B. Background

The Director, Office of Management and Budget (OMB), by memorandum dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. The exemption applies to this rule. The rule provides internal operating procedures and guidance to GSA contracting personnel and has no impact on the public. The rule does not contain information collection requirements that require the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

List of Subjects in 48 CFR 507

Government procurement.

PART 507—ACQUISITION PLANNING

1. The authority citation for 48 CFR part 507 continues to read as follows:

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

2. Section 507.102 is revised to read as follows:

507.102 Policy.

(a) All acquisitions exceeding the small purchase limitation must have a limited acquisition plan unless a comprehensive acquisition plan is required under GSA Order, Comprehensive Acquisition Planning (APD 2800.13A). Priced options must be included when determining the dollar threshold. An acquisition plan must be prepared before exercise of unpriced and/or unevaluated options exceeding the small purchase limitation.

(b) No solicitation may be issued until either a comprehensive acquisition plan or a limited acquisition plan has been prepared or the requirement waived under GSA Order APD 2800.13A or 507.104(d). A contract may not be entered into without full and open competition on the basis of a lack of acquisition planning or concerns related to the amount of funds available to the acquisition.

3. Section 507.104 is amended by revising paragraphs (a) and (d) to read as follows:

507.104 General procedures.

(a) Policies and procedures for comprehensive acquisition plans are in GSA Order, Comprehensive Acquisition Planning (APD 2800.13A).

* * * * *

(d) The contracting director may waive the requirement for a written limited acquisition plan in cases of unusual or compelling urgency. The individual responsible for preparing the plan will present (as a minimum) an oral plan to at least the next higher level for approval. The file must be documented to show: the nature of the urgency, the content of the oral plan, and the name of the individual that approved it. This document may be prepared after award when preparation before award would unreasonably delay the acquisition. The documentation may be included in the justification required by FAR 6.302–2(c).

4. Section 507.105 is amended by revising paragraph (a)(3) and paragraph (b) to read as follows:

507.105 Contents of written acquisition plans.

* * * * *

(a) * * *

(3) Modification of the suggested information for limited acquisition plans by deleting inapplicable elements or adding new ones as needed.

(b) The outline in FAR 7.105 must be used as the basis for comprehensive acquisition plans required under GSA Order APD 2800.13A. If an element does not apply, it must be so annotated. Elements may be added to the outline as appropriate. It is suggested that a limited acquisition plan include the information cited below:

* * * * *

Note: GSA forms listed in this rule are made a part of the GSAR looseleaf edition. The forms will not appear in this volume of the Federal Register or title 48, chapter 5 of the Code of Federal Regulations. Copies may be obtained from the Director of the Office of GSA Acquisition Policy (VP), 18th & F Streets, NW., Washington, DC 20405.

Dated: June 19, 1990.

Richard W. Hopf, III,
Associate Administrator for Acquisition Policy.

[FR Doc. 90–16108 Filed 7–11–90; 8:45 am]
BILLING CODE 5820–61–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 640

[Docket No. 70345–0122]

RIN 0648–AC25

Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic; Correction

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule; correction.

SUMMARY: This document corrects the effective date for the final rule to implement portions of Amendment 1 to the Fishery Management Plan for Spiny Lobster of the Gulf of Mexico and South Atlantic, published June 28, 1990 (55 FR 26447).

EFFECTIVE DATES: July 28, 1990, except that § 640.4 is effective June 28, 1990.

FOR FURTHER INFORMATION CONTACT: Michael E. Justen, 813–893–3722.

In FR Doc. 90–15073 beginning on page 26447 in the issue of June 28, 1990, make the following correction:

On page 26447, column one, under the "EFFECTIVE DATE" heading, "July 30, 1990" should read "July 28, 1990".

Dated: July 9, 1990.

James E. Douglas,
Deputy Assistant Administrator For Fisheries, National Marine Fisheries Service.

[FR Doc. 90–16281 Filed 7–11–90; 8:45 am]
BILLING CODE 3510–22–M

Proposed Rules

Federal Register
Vol. 55, No. 134
Thursday, July 12, 1990

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 Parts 317, 359, and 842

Senior Executive Service Recertification

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations on procedures governing the recertification of career appointees in the Senior Executive Service. The regulations are intended to assure consistency and fairness in the recertification process.

