zone rulemakings. Commentors should refer

to the following sources for responses to comments not addressed in this final rulemaking. (References are to the pertinent portions of the Supplemental Environmental Impact Statement on the Use of Lead Shot for Hunting Migratory Birds in the United States (1986) and the final rulemaking for the 1986–87 nontoxic zones (51 FR 31429; September 3, 1986).)

- Arguments against the lead shot-lead poisoning connection in waterfowl and bald eagles, including situations involving shooting over fields and over deep water, observers noting absence of carcasses, perceived documentation deficiencies, etc. (see, for example, Issues 1, 2, 7 and 8 and chapter III of the SEIS);
- Relative merits of the "hotspots" approach vs. the current phase-in strategy (see, for example, Issue 5 and chapters II and IV of the SEIS);
- Crippling and shooting performance of lead vs. steel shot (see, for example, Issue 12 and chapter III, page 86, of the SEIS);
- Cost of steel shot vs. lead shot and availability of steel shot (see, for example, Issue 14 and chapter III, page 90, of the SEIS);
- Capability of steel shot with weapons and safety (see, for example, Issue 13 and chapter IV, pages 11–15, of the SEIS);
- General allegations of arbitrariness in Service actions to eliminate lead poisoning as a mortality factor in waterfowl and coot (see, for example, Issue 3);
- Enforcement concerns (See chapter IV, page 57, of the SEIS); and
- Finding a suitable nontoxic alternative to lead (see, for example, Issue 14 and chapter III, page 90, of the SEIS).

Relevant Issue Identification and Responses

After review of the letters of comment provided to the Service on this proposal, a relatively few relevant common issues emerge. The following is an identification of those relevant common issues raised by commentors and the Service's response to each. Two of those identified, the "themes" mentioned earlier, predominate among the comments submitted and are addressed first as issues 1 and 2.

Issue No. 1: Although expressed in various ways, the essence of this concern is that in the more controlled shooting situations, i.e., "tower shoots," there is little or no potential for exposing wild migratory birds to spent lead shot and consequent lead poisoning.

Response: The Service recognizes that there exists a spectrum of shooting preserve types, from the wild bird/natural habitat conditions on one end to the captive-reared bird/tower-pond shoots on the other; there is also a concomitant spectrum of potential for spent shot exposure. However, even for the "tower shoots," it is virtually impossible to ensure that no exposure to spent lead shot results for wild waterfowl and raptors. Most of those commenting referenced only that the risks were minimal or nonexistent for wild waterfowl. Raptors are an important part of the overall lead shot-lead poisoning equation; bald eagles were a primary consideration in the litigation that resulted in adoption of the nationwide lead shot ban strategy.

Wild waterfowl are attracted to shooting preserves because of the "decoy effect" and/or because "tower shoot" ranges ordinarily include a wetland collection point for the flighted birds. Raptors are attracted to debilitated birds on or off preserves that have embedded and/or ingested shot because of the vulnerability resulting.

Too, it is not necessary for raptors to visit the shooting area to be exposed to ingested and/or embedded lead shot. One commentor pointed out that the club, to which he belongs, raises 25,000 mallards for "tower shoots" and, of that number, 10–15 percent are lost to the wild. Others cited losses of captive-reared birds to the wild at their clubs but stated that it was a positive factor because it supplemented wild populations. Despite the lack of evidence that released or escaped captive-reared mallards are benefiting wild populations of mallards in any significant way, captive-reared mallards undoubtedly transport imbedded or ingested lead shot that can be ingested by bald eagles and other predators remotely from the game preserves.

Issue No. 2: Authority should be delegated to the individual States to certify qualified shooting preserves to be nonproblem lead shot-lead poisoning areas, on a case-by-case basis.

Response: In light of the information presented here and elsewhere in these issues and responses, it should be apparent that the problem is not as simple as visiting game preserves and certifying that problems with lead shot-lead poisoning do not exist on-site because the lead problem is in all probability not that obvious on-site, spatially or temporally, and can be exported off-site as well. Lead poisoning problems traditionally are not readily identified or believed by the casual observer because of the nature of the illness. There are also considerable problems associated with establishing standards/definitions for what does or does not constitute a problem and the administrative burdens associated with inspection, certification and enforcement. Most importantly, exempting certain areas from nontoxic shot requirements is a significant departure from the strategy adopted to eliminate lead poisoning and does not treat the problem evenheandedly. Too, no responding States have suggested that the problem be resolved on the basis that they be empowered to certify game preserves as lead shot-lead poisoning nonproblem sites.

Issue No. 3: The proposal justification is not supported by factual data/biological information.

