

Rules and Regulations

Federal Register

Vol. 55, No. 134

Thursday, July 12, 1990

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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1209

RIN 3124-AA19

Practices and Procedure for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: On July 6, 1989, the U.S. Merit Systems Protection Board (the Board) published, as an interim rule with request for comments, a new part of its regulations to implement the Whistleblower Protection Act of 1989, Public Law 101-12. The interim regulations published under part 1209 on July 6, 1989 are hereby amended as set forth below, and these are now the final regulations of the Board in this part.

EFFECTIVE DATE: July 12, 1990.

FOR FURTHER INFORMATION CONTACT: Mark Kelleher, (202) 653-8892.

SUPPLEMENTARY INFORMATION: On July 6, 1989 (54 FR 28654), the Board published interim regulations in this part to implement the Whistleblower Protection Act of 1989 (Pub. L. 101-12). The public was invited to comment on the interim regulations. The Board has considered the comments received and has adopted many of the suggestions made. The Board has also determined that certain substantive and clarifying changes should be made, based on experience in processing cases under the interim regulations. In addition, changes have been made to simplify and clarify the regulations, to express them in "plain English" to the extent possible, and to conform the regulations in this part to the Board's final regulations in part 1201, published December 29, 1989

(54 FR 53500). The interim rules are hereby modified and are published here as the final rules of the Board in part 1209. The Board is republishing the entire rules in this part for clarity and the convenience of the public, parties, and practitioners.

Two agencies and two individuals submitted comments on the interim rules published July 6, 1989. No organizations responded. The Board adopted suggestions for the following: simplify the rules to the extent possible, using "plain English;" require the appellant to include a description of his or her whistleblowing activity in the appeal; replace the separate time limits for filing a stay request before, simultaneous with, or after filing an appeal with a single time limit; allow flexibility for an agency to designate a representative for service of a stay request; allow filing of stay requests by facsimile; allow stay requests to be signed by either the appellant or the appellant's designated representative; eliminate the provision allowing oral response by an agency to a stay request; and clarify the matters the judge must consider in ruling on a stay request.

The Board did not adopt suggestions for the following: establish a specific time limit for an individual to seek corrective action from the Special Counsel; repeat in this part the 5 CFR part 1201 provisions for filing a petition for review of an initial decision; adopt a construction of the individual right of action provisions of the Whistleblower Protection Act that precludes filing an individual right of action appeal when the Special Counsel and the agency have agreed to corrective action; require service of stay requests by express mail or facsimile; require the Board regional office to serve a stay request on the agency; establish a faster procedure to enforce compliance with stay orders than the 5 CFR part 1201, subpart F procedure; provide that a stay cannot be sought that would order the agency to take an action the employee contends the agency improperly failed to take; eliminate the option to file a stay request before filing an appeal; extend the time limit for an agency to respond to a stay request; provide that any stay granted the Special Counsel that is in effect at the time the Special Counsel terminates its investigation shall continue for no more than 10 calendar days, regardless of the time provided for

in the previous order of the Board; and state specifically in the regulations that the appellant bears the burden of showing entitlement to a stay. Suggestions for changes in sections of this part that have been deleted are moot.

The following constitutes a section-by-section analysis and discussion of each substantive change made at this time.

(a) The title to part 1209—is amended by changing it to "Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing."

(b) Authority—is amended by adding 5 U.S.C. 2302(b)(8).

(c) The title to subpart A—is amended by changing it to "Jurisdiction and Definitions."

(d) Section 1209.1—is amended by deleting it in its entirety as redundant.

(e) Section 1209.3—is amended by renumbering it § 1209.1, by revising it for simplicity and clarity, and by substituting the term "appellant's" for "individual's."

(f) Section 1209.2—is amended by renumbering it paragraph (a) of § 1209.2, by revising it for simplicity and clarity, by incorporating as new paragraphs (b)(1) and (b)(2), respectively, the definitions of "individual right of action appeals" and "otherwise appealable action appeals" and the examples from § 1209.5, and by adding new paragraph (b)(3) to state the Board's jurisdiction over "stays." Also, in paragraph (b)(1), a citation to § 1209.4(a) is added to clarify what personnel actions may be the subject of an individual right of action appeal.