DATES: Written comments will be considered if received no later than August 13, 1990.

ADDRESSES: Send or deliver written comments to the Director, Office of Executive Personnel, OEA, room 6R48, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Neal Harwood, (202) 606–1610.

SUPPLEMENTARY INFORMATION: Under section 506 of the Ethics Reform Act of 1989 (Pub. L. 101–194, November 30, 1989), Senior Executive Service (SES) career appointees are subject to recertification by their agencies every 3rd year, beginning in calendar year 1991. The Act adds a new section 3393a to title 5 of the U.S.C. The section states that recertification is intended "to ensure that the performance of career appointees demonstrates the excellence needed to meet the goals of the Senior Executive Service, as set forth in section 3131 * * *."

Thus, the Act aims at ensuring that the career members of the SES represent the best that this country has to offer in managing the public's business. It establishes a recertification process that goes beyond the annual performance appraisal, which remains as one of the essential features of the SES, to look at how the executive has performed over a period of several years and whether the executive's overall performance during that period has demonstrated the excellence expected of a senior executive. It is intended to enhance the performance of the SES, to set a standard of excellence for members of the SES, and to assure that executives remain in the SES only when they are performing at the expected level of excellence.

The regulations outline the procedures that agencies will be required to follow in making recertification determinations. The following information clarifies certain of the regulatory provisions:

(1) *Coverage.* Under 5 U.S.C. 3393(a)(2) and proposed 5 CFR 317.504(b)(1), an individual must be a career SES appointee as of the end of the recertification period and must have been continuously employed in the SES for the preceding 156 weeks, except that breaks in SES service totaling 6 months or less are not considered to interrupt the continuous service. The 156 weeks include any service as an SES noncareer or limited appointee. For example, the first 56 weeks could be as an SES limited emergency appointee and the remaining 100 weeks as an SES career appointee. The 156 weeks also include SES service in any agency.

(2) *When recertification takes place.* Under 5 U.S.C. 3393a(a)(2) and proposed 5 CFR 317.054(c), the initial recertification determination is to take place in calendar year 1991 at a time determined by the agency head. That means the entire recertification process, from the initial recommendation of the supervising official to the final determination by the agency head must be made sometime during the calendar year. It is possible, however, that the 156-week recertification period could end before CY 91. For example, an agency head could determine that the period ends on December 31, 1990, with the recertification process being initiated in January 1991.

(3) *Conducting the recertification process.* If an agency is going to consider the 1991 annual performance ratings of executives in making the recertification determination, the agency may wait until the appraisal process is completed (i.e., the appointing authority has given the final summary rating for 1991) before beginning the recertification process, or the agency may conduct the two processes concurrently.

In the latter case, the supervising official could recommend a 1991 annual rating and recommend whether the executive should be recertified at the same time; and the same Performance Review Board could consider both recommendations. The appointing authority would then give the final summary rating for 1991 and recommend to the agency head whether the executive should be recertified.

Concurrent consideration is being permitted because the appraisal period for many agencies will end on September 30, 1991, which will leave only 3 months to complete both the appraisal and recertification processes. Agencies will need to make clear in their procedures, however, that the two processes are separate and that different factors are considered in each of the processes. To help make this clear, recertification recommendations and determinations should be separately documented from the documentation used for the performance appraisals.

Under guidelines issued by OPM, each agency shall provide for a program to train executives who supervise SES career personnel. The purpose of this training would be to make clear the objectives and procedures of the SES recertification process, including the requirement for excellent performance as a prerequisite for continued service in the SES.

(4) *Factors considered.* Under 5 U.S.C. 3393a(b) and proposed 5 CFR 317.504(e)(1), the recommendation of the supervising official shall be based on the following factors.

(a) The appointee's performance ratings in the SES for the 3 preceding years. For example, the agency's annual performance appraisal period ends on September 30, 1991. If the agency's recertification period also ends on September 30, 1991, the agency would consider the ratings given the appointee for performance in the SES between October 1, 1988, and September 30, 1991, even if the performance rating for the last year is not given until November 1991. If the recertification period ends before September 30, 1991, then the agency in this example must consider the ratings for the 3 earlier periods, i.e., October 1, 1987, through September 30, 1990.