Response: Although the charges made are much broader than this proposal and are largely answered in the references noted earlier for nonrelevant issues, the Service believes a general response is appropriate. As previously stated, the purpose of this rule is to correct an anomaly existing under the current regulations relating to nontoxic shot requirements. The justification for this action is the same justification presented in the 1986 Supplemental Environmental Impact Statement on the Use of Lead Shot for Hunting Migratory Birds in the United States for implementing a nationwide ban of lead shot for hunting waterfowl. The intent continues to be to cover all hunting activities involving waterfowl, coots and certain other species. (For the purposes of the Migratory Bird Treaty Act, as amended (16 U.S.C. 703 *et seq.*; 40 Stat. 755), captive-reared mallards are migratory waterfowl and subject to Federal regulation.)

It is also important to this discussion to note that a major stimulus for the action to phase out nationwide the use of lead shot for waterfowling is the *NWF* vs. *Hodel* court decision of 1985 (Civ. No. 585–0837 EJG). In this decision, the court found, on the basis of the factual data/biological information, that a lead poisoning problem does exist and that the Department of the Interior had not responded to this problem commensurate with its statutory responsibilities. Since the 1985 decision, the Court has on two separate occasions relied upon that same factual data/biological information to support the Service's actions to eliminate lead poisoning in migratory birds through the cessation of lead shot use for waterfowling.

Issue No. 4: Game farm mallards do not have lead poisoning problems, therefore, lead poisoning cannot be a problem for wild waterfowl or bald eagles; there are no waterfowl and/or eagles in the vicinities of some of the

preserves; wild waterfowl and eagles are kept away from the preserves by all the activities; etc.

Response: Some of the comments provided on this issue were somewhat contradictory. A game preserve operator pointed out that lead poisoning was recognized as a problem for game farm mallards years ago and, therefore, it is in the best interests of the game preserves to ensure that the lead shot does not fall into lakes and streams where feeding occurs. Others stated that the lead shot could not conceivably cause lead poisoning because it is deposited in upland areas away from the flight terminus—usually a pond. Others readily agreed that the lead shot does reach areas where it is accessible to wild and captive-reared waterfowl but stated that lead poisoning has never been noted in the captive-reared birds that utilize the pond areas for as long as 9 months out of the year. Assurances were also given that some of these areas were not within any flyway, and are not frequented by bald eagles.

For captive-reared waterfowl, there are probably few studies illustrating the lead risk. One such study of Hungarian mallards (Salyi et al. 1987) showed an associated decreased flying ability and wing and leg paralysis from physiological damage after ingestion of lead shot in the shooting area. In a recent (1988) radiological evaluation of captive-reared mallards shot in an upland area at Winchester's Nilo Farms, fully 12 percent of the birds had ingested lead shot although that "tower" shooting operation had been steel-only for 2 years.

As captive-reared mallards return overland to the release site from the flight terminus there is ample opportunity to ingest shot when picking up grit for the gizzard. Thus, the fact that ponds at the flight terminus are not shot-over may not preclude captive-reared mallards from ingesting spent lead shot. Certainly, many do carry embedded shot.

The concept of a "flyway" can be misunderstood. Although the number of birds passing through a given area in the north may be quite small in comparison to that of a comparably-sized area in the south, both are a part of a "flyway." All of the States of the continguous States and Alaska are part of a "flyway." Eagles and other raptors also have migratory routes, "flyways," that may bring them to the vicinities of game preserves on a seasonal basis. However, their absence in a given area may mean only that bald eagle recovery there has not been as successful as it should be. Although bald eagle recovery is very encouraging in some parts of the United States, there are large portions of the historical range that are still unused or the numbers there are still below established recovery goals. The use of lead shot for captive-reared and wild waterfowl shooting is clearly inimical to the long-term recovery objectives for bald eagles.

Issue No. 5: Two concerns addressed in this single response relate to the charges that the proposal totally eliminates lead shot use from game preserves and is a "foot-in-the-door" to require nontoxic shot for taking other species.

Response: As stated earlier, the reopening **Federal Register** notice of March 25, 1988, explains that the proposal is restricted to § 21.13 of 50 CFR, Permit exceptions for captive-reared mallards, and does not change the existing regulations restricting hunting of any other captive-reared species, or use of other captive-reared species in dog trials or dog training. The implementation of nontoxic shot zones affects only the taking of waterfowl, coots and certain other species—"certain other species" referring to species taken in an aggregate with waterfowl or coots. Thus, the use of lead shot is not disallowed for taking other game preserve species that would otherwise be allowed by Federal and/or State regulations. The regulation change being implemented still allows shooting captive-reared mallards over water areas, it simply requires that it be done with nontoxic shot.