(g) Section § 1209.4—is amended by renumbering it § 1209.3 and by revising it for simplicity and clarity.

(h) Section 1209.5—is amended by renumbering it § 1209.4, by revising paragraph (b) for simplicity and clarity, by deleting paragraphs (c) and (d) since they have been incorporated in the revised § 1209.2, and by adding new paragraphs (c) and (d) to provide definitions of "contributing factor" and "clear and convincing evidence."

(i) The title to subpart B—is amended by changing it to "Appeals."

(j) Section 1209.6—is amended by renumbering it § 1209.5 and changing the title, by deleting paragraph (a) in its entirety as redundant, by deleting paragraphs (b) and (d) in their entirety

as unnecessary since the provisions of part 1201 apply, by renumbering paragraph (c)(2) as paragraph (a), by renumbering paragraph (c)(1) as paragraph (b), by renumbering paragraph (c)(3) as paragraph (c), and by revising the renumbered paragraphs (a), (b), and (c) for simplicity and clarity. Also, in paragraph (a), the term "appeal" is substituted for "petition for appeal". Paragraph (a)(1) is amended to clarify that the time for filing an individual right of action appeal, after termination of a Special Counsel investigation, begins to run from the date of issuance of the Special Counsel's written notification to the appellant and to increase the time limit for filing from 60 to 65 days to allow for mailing time. Paragraph (b) is amended to clarify that the time limit for filing an otherwise appealable action appeal is governed by paragraph (a) when the appellant has chosen to seek corrective action from the Special Counsel first and by 5 CFR 1201.22(b) when the appellant appeals directly to the Board. Paragraph (c) is amended by substituting the term "appellant" for "individual," by substituting the term "appeal" for "petition for appeal," and by changing "may" to "will" in the last sentence.

(k) Section 1209.7—is amended by renumbering it § 1209.6, by adding a new paragraph (a)(4) to require an appellant to include in the appeal a description of his or her whistleblowing activity, by renumbering paragraph (a)(4) as paragraph (a)(5), by adding to (i) of new paragraph (a)(5) a requirement that the appellant provide specific indications of his or her apprehensions with respect to threatened actions, by adding "wholly or in part" after "based" in (ii) of new paragraph (a)(5), by adding new paragraph (b) to make it clear that an appellant has a right to a hearing, by renumbering paragraph (b) as paragraph (c) and changing the title and deleting the last sentence, and by revising the entire section for simplicity and clarity. Also, in paragraph (a), the term "Appeals" is substituted for "Petitions" and the citations to §§ 1209.5(a) and 1209.5(b) are corrected to read §§ 1209.4(a) and 1209.4(b), respectively. In paragraph (c), the term "judge" is substituted for "presiding official."

(l) Section 1209.8—is amended by deleting it in its entirety as unnecessary since the provisions of part 1201 apply.

(m) Section 1209.9—is amended by deleting it in its entirety as unnecessary since the provisions of part 1201 apply.

(n) Section 1209.10—is amended by deleting it in its entirety as unnecessary since the provisions of part 1201 apply.

(o) Section 1209.11—is amended by renumbering it § 1209.7, by revising it for

simplicity and clarity, and by adding language in the first sentence of paragraph (a) to clarify that the degree of proof required of the appellant is "a preponderance of the evidence."

(p) Section 1209.12—is amended by deleting it in its entirety as unnecessary since the provisions of part 1201 apply.

(q) Section 1209.13—is amended by deleting it in its entirety as unnecessary since the provisions of part 1201 apply.

(r) The title to subpart C—is amended by changing it to "Stay Requests."