(b) Awards and recognition. These may be from the Federal Government (e.g., SES performance awards or Presidential rank awards) or from outside the Government, as long as they are related to performance as a senior executive during the 3 preceding years.

(c) Developmental activities. These may include any professional, educational, or self-development activities related to performance as a senior executive during the 3 preceding years.

(d) Other relevant factors. Among the other relevant factors are whether the executive demonstrated he or she led or actively participated in an effort which:

—Developed and secured approval of a major policy initiative;
—Substantially advanced achievement of a Presidential objective in the President's MBO system or agency objectives;
—Significantly improved the delivery of program services;
—Saved the Government substantial sums of money in the execution of a program for which he or she is responsible;
—Provided for training, activities, or assignments that significantly advanced the development of staff members; and
—Resulted in a successful task force or special project.

Agencies may add other similar factors. The purpose is to provide for recertification only where the executive has demonstrated excellence in achieving the attainable objectives of his or her position. The factors the agency plans to use must be included in the agency's written recertification procedures.

Since the recertification determination is to consider overall performance for the executive for a 3-year period and is to be based on a number of different factors, an agency's procedures may not provide that an executive will be automatically recertified or not recertified based on a single factor. Therefore, for example, the agency's procedures could not provide that an individual will be recertified solely on the basis of having received two above fully successful performance ratings or a rank award during the 3 preceding years. Similarly, the procedures could not provide that an executive will not be recertified solely on the basis of having received a minimally satisfactory performance rating during the 3-year period. The recertification decision should be based on whether the executive has affirmatively demonstrated during the preceding 3 years the excellence expected of a senior executive based on all the factors under consideration.

(5) *Conditional recertification.* Under 5 U.S.C. 3393a(e)(2), the agency head may reduce the pay of an executive who is conditionally recertified to the next lower rate (e.g., from ES-5 to ES-4). If the executive is later recertified, the executive's pay is restored to the former rate on a prospective basis. Under 5 U.S.C. 5383(c), which contains the general rules for setting individual senior executive pay, an executive's pay may be adjusted only once every 12 months. Therefore, proposed 5 CFR 317.504(h)(3) provides that any pay reduction or restoration in the case of conditional recertification may take place only after the executive has been at the current rate of pay for 12 months.

(6) *Relationship to removals based on annual performance ratings.* If an executive's latest SES annual performance rating under 5 U.S.C. 4314 is less than fully successful and requires the individual's removal from the SES because it is the second unsatisfactory rating in less than 5 years, or the second less than fully successful rating in 3 years, then no recertification determination need be made since the individual cannot be retained in the SES; and the removal is effected under 5 U.S.C. 3592(a)(2) governing removal for less than fully successful executive performance.

(7) *Removal for failure to be recertified.* If an executive is removed from the SES for failure to be recertified, then:

(a) Under 5 U.S.C. 3592(a)(3), the individual may appeal the removal to the Merit Systems Protection Board under 5 U.S.C. 7701, which provides a right to a formal hearing. Under 5 U.S.C. 7701(c)(1)(A), the agency action is to be sustained if it is supported by "substantial evidence," which is defined in the Board's regulations at 5 CFR 1201.56(c). The burden is on the agency to show that there is substantial evidence to support its action. Once such substantial evidence is demonstrated, the burden shifts to the appellant to refute the agency's case that there was substantial evidence or to make a demonstration under 5 U.S.C. 7701(c)(2).

(b) Under 5 U.S.C. 3594 (b)(3) and (c) and proposed subpart G of 5 CFR part 359, the individual is guaranteed fallback to no lower than GS-15, or equivalent, with saved pay. As with removal based on less than fully successful performance ratings, the fallback may not cause the separation or reduction in grade of another employee.

(c) Under 5 U.S.C. 8336(h)(1) for CSRS and 5 U.S.C. 8414(a)(1) for FERS, the individual may elect discontinued service retirement in lieu of fallback if otherwise eligible, i.e., is age 50 with 20 years of service or is any age with 25 years of service. If the individual is subject to CSRS, under 5 U.S.C. 8339(h) there is no annuity reduction based on age. If the individual is subject to FERS, under 5 U.S.C. 8421(a)(2) the individual is eligible for an annuity supplement regardless of age (see § 842.503(b)(4) of the proposed regulations).