There are currently no data available that suggest a necessity to expand a nationwide requirement for nontoxic shot to other species of migratory birds. States may be, and sometimes are, more restrictive in their regulations to take other species (migratory and nonmigratory) in instances where there are lead poisoning problems.

One person commenting on the upland game bird aspect of this situation remarked that it is illogical to require nontoxic shot for captive-reared mallards and not pheasants when on preserves both may be hunted in the same areas. States customarily have primary authority for managing upland game birds. It would be a State's prerogative to require nontoxic shot for pheasants and other upland game species except where Federal lands involve a cooperative effort by the State and the managing Federal agency. In this regard, on Service managed lands, the Service is cooperating with the States to require the use of nontoxic shot to hunt pheasants and other upland game species in wetlands. Some States have taken the initiative to require nontoxic shot on all State-regulated hunting areas.

Issue No. 6: Steel shot is not compatible with some double barreled shotguns used by members of game preserves; game preserves are the last areas where the expensive, "classic" American and European double guns may be used for waterfowling because of the exemption there for lead shot.

Response: The Service has consistently stated to waterfowlers and other members of the interested public that, in the process of converting the nation from lead shot to steel shot for waterfowl and coot hunting to eliminate lead poisoning in migratory birds, there are shotguns having thin-walled or soft steel barrels that likely could not be used with steel shot. Nevertheless, the Service has not given exemptions for hunters who have traditionally used these antique or "classic" shotguns with such barrels—even off game preserves. Neither has the Service given exemptions to the relatively small number of waterfowlers who hunt with muzzleloading guns of recent or early ("originals") manufacture. Although their use for waterfowling may have to be discontinued under this regulatory change, these breechloading antique or "classic" shotguns may still be used for hunting upland birds and/or migratory birds other than waterfowl or coot. For the game preserves that require the use of double guns, there are doubles sold currently that are certified for steel shot. Some older, "classic" doubles are reputedly suitable for use with steel shot, but should be approved for use by the manufacturer or a qualified gunsmith.

Issue No. 7: Field trials and bona fide dog training activities should be exempted because in the areas where these two activities occur it is also common for other game birds to be hunted.

Response: This comment has been substantially addressed in Issue No. 5. Further, training and field trials with captive-reared mallard taking usually involves retrieving dogs in water and field areas that often are available to wild waterfowl. Requiring nontoxic shot for these activities will help to ensure that such areas do not present lead exposure opportunities and lead poisoning. Where these same areas have upland game bird hunting, the State has the prerogative to expand nontoxic shot coverage beyond captive-reared and wild waterfowl and coots. However, it should be recalled that the developing nationwide ban on the use of lead shot for waterfowling involves uplands as well as wetlands.

Issue No. 8: The implementation of this rule as proposed will place an economic burden on shooting preserves because they have already purchased ammunition supplies that will not be legal to use in the coming season.

Response: Recognizing that some shooting preserve operators may have inventories of lead shot ammunition, and consistent with its approach of "phasing-in" steel shot use in proportion to the risks posed to migratory birds, the Service is delaying the implementation of this rule requiring the use of nontoxic shot for taking captive-reared mallards until September 1, 1990.

In summary, this final rule makes § 21.13 of part 21, Permit exceptions for captive-reared mallards, subject to the requirements of § 20.108, Nontoxic shot zones, and becomes effective on September 1, 1990. All game preserves and other affected areas in existing nontoxic shot zones will convert to steel shot for taking captive-reared mallards simultaneously in the 1990–91 waterfowl hunting season. Game preserves and dog training/field trial areas not affected by the 1990–91 zoning will convert to steel shot in the final year of the nationwide phase-in, i.e., in the 1991–92 waterfowl hunting season.

This action is taken under the authority granted the Secretary of the Interior by the Migratory Bird Treaty Act and the Endangered Species Act, as amended (16 U.S.C. 1531–1543; 87 Stat. 884). Justification for this action is based on: The 1986 SEIS analyses of the effects of the use of lead shot in waterfowl and coot hunting on migratory birds; scattered and light response from the general public and the States; the support of the majority of the States responding; the discriminatory effect that continuing this exemption would have on a portion of the waterfowl hunting community; and the need to be consistent in the approach to eliminating lead poisoning in waterfowl and raptors, nontoxic shot zoning and enforcement and compliance with nontoxic shot requirements.

Economic Effect

Executive Order 12291, "Federal Regulation," of February 17, 1981, requires the preparation of regulatory impact analyses for major rules. A major rule is one likely to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or significant adverse effects on the ability of United States-based enterprises to compete with foreign-based enterprises. The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) further requires the preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which includes small businesses, organizations and/or governmental jurisdictions.