(s) Section 1209.14—is amended by renumbering it § 1209.8, by deleting paragraph (a) in its entirety, by renumbering paragraph (c) as paragraph (a), by renumbering paragraph (d) as paragraph (c) and changing the title, by renumbering paragraph (e) as paragraph (d), and by revising the entire section for simplicity and clarity. Also, in new paragraph (a), the separate time limits for filing a stay request before, simultaneous with, or after an appeal are replaced with a single time limit for filing, and language stating when an appellant is eligible to file a stay request is incorporated from the former paragraph (a). Paragraph (b) is amended by substituting the terms "must" and "with" for "shall" and "at," respectively. In renumbered paragraph (c), the requirement for service of a stay request on the agency's General Counsel in deleted and replaced by a requirement that either the local servicing personnel office or the agency's designated representative, if any, be served. Renumbered paragraph (d) is amended to permit filing of stay requests by facsimile, to be consistent with the part 1201 provisions relating to filing appeals and petitions for review.

(t) Section 1209.15—is amended by renumbering it § 1209.9, by substituting the term "appellant" for "individual," by amending paragraph (a)(3) to permit signature of a stay request by either the appellant or the appellant's designated representative—if any—to be consistent with part 1201 signature requirements for appeals and petitions for review, by adding new paragraph (a)(5) to require evidence of timeliness where the appellant first sought corrective action from the Special Counsel, by renumbering paragraphs (a)(5)–(7) as (a)(6)–(8), by deleting former paragraph (a)(8) since the certificate of service requirement is now contained in § 1209.8(c), by renumbering paragraph (b) as paragraph (c), by adding new paragraph (b) to permit an appellant to address the issue of whether a stay would impose extreme hardship on the agency, and by revising the entire section for simplicity and clarity. Also, paragraph (c)(1) is revised to delete the

provision permitting an oral response by an agency to a stay request. In paragraph (c)(2), (i) is deleted in its entirety as unnecessary and (ii) is divided and renumbered as (i), (ii), and (iii).

(u) Section 1209.16—is amended by renumbering it § 1209.10, by substituting the term "judge" for "presiding official," by deleting the language regarding oral rulings in paragraph (b)(2) as unnecessary, by numbering the last sentence of paragraph (b)(2) as paragraph (b)(3), and by revising the entire section for simplicity and clarity. Also, the requirement in paragraph (b)(3) that the order inform the agency regarding interim compliance and procedures for appealing the order is deleted as unnecessary.

(v) Section 1209.17—is amended by renumbering it § 1209.11 and changing "stays" to "stay" in the title, by adding "Duration of stay" as the title of paragraph (a), by moving the last sentence of paragraph (a) to become the first sentence of paragraph (b), by adding "Interim compliance" as the title of paragraph (b), and by revising the entire section for simplicity and clarity.

(w) Section 1209.18—is amended by deleting it in its entirety as unnecessary since the interlocutory appeal provisions of part 1201 apply and also to eliminate the requirement that the judge certify to the Board any appeal filed by either party of an order granting or denying a stay.

(x) Section 1209.19—is amended by renumbering it § 1209.12 and revising it for simplicity and clarity.

List of Subjects in 5 CFR Part 1209

Administrative practice and procedure, Government employees, whistleblowing.

Accordingly, the Merit Systems Protection Board revises 5 CFR part 1209 as follows:

PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING

Subpart A—Jurisdiction and Definitions

Sec.

- 1209.1 Scope.
- 1209.2 Jurisdiction.
- 1209.3 Application of 5 CFR part 1201.
- 1209.4 Definitions.

Subpart B—Appeals

- 1209.5 Time of filing.
- 1209.6 Content of appeal; right to hearing.
- 1209.7 Burden and degree of proof.

Sec.

Subpart C—Stay Requests

- 1209.8 Filing a request for a stay.
 1209.9 Content of stay request and response.
 1209.10 Hearing and order ruling on stay request.
 1209.11 Duration of stay; interim compliance.

Subpart D—Reports on Applications for Transfers

- 1209.12 Filing of agency reports.

Authority: 5 U.S.C. 1204, 1221, 2302(b)(8), and 7701.