(d) Under 5 U.S.C. 3593(a)(2) and proposed 5 CFR 317.702(a), the individual does not have SES reinstatement eligibility and thus must compete to obtain another SES career appointment. Further, under proposed 5 CFR 317.502(e), the individual's qualifications must be reapproved by a Qualifications Review Board (QRB) before individual may receive a new SES career appointment. (Note that the proposed regulations provide that any individual who completed an SES probationary period and was removed for a reason that made the individual ineligible for reinstatement to the SES as a career appointee, including removal for performance or under adverse action procedures, must be reapproved by a QRB before receiving a new SES career appointment.)

(8) *Documentation.* Under proposed 5 CFR 317.504(i), a written reason must be provided for any recommendation or decision to conditionally recertify or to not recertify an executive. If such a reason is already in the recertification record (e.g., it was prepared by the supervising official when making his or her recommendation), later reviewers may concur without providing additional written reasons.

In addition to regulations, OPM will also provide guidance for implementation of the recertification process through the Federal Personnel Manual system.

A number of agencies have annual performance appraisal periods that begin July 1, 1990; and most other periods begin October 1. In order to assure that these regulations are issued as early as possible, since the annual performance rating is one of the factors considered in determining whether to recertify an individual, and to assure that agencies have adequate time to develop their own recertification procedures, the Director of OPM finds that good cause exists for shortening the comment period to 30 days.

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 it will only affect Government employees who are members of the Senior Executive Service.

List of Subjects

5 CFR Part 317

Government employees.

5 CFR Part 359

Administrative practice and procedure, Government employees.

5 CFR Part 842

Administrative practice and procedure, Government employees, Retirement.

U.S. Office of Personnel Management.

Constance Berry Newman,

Director.

Accordingly, OPM is proposing to amend 5 CFR part 317, 5 CFR part 359, and 5 CFR part 842 as follows:

PART 317—APPOINTMENT, REASSIGNMENT, TRANSFER, AND REINSTATEMENT IN THE SENIOR EXECUTIVE SERVICE

1. The authority for part 317 is revised to read as follows:

Authority: 5 U.S.C. 3392, 3393, 3393a, 3395, 3397, 3593, and 3595.

2. Under subpart E, paragraph (e) is added to § 317.502 and § 317.504 is added to read as follows:

Subpart E—Career Appointments

§ 317.502 Qualifications Review Board certification.

* * * * *

(e) A new QRB certification is required for an individual to be reappointed as an SES career appointee following separation of the individual from an SES career appointment if:

(1) The individual was removed during the SES probationary period for performance or disciplinary reasons; or

(2) The individual completed an SES probationary period, or did not have to serve one, and was removed for a reason that made the individual ineligible for reinstatement to the SES under subpart G of this part.

§ 317.504 Agency recertification.

(a) *General.* (1) Section 3393a of title 5, U.S.C., provides that each career SES appointee shall be subject to recertification by his or her employing agency "to ensure that the performance of career appointees demonstrates the excellence needed to meet the goals of the Senior Executive Service as set forth in section 3131 * * *."

(2) For purposes of this section, "agency" is an executive agency as defined in 5 U.S.C. 105 or a military department as defined in 5 U.S.C. 102.

(b) *Coverage.* (1) This section covers SES career appointees who have been continuously employed in the SES for the 156 weeks preceding the end of the recertification period. One or more breaks in SES service of a total of 6 months or less do not interrupt the 156 weeks of continuous employment.

(2) This section does not apply to SES noncareer, limited emergency, or limited term appointees. It also does not apply to former SES career appointees who took Presidential appointments with Senate confirmation and elected to retain SES benefits under subpart H of this part.

(c) *When recertification takes place.* (1) The initial recertification shall take place in calendar year 1991. Future recertifications shall take place every 3rd calendar year thereafter.

(2) The agency head shall determine when in the calendar year recertification shall take place and shall establish a date for calculating the 156-week employment period. Recertification may take place at different times during the calendar year for different components within the agency.