In accordance with Executive Order 12291, a determination has been made that this rule is not a major rule. In accordance with the Regulatory Flexibility Act, a determination has been made that this rule, if implemented without adequate notice, could result in lead shot ammunition supplies for which there would be no local demand. Conversely, nontoxic shot zones could conceivably be established where little or no nontoxic shot ammunition would be available to hunters. The Service believes, however, that adequate notice has been provided and that sufficient supplies of nontoxic shot ammunition will be available to hunters. Therefore, this rule would not have a significant economic effect on a substantial number of small entities.

Paperwork Reduction Act

This rule will not result in the collection of information from, or place recordkeeping requirements on, the public under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Environmental Considerations

Pursuant to the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), a Final Environmental Statement (FES) on the use of steel shot for hunting waterfowl in the United States was published in 1976. As stated above, a supplement to the FES was completed in June 1986. In this supplement, pursuant to the Endangered Species Act, a section 7 consultation was done on the potential impacts of the provisions of this rule on bald eagles. The section 7 opinion concluded that implementation of the preferred alternative would not be likely to jeopardize the continued existence of the bald eagle. More recently, a section 7 opinion concluded that the actions being carried out to ban the use of lead shot nationwide for waterfowl hunting is not likely to jeopardize the continued existence of the Aleutian Canada goose.

Authorship

The primary author of this final rule is Dr. Keith A. Morehouse, Staff Specialist, Office of Migratory Bird Management.

List of Subjects in 50 CFR Part 21

Exports, Imports, Reporting requirements, Wildlife.

Accordingly, part 21, subchapter B, chapter I of title 50 of the Code of Federal Regulations is amended as follows:

PART 21—[AMENDED]

1. The authority citation for part 21 continues to read as follows:

Authority: Migratory Bird Treaty Act, sec. 3, Pub. L. 65–186, 40 Stat. 755 (16 U.S.C. 704); sec. 3(h)(3), Pub. L. 95–616, 92 Stat. 3112 (16 U.S.C. 712).

2. Section 21.13(d) is amended by revising the language beginning with "Provided further," and ending with the words "preserve operations," to read as follows (the introductory paragraph is being republished):

§ 21.13 Permit exceptions for captive-reared mallard ducks.

Captive-reared and properly marked mallard ducks, alive or dead, or their eggs may be acquired, possessed, sold, traded, donated, transported and disposed of by any person without a permit subject to the following conditions, restrictions and requirements.

* * * * *

(d) * * * *Provided further,* That the provisions of:

(1) The hunting regulations (part 20 of this subchapter), with the exception of § 20.108 (Nontoxic shot zones), and

(2) The Migratory Bird Hunting Stamp Act (duck stamp requirement) shall not apply to shooting preserve operations. * * *

* * * * *

Dated: August 10, 1989.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 89–20677 Filed 9–1–89; 8:45 am]

BILLING CODE 4310–55–M

Proposed Rules

Federal Register
Vol. 54, No. 170
Tuesday, September 5, 1989

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 841

RIN 3206-AD62

Federal Employees Retirement System; General Administration; Cost of Living Adjustments

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing regulations concerning computation of the cost-of-living adjustment (COLA) on basic benefits under the Federal Employees Retirement System (FERS). These regulations state which benefits are subject to COLA's and provide the methodology for computing COLA's on each type of FERS basic benefit subject to COLA's. These regulations also provide the methodology for determining the COLA's on mixed annuities (partially computed under FERS and partially computed under the Civil Service Retirement System (CSRS)). These regulations are necessary to implement the Federal Employees Retirement System Act of 1986.

DATE: Comments must be received on or before November 6, 1989.

ADDRESS: Send comments to Reginald M. Jones, Jr., Assistant Director for Retirement and Insurance Policy; Retirement and Insurance Group; Office of Personnel Management; P.O. Box 57; Washington, DC 20044; or deliver to OPM, Room 4351, 1900 E Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Harold L. Siegelman, (202) 632-4682.

SUPPLEMENTARY INFORMATION: FERS COLA's are effective December 1 of each year and first appear in the January annuity payments for those eligible for the increases.

1. COLA's on FERS Basic Annuities and Survivor Annuities

Generally, FERS COLA's are 1 percent less than the actual increase in the cost of living as determined under the law. However, if the actual increase is between 2 and 3 percent, FERS COLA's are 2 percent and, if the actual increase is 2 percent or less, FERS COLA's match the inflation rate. FERS COLA's apply to retirees' basic annuities only (not annuity supplements), but for survivor annuitants they apply to both the basic survivor annuities and the annuity supplements. In addition, FERS COLA's do not apply for annuitants who are under age 62 as of December 1, except:

1. Spouse, former spouse, or insurable interest survivor annuitants;
2. Certain disability annuitants;
3. Those who retired under the special provisions for law enforcement officers and firefighters;
4. Those who retired under the special provision for air traffic controllers; and
5. Those who retired under the special provision for military reserve technicians because they ceased satisfying the requirements of their position due to a disability.