Subpart A—Jurisdiction and Definitions**§ 1209.1 Scope**

This part governs any appeal or stay request filed with the Board by an employee, former employee, or applicant for employment where the appellant alleges that a personnel action defined in 5 U.S.C. 2302(a)(2) was threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. Included are individual right of action appeals authorized by 5 U.S.C. 1221(a), appeals of otherwise appealable actions allegedly based on the appellant's whistleblowing activities, and requests for stays of personnel actions allegedly based on whistleblowing.

§ 1209.2 Jurisdiction.

(a) Under 5 U.S.C. 1214(a)(3), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.

(b) The Board exercises jurisdiction over:

(1) *Individual right of action appeals.* These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in § 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board.

Example: Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because of his whistleblowing activities. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or

exhausted, his appeal is an individual right of action appeal.

(2) *Otherwise appealable action appeals.* These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to appeal directly to the Board. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3 (a)(1) through (a)(19).)

Example: Agency B removes Ms. Y for alleged misconduct under 5 U.S.C. 7513. Ms. Y believes that the agency removed her because of her whistleblowing activities. Because the removal action is appealable to the Board under some law, rule or regulation other than 5 U.S.C. 1221(a), Ms. Y may choose to file an appeal with the Board without first seeking corrective action from the Special Counsel or to seek corrective action from the Special Counsel and then appeal to the Board.

(3) *Stays.* Where the appellant alleges that a personnel action was or will be based on whistleblowing, the Board may, upon the appellant's request, order an agency to suspend that action.

§ 1209.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A, B, C, E, F, and G of 5 CFR part 1201 to appeals and stay requests governed by this part.

§ 1209.4 Definitions.

(a) *Personnel action* means, as to individuals and agencies covered by 5 U.S.C. 2302:

- (1) An appointment;
- (2) A promotion;
- (3) An adverse action under chapter 75 of title 5, United States Code or other disciplinary or corrective action;
- (4) A detail, transfer, or reassignment;
- (5) A reinstatement;
- (6) A restoration;
- (7) A reemployment;
- (8) A performance evaluation under chapter 43 of title 5, United States Code;
- (9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; or

(10) A significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

(b) *Whistleblowing* is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes

evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

(c) *Contributing factor* means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure.

(d) *Clear and convincing evidence* is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than "preponderance of the evidence" as defined in 5 CFR 1201.56(c)(2).

Subpart B—Appeals**§ 1209.5 Time of filing.**

(a) *Individual right of action appeals.* The appellant must seek corrective action from the Special Counsel before appealing to the Board. Where the appellant has sought corrective action, the time limit for filing an appeal with the Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed:

(1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations; or,

(2) If the Office of Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the date of filing of the request for corrective action, at any time after the expiration of 120 days.

(b) *Otherwise appealable action appeals.* The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to file the appeal directly with the Board. If the appellant seeks corrective action from the Special Counsel, the time limit for appealing is governed by paragraph (a) of this section. If the appellant appeals directly to the Board, the time limit for filing is governed by 5 CFR 1201.22(b).

(c) *Appeals after a stay request.* Where an appellant has filed a request for a stay with the Board without first filing an appeal of the action, the appeal must be filed within 20 days after the

date of the order ruling on the stay request. Failure to timely file the appeal will result in the termination of any stay that has been granted unless a good reason for the delay is shown.

§ 1209.6 Content of appeal; right to hearing.

(a) *Content.* Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file an appeal. Appeals may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24 (a)(1) through (a)(9);

(2) Where the appellant first sought corrective action from the Special Counsel, evidence that the appeal is timely filed;

(3) The name(s) and position(s) held by the employee(s) who took the action(s), and a chronology of facts concerning the action(s);

(4) A description of the appellant's disclosure evidencing whistleblowing as defined in § 1209.4(b) of this part; and

(5) Evidence or argument that:

(i) The appellant was or will be subject to a personnel action as defined in § 1209.4(a) of this part, or that the agency has threatened to take or not to take such a personnel action, together with specific indications giving rise to the appellant's apprehensions; and

(ii) The personnel action was or will be based wholly or in part on the appellant's whistleblowing, as described in § 1209.4(b) of this part.