(3) If an individual is recertified in one agency and then transfers to another agency during the calendar year, the individual is not subject to recertification in the new agency. If an individual transfers to another agency during the calendar year and no recertification decision was made in the old agency, a recertification decision must be made in the new agency.

(d) *Standard for recertification.* (1) To be recertifed, the career appointee must perform at the level of excellence expected of a senior executive. Excellence means that the executive has demonstrated over the evaluation period that he or she has achieved excellence in:

(i) Planning for and attaining goals that required a sustained superior effort;

(ii) Taking specific initiatives that improved delivery of services;

(iii) Taking necessary actions to ensure the achievement of a quality product in a timely manner; and

(iv) Providing leadership, and support, that enhanced the professional development and achievements of subordinate employees.

(2) Agencies may add other activities, as appropriate in their written recertification procedures.

(e) *Recommendation by the supervising official.* (1) The supervising official of the career appointee shall submit to an agency Performance Review Board established under 5 U.S.C. 4314 a recommendation whether the appointee's performance justifies recertification as a senior executive. The recommendation shall be based on the following factors:

(i) The appointee's performance ratings in the SES for the 3 preceding years under 5 U.S.C. 4314;

(ii) Any award or other recognition related to performance as a senior executive received by the appointee during the 3 preceding years;

(iii) Any professional, education, or self-developmental activities of the appointee during the 3 preceding years related to performance as a senior executive; and

(iv) Other relevant factors. Among the other relevant factors are whether the executive demonstrated he or she led or actively participated in an effort which:

(A) Developed and secured approval of a major policy initiative;

(B) Substantially advanced achievement of a Presidential objective in the President's MBO system or agency objectives;

(C) Significantly improved the delivery of program services;

(D) Saved the Government substantial sums of money in the execution of a program for which he or she is responsible;

(E) Provided for training, activities, or assignments that significantly advanced the development of staff members; and

(F) Resulted in a successful task force or special project.

(2) The recommendation shall reflect the official's view whether the appointee's overall performance for the 3 preceding years has demonstrated the excellence expected of a senior executive based on the factors outlined in this section.

(3) The appointee shall be given a copy of the recommendation and advised of the right to submit to the Performance Review Board a statement of accomplishment and other documentation giving evidence of the quality of the appointee's performance during the 3 preceding years.

(f) *Recommendation by the Performance Review Board.* (1) More than one-half of the members of the Board shall consist of SES career appointees, unless OPM determines that there exists an insufficient number of career appointees available to comply with this requirement.

(2) After receiving the recommendation of the supervising official and any information provide by the career appointee under paragraph

(e)(3) of this section, the Board shall submit to the appointing authority a recommendation whether the appointee should be recertified, conditionally recertified, or not recertified, or not recertified for continued employment as a senior executive in the SES.

(3) If the Board proposes to recommend conditional recertification or non-recertification, the appointee shall be notified in writing and shall have the opportunity to appear before the Board prior to the forwarding of the recommendation to the appointing authority.

(4) If the Board recommends recertification, it may also recommend that the appointee's rate of basis pay be increased to a higher rate under 5 U.S.C. 5382. If the Board recommends conditional recertification, it may also recommend that the appointee's rate of basic pay be reduced to the next lower rate under 5 U.S.C. 5382.

(5) In addition to its recommendation, the Board, shall also provide the appointing authority the recommendation from the supervising official and any information received from the appointee under paragraph (e)(3) or paragraph (f)(3) of this section.

(6) If the appointing authority is also the agency head, the recommendation of the Board shall go directly to the individual as the agency head.

(g) *Recommendation by the appointing authority.* (1) If the appointing authority determines that the appointee's performance during the 3 preceding years demonstrates the excellence expected of a senior executive, the appointing authority shall recommend to the agency head that the appointee be recertified as a senior executive.

(2) If the appointing authority determines that the appointee's performance has not demonstrated the excellence expected of a senior executive, the appointing authority shall recommend to the agency head that the appointee be conditionally recertified or not be recertified.

(h) *Determination by the agency head.* (1) The agency head shall determine whether the appointee shall be recertified, conditionally recertified, or not recertified as a senior executive.

(2) If the agency head determines that the appointee's performance warrants recertification, the appointee shall continue in the SES. Further, the appointee, rate of basic pay may not be reduced at the time of recertification.