Under FERS, children's annuities are increased under CSRS provisions rather than FERS provisions. However, children's benefits under FERS are offset by social security children's benefits (which also receive a cost-of-living increase effective December 1). In most cases the social security benefit will exceed the FERS benefit, with the result that no FERS benefit is actually paid.

Generally, COLA's are not payable on disability annuities during the first year (nor does the social security offset increase during the first year). However, COLA's are payable during the first year if the annuity rate payable is the retiree's earned benefit or if the annuity is being redetermined because the retiree has reached age 62 during the first year. After the first year, both the disability benefit and the social security offset (if any) are increased by FERS COLA's. Disability annuitants' earned benefits also increase with COLA's, even when we are not paying the earned benefits. After application of the COLA, we compare the increased earned benefit to the increased 40 percent disability benefit offset by social security and pay the greater benefit until the annuity is redetermined at age 62. After age 62, we compare the redetermined annuity with the earned annuity after application of COLA's and we pay the greater benefit.

Full COLA's are paid only to annuitants who have been on the annuity roll for the full period covered by the COLA. Others receive only prorated shares of full COLA's. For example, FERS COLA's were payable on annuities having a commencing date before December 1, 1988. The full 1988 FERS COLA rate was 3.0 percent, but, only FERS annuities that commenced before January 1, 1988, received the full 1988 COLA. Annuities that began on or after January 1, 1988, received prorated COLA's according to the commencing date of the annuity. For survivors (other than children) of deceased annuitants, the proration was determined by the date the annuity was first payable to the deceased annuitant, and COLA's were applied to annuity supplements as well as basic survivor annuities. Eligible FERS annuitants received prorated COLA's effective December 1, 1988, according to the following chart:

Month annuity commenced	Proportion of full 3.0% increaase	Prorated percentage
January 1988	11/12	2.8
February 1988	10/12	2.5
March 1988	9/12	2.3
April 1988	8/12	2.0
May 1988	7/12	1.8
June 1988	6/12	1.5
July 1988	5/12	1.3
August 1988	4/12	1.0
September 1988	3/12	0.8
October 1988	2/12	0.5
November 1988	1/12	0.3

Annuitants who do not get COLA's during their first year because they are under age 62 will have been on the annuity roll for over a full year when eligible for their first COLA's; therefore, their first COLA's are not prorated. The same is true for disability annuitants barred from receiving COLA's during their first year as annuitants.

2. COLA's on Basic Employee Lump Sum Death Benefits

Under FERS, a basic lump sum benefit is payable to the surviving spouse (or by court order to a former spouse) of a deceased employee with at least 18 months creditable civilian service. The law provides that this lump sum benefit is an amount equal to half the employee's final annual pay (or high-3

average pay, if higher) plus $15,000, adjusted for COLA's under CSRS rules.

Since the COLA's under CSRS rules were 4.2 percent and 4.0 percent effective December 1, 1987, and 1988, respectively, the $15.000 has increased to $16,255.20.

3. Applying COLA's to Combined CSRS/FERS Annuities

To compute COLA's on mixed benefits, we first compute the initial retired employee annuity rate. After applying CSRS rules to CSRS service and FERS rules to FERS service to obtain the annual amount payable for each component, we make any applicable FERS reductions for age and/or survivor benefits to each component. The sum of the two components is the initial annual annuity rate. The initial monthly installment is 1/12th (with cents dropped) of the initial annual annuity rate. Then, we determine the initial whole-dollar amount of the monthly CSRS component by dividing the annual CSRS component by 12 and dropping any odd cents. The initial whole-dollar amount of the monthly FERS component equals the initial monthly rate minus the initial monthly whole-dollar CSRS component. The following example illustrates the computation of the initial whole-dollar amount of monthly CSRS and FERS components for an annual CSRS component of $11,987.76 and an annual FERS component of $15.30:

—Initial monthly installment: $1,000
Annual CSRS component divided by 12: 998.980
Annual FERS component divided by 12: 1.275
—Drop odd cents from CSRS component $998
—Subtract CSRS component (less any cents) from monthly installment.
—The balance—$2—is the FERS component.

In some cases an employee with only a month or two of FERS service would have a monthly FERS component of zero under the method described above for determining the amounts of the components. In such cases, the FERS component will be the minimum of $1 per month in addition to the CSRS component. This FERS component receives a $1 COLA. (Employees with less than a month of FERS service have no FERS components and are not due any FERS COLA's.)