(b) *Right to hearing.* An appellant has a right to a hearing.

(c) *Timely request.* The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

§ 1209.7 Burden and degree of proof.

(a) Subject to the exception stated in paragraph (b) of this section, in any case involving a prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant.

(b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened,

proposed, taken, or not taken the same personnel action in the absence of the disclosure.

Subpart C—Stay Requests

§ 1209.8 Filing a request for a stay.

(a) *Time of filing.* An appellant may request a stay of a personnel action allegedly based on whistleblowing at any time after the appellant becomes eligible to file an appeal with the Board under § 1209.5 of this part, but no later than the time limit set for the close of discovery in the appeal. It may be filed prior to, simultaneous with, or after the filing of an appeal.

(b) *Place of filing.* Requests must be filed with the appropriate Board regional office as set forth in 5 CFR 1201.4(d).

(c) *Service of stay request.* A stay request must be simultaneously served upon the Board's regional office and upon the agency's local servicing personnel office or the agency's designated representative, if any. A certificate of service stating how and when service was made must accompany the stay request.

(d) *Method of filing.* A stay request must be filed with the appropriate Board regional office by personal delivery, by facsimile, or by mail.

§ 1209.9 Content of stay request and response.

(a) Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file a stay request. The request may be in any format, and must contain the following:

(1) The name, address, and telephone number of the appellant, and the name and address of the acting agency;

(2) The name, address, and telephone number of the appellant's representative, if any;

(3) The signature of the appellant or, if the appellant has a representative, of the representative;

(4) A chronology of facts, including a description of the appellant's disclosure and the action that the agency has taken or intends to take;

(5) Where the appellant first sought corrective action from the Special Counsel, evidence that the stay request is timely filed;

(6) Evidence and/or argument showing that:

(i) The action threatened, proposed, taken, or not taken is a personnel action, as defined in § 1209.4(a) of this part;

(ii) The action complained of was based on whistleblowing, as defined in § 1209.4(b) of this part; and

(iii) There is a substantial likelihood that the appellant will prevail on the merits of the appeal;

(7) Evidence and/or argument addressing how long the stay should remain in effect; and

(8) Any documentary evidence that supports the stay request.

(b) An appellant may provide evidence and/or argument addressing the question of whether a stay would impose extreme hardship on the agency.

(c) *Agency response.* (1) The agency's response to the stay request must be received by the appropriate Board regional office within five days (excluding Saturdays, Sundays, and Federal holidays) of the date of service of the stay request on the agency.

(2) The agency's response must contain the following:

(i) Evidence and/or argument addressing whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal;

(ii) Evidence and/or argument addressing whether the grant of a stay would result in extreme hardship to the agency; and

(iii) Any documentation relevant to the agency's position on these issues.

§ 1209.10 Hearing and order ruling on stay request.

(a) *Hearing.* The judge may hold a hearing on the stay request.

(b) *Order ruling on stay request.* (1) The judge must rule upon the stay request within 10 days (excluding Saturdays, Sundays, and Federal holidays) after the request is received by the appropriate Board regional office.

(2) The judge's ruling on the stay request must set forth the factual and legal bases for the decision. The judge must decide whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal, and whether the stay would result in extreme hardship to the agency.

(3) If the judge grants a stay, the order must specify the effective date and duration of the stay.

§ 1209.11 Duration of stay; interim compliance.

(a) *Duration of stay.* A stay becomes effective on the date specified in the judge's order. The stay will remain in effect for the time period set forth in the order or until the Board issues a final decision on the appeal of the underlying personnel action that was stayed, or until the Board vacates or modifies the stay, whichever occurs first.

(b) *Interim compliance.* An agency must immediately comply with an order granting a stay request. Although the

order granting a stay request is not a final order, petitions for enforcement of such orders are governed by 5 CFR part 1201, subpart F.

Subpart D—Reports on Applications for Transfers

§ 1209.12 Filing of agency reports.