(3) If the agency head determines that the appointee's performance warrants conditional recertification, the appointee:

(i) Shall remain a career appointee in the SES;

(ii) Shall be subject to continuing close review of the appointee's performance by the supervising official in coordination with an Executive Resources Board established under 5 U.S.C. 3393, in accordance with a performance improvement plan developed by the supervising official and subject to the approval of the Executive Resources Board;

(iii) May, if the agency head so determines, be reduced to the next lower rate of basic pay established under 5 U.S.C. 5382, once 12 months have elapsed since the appointee's last pay adjustmenmt, in accordance with § 534.401(c) of this chapter;

(iv) Shall be removed from the SES if not recertified at the end of the 12-month period following the conditional recertification; and

(v) Shall be retained in the SES if recertified at the end of the 12-month period following the conditional recertification and shall have any reduction in basic pay made under paragraph (h)(3)(iii) of this section restored as of the beginning of the first pay period following recertification when 12 months have elapsed since the pay reduction.

(4) The process for determining whether to recertify at the end of the 12-month period an individual who has been conditionally recertified shall be the same as for the initial recertification decision, including review and recommendation by a Performance Review Board.

(5) If the agency head determines that the appointee's performance does not warrant recertification or conditional recertification, the appointee shall be removed from the SES in accordance with 5 U.S.C. 3592 and part 359, subpart C, of this chapter.

(6) The decision to recertify a senior executive may be delegated by the agency head, but no lower than the appointing authority. The decision to conditionally recertify, or to not recertify, a senior executive must be made by the agency head, the deputy agency head, or the head of a major operating unit within a department. The agency's written recertification procedures must indicate who is to make the decision.

(i) *Procedures.* Written reasons must be provided for any recommendation or decision to conditionally recertify or to not recertify a career appointee.

(j) *Agency responsibilities.* Each agency that has career appointees subject to recertification:

(1) Shall develop and issue regulations before the recertification process is initiated and shall provide its senior executives and OPM a copy of the regulations upon issuance and upon any change;

(2) Shall provide for a program, under guidelines issued by OPM, to train its executives who supervise SES career personnel in the objectives and procedures of the recertification process;

(3) Shall maintain such records as OPM may require;

(4) Shall report to OPM such information as OPM may request relating to recertification actions or the training of SES supervisor; and

(5) Shall take such corrective action as may be directed by OPM if OPM finds that the agency's written procedures, or any actions taken by the agency, are contrary to law or regulation.

3. In § 317.702 of subpart G, paragraph (a) introductory text and paragraph (a)(1) are republished, and the first sentence of paragraph (a)(2) up to the first semi-colon is revised to read as follows:

Subpart G—SES Career Appointment by Reinstatement

§ 317.702 General reinstatement: SES career appointees.

(a) *Eligibility for general reinstatement.* A former SES career appointee who meets the following conditions is eligible for reinstatement under this section:

(1) The individual completed an SES probationary period under a previous SES career appointment or was exempted from that requirement; and

(2) The individual's separation from his or her last SES career appointment was not a removal under subpart C of part 359 of this chapter for failure to be recertified as a senior executive; or a removal under subpart E of part 359 of this chapter for less than fully successful executive performance; * * *

* * * * *

PART 359—REMOVAL FROM THE SENIOR EXECUTIVE SERVICE; GUARANTEED PLACMENT IN OTHER PERSONNEL SYSTEMS

4. The authority citation for part 359 continues to read as follows:

Authority: 5 U.S.C. 1302 and 3596, unless otherwise noted.

5. Subpart C, which was formerly reserved, is added to read as follows:

Subpart C—Removal of Career Appointees for Failure To Be Recertified

Subpart C—Removal of Career Appointees for Failure To Be Recertified

§ 359.301 Coverage.

(a) This subpart covers a career appointee who has failed to be recertified under § 317.504 of this chapter.

(b) This subpart does not cover, however, a career appointee who is serving as a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

§ 359.302 Notice requirements.

(a) The agency shall notify the career appointee in writing before the effective date of the action. If the appointee has completed the SES probationary period, or was not required to serve a probationary period, the notice shall be at least 30 calendar days before the effective date of the removal.