After computing the initial retired employee annuity rates, we can apply COLA's to employee annuities. COLA's are determined by applying the appropriate increase to each component and rounding to the next lower dollar (each component must increase by at least one dollar) before adding them together for the new monthly amount payable. The components are already whole-dollar amounts to which we can apply future COLA's. For example:

	CSRS	FERS	Monthly amount payable
Component	$998	$2	$1,000
COLA	1.05	1.04	
Total	1,047.90	2.08	
New amounts	1,047	3	1,050

Survivor annuities do not have CSRS/FERS components. The initial survivor annuity is 50 percent (or in some cases 25 percent) of the annual amount of the retiree's annuity before reduction for the survivor benefit. The initial monthly survivor rate is 1/12th of the annual survivor rate, rounded down to the next lower dollar (but not less than one dollar).

Because the CSRS and FERS COLA's are usually computed using different rates and because FERS generally does not pay COLA's for retirees under age 62, the total annuity increases at a rate different from either of its components.

When the retiree dies, the monthly rate payable to the survivor is the initial monthly survivor rate increased by the total percent by which the deceased's annuity had increased since retirement.

For example:

A. At Retirement

- Retiree's annual annuity rate before reduction for survivor annuity: $17,567.89
- Retiree's rate after 10 percent reduction for survivor benefit and conversion to monthly rate: $17,567.89 × .90 = $15,811.10, divided by 12 and rounded to the next lower dollar: $1,317
- Initial monthly survivor rate (50 percent of retiree's annual rate before reduction for survivor benefit, divided by 12 and rounded to the next lower dollar): $17,567.89 × .50 = $8783.95, divided by 12 and rounded to the next lower dollar: $731

B. At Retiree's Death

- Retiree's monthly annuity rate at death: $2,174
- Total percent of increase in retiree's monthly annuity rate since retirement began: 65 percent
- Initial monthly survivor annuity payable ($731 × 1.65, rounded to next lower dollar): $1,206

C. After the Retiree Dies and the Survivor Annuity Has Begun

- The survivor annuity increases according to FERS COLA provisions.

4. COLA's for Certain Military Reserve Technicians

Under section 8462(c)(3)(B)(ii) of title 5, United States Code, military reserve technicians who retired under section 8414(c) of title 5, United States Code, as a result of a disability are excepted from the bar against COLA increases for retirees under age 62. Section 841.708 provides that for this purpose disability means medical disability.

Military reserve technicians who meet the requirements that apply to the general employee population may retire under the general disability retirement rule, section 8451(a)(1)(B) of title 5, United States Code. This allows retirement of military reserve technicians who are medically disabled for their positions and who meet the same disability provisions as other disabled Federal employees.

In addition, military reserve technicians may retire under either of two special provisions depending on their age and length of service. Section 8414(c) of title 5, United States Code, provides a special form of discontinued service retirement for military reserve technicians. It allows retirement of military reserve technicians who may not be disabled for their positions, but are medically or nonmedically disqualified for military service or the rank required to hold the position, and who are at least age 50 with 25 years of service.

Section 8456 of title 5, United States Code, allows military reserve technicians who are not eligible under section 8451(a)(1)(B) or section 8414(c) but who are medically disqualified for military service or the rank required to hold their positions to retire on disability. These technicians retire under the general disability provision, but the annuity stops if they are rehired in the Federal service or they decline a Federal job offer.

Technicians who retire under the disability provisions (section 8451(a)(1)(B) or section 8456) get COLA's after their first full year on the disability rolls. In providing COLA's for military reserve technicians retiring under the discontinued service provision (section 8414(c)) only when the technicians are disabled, section 8462(c)(3)(B)(ii) distinguishes between medical and nonmedical disqualification from military service or rank.

Usually, when technicians retire under section 8414(c), neither OPM nor the technician's employing office receives information about the reason for disqualification. These regulations provide that when we receive no

information about the reason for the disqualification, we will process the case assuming that the disqualification was for a nonmedical reason. We will inform these retirees that they will not receive COLA's until they reach age 62 unless they provide an official certification from the military showing that their disqualification was for medical reasons.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Federal agencies and retirement payments to retired Government employees, spouses, and former spouses.

List of Subjects in 5 CFR Part 841

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

Constance B. Newman,

Director.

Accordingly, OPM proposes to amend 5 CFR part 841 as follows:

PART 841—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION

1. The authority citation for part 841 is revised to read as follows:

Authority: 5 U.S.C. 8461; Section 841.108 also issued under 5 U.S.C. 552a; subpart D also issued under 5 U.S.C. 8423; Section 841.504 also issued under 5 U.S.C. 8422; Section 841.507 also issued under section 505 of Public Law 99-335; Subpart J also issued under 5 U.S.C. 8469.