When an employee who has applied for a transfer to another position in an Executive agency under 5 U.S.C. 3352 asks the agency head to review a rejection of his or her application for transfer, the agency head must complete the review and provide a written statement of findings to the employee and the Clerk of the Board within 30 days after receiving the request.

Dated: July 9, 1990.

Matthew D. Shannon,
Acting Clerk of the Board.

[FR Doc. 90-16322 Filed 7-11-90; 8:45 am]

BILLING CODE 7400-01-M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 90-070]

Pink Bollworm; Removal of Regulated Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule.

SUMMARY: We are amending the pink bollworm regulations by removing Chicot, Drew, Jefferson, Lincoln, Monroe, and Phillips Counties, and a portion of Desha County, Arkansas, from the list of suppressive areas. We have determined that the pink bollworm has been eradicated from these areas. This action removes unnecessary restrictions on the interstate movement of regulated articles.

DATES: Interim rule effective July 12, 1990. Consideration will be given only to comments received on or before September 10, 1990.

ADDRESSES: To help ensure that your comments are considered, send an original and three copies to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket Number 90-070. Comments received may be inspected at USDA, room 1141, South Building, 14th and Independence Avenue SW., Washington, DC, between

8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT:

Mr. Sidney E. Cousins, Senior Operations Officer, Domestic and Emergency Operations, PPQ, APHIS, USDA, room 644, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-8247.

SUPPLEMENTARY INFORMATION:

Background

The pink bollworm, *Pectinophora gossypiella* (Saunders), is one of the world's most destructive pests of cotton. This insect spread to the United States from Mexico in 1917, and now exists throughout most of the cotton-producing States west of the Mississippi River.

The pink bollworm regulations contained in 7 CFR 301.52 *et seq.* (referred to below as the pink bollworm regulations) quarantine the States of Arizona, Arkansas, California, Louisiana, Nevada, New Mexico, Oklahoma, and Texas, and restrict the interstate movement of regulated articles from regulated areas in quarantined States for the purpose of preventing the spread of the pink bollworm.

Regulated areas for the pink bollworm are designated as either suppressive areas or generally infested areas. Restrictions are imposed on the interstate movement of regulated articles from both types of areas in order to prevent the movement of the pink bollworm into noninfested areas. However, the eradication of the pink bollworm is undertaken as an objective only in places that are designated as suppressive areas.

Based on trapping surveys conducted by inspectors of Arkansas State and county agencies and by inspectors of the Animal and Plant Health Inspection Service, an agency of the U.S. Department of Agriculture, we have determined that the pink bollworm has been eradicated from Chicot, Drew, Jefferson, Lincoln, Monroe, and Phillips Counties, and a portion of Desha County, Arkansas. No evidence of pink bollworm infestations has been found in these areas since November 1, 1987. We are therefore removing these areas from the list of suppressive areas in § 301.52-2a.

Immediate Action

James W. Glosser, Administrator of the Animal and Plant Health Inspection Service, has determined that a situation exists that warrants publication of this interim rule without prior opportunity for public comment. Immediate action is necessary to relieve unnecessary

restrictions on the interstate movement of regulated articles.

Since prior notice and other public procedures with respect to this interim rule are impracticable and contrary to the public interest under these conditions, there is good cause under 5 U.S.C. 553 to make this rule effective upon publication. We will consider comments that are received within 60 days of publication of this interim rule in the *Federal Register*. As soon as possible after the comment period closes, we will publish another document in the *Federal Register* discussing the comments we received and any amendments we are making to the rule as a result of the comments.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than \$100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This regulation affects the interstate movement of regulated articles from specified areas in Arkansas. There are 21 cotton growers, processors, and seed producers within these areas that will experience a modest economic benefit as a result of this rule, since they will no longer be required to comply with the treatment and handling requirements contained in the pink bollworm regulations. We estimate that each of these entities will save approximately \$100 per year in compliance costs. These entities comprise less than 1 percent of the total of similar enterprises operating in the State of Arkansas.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The regulations in this subpart contain no new information collection or recordkeeping requirements under the