Subpart A—General Provisions

2. In § 841.102, paragraph (a)(7) is revised to read as follows:

§ 841.102 Regulatory structure for the Federal Employees Retirement System.

(a) * * *

(7) Cost-of-living adjustments (subpart G);

* * * * *

3. Subpart G is added to read as follows:

Subpart G—Cost-of-Living Adjustments

Sec.

Subpart G—Cost-of-Living Adjustments

§ 841.701 Purpose and scope.

(a) The purpose of this subpart is to regulate computation of cost-of-living adjustments (COLA's) for basic benefits under the Federal Employees Retirement System (FERS).

(b) This subpart provides the methodology for—

(1) Computing COLA's on each type of FERS basic benefit subject to COLA's; and

(2) Computing COLA's on mixed annuities (partially computed under FERS and partially computed under the Civil Service Retirement System (CSRS)).

(c) COLA's on children's annuities are not covered by this subpart because COLA's on children's annuities are computed under CSRS rules.

§ 841.702 Definitions.

In this subpart—

Annuity supplement means the benefit under subpart E of part 842 of this chapter. An "annuity supplement" is only payable to retirees.

Basic annuity means the benefits computed under subpart D of part 842 of this chapter and payable to retirees.

Basic employee death benefit means the basic employee death benefit as defined in § 843.102 of this chapter.

Beneficiary of insurable interest annuity means a person receiving a recurring benefit under FERS that is payable (after the employee's, Member's, or retiree's death) to a person designated to receive such an annuity under § 842.605 of this chapter.

COLA means a cost-of-living adjustment.

Combined CSRS/FERS annuity means the recurring benefit with a CSRS component and a FERS component. A "combined CSRS/FERS annuity" is only payable to a retiree who as an employee elected to transfer to FERS under part 846 of this chapter, who at the time of transfer had at least 5 years of civilian service creditable under CSRS (excluding service that was subject to both social security and partial CSRS deductions), and who was covered by FERS for at least 1 month.

CSRS means the Civil Service Retirement System as described in subchapter III of chapter 83 of title 5, United States Code.

CSRS component means the portion of a combined CSRS/FERS annuity that is computed under CSRS rules.

Current spouse annuity means a current spouse annuity as defined in § 842.602 of this chapter.

Disability retiree means a retiree who retired under part 844 of this chapter

Effective date means the date annuities increased by a COLA begin to accrue at the higher rate.

FERS means the Federal Employees Retirement System as defined in chapter 84 of title 5, United States Code.

FERS component means the portion of a combined CSRS/FERS annuity computed under FERS rules.

Former spouse annuity means a former spouse annuity as defined in § 842.602 of this chapter.

Initial monthly rate means the monthly annuity rate that a retiree (other than a disability retiree) is entitled to receive at the time of retirement (as defined in § 842.602 of this chapter).

Percentage change means the percent change in the price index as defined in section 8462(a)(2) of title 5, United States Code.

Retiree means a retiree as defined in § 842.602 of this chapter.

Survivor means a person receiving a current spouse annuity or a former spouse annuity, or the beneficiary of an insurable interest annuity. As used in this subpart, "survivor" does not include a child annuitant.

Survivor supplement means the recurring benefit payable to a survivor under § 843.308 of this chapter.

§ 841.703 Increases on basic annuities and survivor annuities.

(a) Except as provided in §§ 841.704, 841.706, and 841.707, and paragraph (e) of this section COLA's on basic annuities and survivor annuities are the greater of—

(1) One dollar per month; or

(2)(i) If the percentage change is less than 2 percent, the percentage change;

(ii) If the percentage change is at least 2 percent and not greater than 3 percent, 2 percent; and

(iii) If the percentage change exceeds 3 percent, 1 percentage point less than the percentage change.

(b) After survivor annuities commence, they are subject to COLA's

computed under paragraph (a) of this section, even if they are based on a basic employee annuity that includes a CSRS component.

(c) COLA's apply to basic annuities (not to annuity supplements), survivor annuities, and survivor supplements.

(d) COLA's do not apply for annuitants who are under age 62 as of the effective date, except—

(1) Survivors;

(2) Disability retirees (other than disability retirees whose benefit is based on 60 percent of high-3 average salary);

(3) Retirees who retired under § 842.208 of this chapter (the special provisions of law enforcement officers and firefighters);

(4) Retirees who retired under § 842.207 of this chapter (the special provision for air traffic controllers);

(5) Retirees who retired under § 842.210 of this chapter (the special provision for military reserve technicians who ceased satisfying the requirements of their position) due to a disability.

(e)(1) Except as provided in paragraph (e)(2) of this section, COLA's are not payable to disability retirees during the first year.

(2) COLA's are payable to disability retirees during the first year if the annuity rate payable is the retiree's earned benefit or the annuity is redetermined because the retiree has reached age 62.

(3) After the first year, both the disability benefit and the social security offset (if any) are increased by COLA's. Disability retirees' earned benefits also increase with COLA's, even when earned benefits are not paid. After application of the COLA, the greater of the increased 40 percent benefit offset by social security or the increased earned benefit is paid until the annuity is redetermined at age 62. After age 62, the redetermined annuity and earned annuity are compared after application of COLA's and the greater benefit is paid.

(f) COLA's are payable to retirees and survivors whose annuities commence before the effective date.

§ 841.704 Proration of COLA's.

(a) The full amounts of COLA's are payable on annuities having a commencing date more than 11 months before the effective date.

(b)(1) Prorated portions of COLA's are payable on annuities having a commencing date within 11 months before the effective date.

(2) Proration is based on the number of months (with any portion of a month counting as a month) between the annuity commencing date and the effective date.

(3) For survivors of deceased retirees, proration is determined by the date the annuity was first payable to the deceased retiree. COLA's apply to survivor supplements as well as basic survivor annuities.

(4) Proration applied to the assumed social security disability insurance benefit is based on the commencing date of the disability annuity, not the beginning of the social security disability benefit.

§ 841.705 Increases on basic employee death benefits.

(a) COLA's on the basic employee death benefit increase the $15,000 component by the percentage change.

(b) Recipients of the basic employee death benefit are entitled to COLA's if the employee or Member died on or after the effective date.

§ 841.706 Increases on combined CSRS/FERS annuities.

(a) COLA's on combined CSRS/FERS annuities are computed by increasing the CSRS component by the percentage change and the FERS component by the amount of COLA's under § 841.703(a).

(b) The initial monthly CSRS component is computed by—

(1) Applying CSRS rules to CSRS service and FERS rules to FERS service to obtain the annual amount payable for each component, then

(2) Making any applicable FERS reductions for age and/or survivor benefits to each component; then

(3) Dividing the annual amount of the CSRS component by 12, then

(4) Dropping any cents from the CSRS component.

(c) The initial monthly FERS component is computed by subtracting the initial monthly CSRS component from the initial monthly rate.

(d) A retiree who was covered under FERS for at least 1 month has an FERS component. If the amount of the FERS component as computed above is zero (because the CSRS component is equal to the monthly installment, leaving no balance for the FERS component), the FERS component is $1 per month. The reitree is due a full dollar increase on the FERS component with the next COLA. (An employee with less than a month of FERS service has no FERS component and is not due any FERS COLA's.)

(e) COLA's are determined by applying the appropriate increase to each component and rounding to the next lower dollar (each component must increase by at least 1 dollar if a COLA applies to each component) before adding them together for the new monthly amount payable.

§ 841.707 COLA's affecting computation of survivor supplements.

For purposes of computing the assumed CSRS annuity under § 843.308 of this chapter, the assumed CSRS annutiy includes COLA's computed under CSRS rules.

§ 841.708 Special provisions affecting retired military reserve technicians.

(a) Military resrve technicians who retire as a result of a medical disability are excepted from the bar against COLA increases for retirees under age 62.

(b) Military reserve technicians have retired as a result of a medical disability if they retire under—

(1) Section 8451(a)(1)(B) of title 5, United States Code, (that allows retirement by military reserve technicians who are medically disabled for their positions); or

(2) Section 8456 of title 5, United States Code, (that allows military reserve technicians who are not disabled for their positions and who are not eligible under the special military reserve technician discontinued service provisions (section 8414(c)) but who are medically disqualified for military service or the rank required to hold their positions).

(c)(1) Military reserve technicians have not retired as a result of a medical disability if they retire under section 8414(c) of title 5, United States Code, (that allows retirement of military reserve technicians who may not be disabled for their positions, but are medically or nonmedically disqualified for military service or the rank required to hold the position, and who are at least age 50 with 25 years of service) unless they provide OPM official documentation from the military showing that their disqualification was for medical reasons.

(2) When OPM receives no information about the reason for the disqualification of a military reserve technician retiring under section 8414(c) of title 5, United States Code, OPM will process the case assuming that the disqualification was for nonmedical reasons. OPM will inform these retirees that they will not receive COLA's until they reach age 62 unless they provide an official certification from the military showing that their disqualification was for medical reasons.

[FR Doc. 89-20787 Filed 9-1-89; 8:45 am]

BILLING CODE 6325-01-M