(b) The notice shall advise the appointee of:

(1) The basis for the action;

(2) The appointee's placement rights under subpart G of this part—the position to which the appointee will be assigned shall be identified either in the advance notice or in a supplementary notice issued no later than 10 calendar days before the effective date of the action;

(3) the appointee's right to appeal to the Merit Systems Protection Board, including the time limit for appeal and the office to which an appeal should be sent;

(4) The effective date of the removal; and

(5) When applicable, the appointee's eligibility for immediate retirement under 5 U.S.C. 8336(h) or 8414(a).

§ 359.303 restrictions.

(a) Removal from the SES under this subpart may not be made effective within 120 days after—

(1) The appointment of a new agency head; or

(2) The appointment in the agency of the career appointee's most immediate spervisor who—

(i) Is a noncareer appointee; and

(ii) Has the authority to remove the career appointee.

(b) For purposes of this section, a noncareer appointee includes an SES noncareer or limited appointee, an appointee in a position filled by Schedule C or noncareer executive assignment, or an appointee in Executive Schedule or equivalent position other than a career Executive Schedule or equivalent position.

§ 359.304 Appeals.

Removal under this subpart is appealable to the Merit Systems Protection Board under 5 U.S.C. 7701. Under 5 U.S.C. 7701(c)(1)(A), the decision of the agency shall be sustained if it is supported by substantial evidence, which is defined in the Board's regulations at 5 CFR 1201.56(c). The burden is on the agency to show that there is substantial evidence to support its action. Once such substantial evidence is demonstrated, the burden shifts to the appellant to refute the agency's case that there was substantial evidence or to make a demonstration under 5 U.S.C. 7701(c)(2).

6. In § 359.401 of subpart D, the introductory test is republished, paragraph (a) is revised, paragraph (b) is redesignated as paragraph (c) and is republished, and a new paragraph (b) is added to read as follows:

Subpart D—Removal of Career Appointees During Probation

§ 359.401 General exclusions.

This subpart does not apply to the removal of a career appointee during probation when—

(a) The action is initiated under 5 U.S.C. 1206(g) or 5 U.S.C. 7542;

(b) The removal is effected under subpart C of this part for failure to be recertified; or

(c) The appointee is a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

7. In § 359.701 of subpart G, the introductory test is republished, paragraph (a) introductory text and paragraph (b) are revised, and paragraph (c) is removed to read as follows:

Subpart G—Guaranteed Placement

§ 359.701 Coverage.

This subpart covers career appointees, other than reemployed annuitants, who are removed from the SES under any of the following conditions:

(a) Removal during the probationary period under subpart C of this part or under subpart D of this part for other than misconduct, neglect of duty, malfeasance, or other disciplinary reasons under §§ 359.403, 359.404, or part 752, subpart F, of this chapter, if at the time of appointment to the SES the individual held a career of career-conditional appointment or an appointment of equivalent tenure, as determined by OPM. An appointment of equivalent tenure is considered to be an appointment in the excepted service other than an appointment—

* * * * *

(b) Removal as the result of

(1) Failure to be recertified under subpart C of this part,

(2) Less than fully successful executive performance under subpart E of this part, or

(3) A reduction in force under subpart F of this part.

The appointee must have completed the required probationary period under the SES or was not required to serve a probationary period.

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

8. The authority citation for part 842 continues to read as follows:

Authority: 5 U.S.C. 8461; § 842.105 also issued under 5 U.S.C. 8402(c)(1); § 842.106 also issued under 5 U.S.C. 8402(c)(1).

9. In § 842.211 of subpart B, paragraph (a) is revised paragraph (c) is redesignated as paragraph (d) and is republished, and a new paragraph (c) is added to read as follows:

Subpart B—Eligibility

§ 842.211 Senior Executive Service, Defense Intelligence Senior Executive Service, and Senior Cryptologic Executive Service.

(a) A member of the Senior Executive Service, the Defense Intelligence Senior Executive Service, or the Senior Cryptologic Senior Executive Service who is removed or who resigns after receipt of written notice of proposed removal for less than fully successful executive performance, or for failure to be recertified as a senior executive, is entitled to an annuity—

(1) After completing 25 years of service; or

(2) After becoming age 50 and completing 20 years of service.

* * * * *

(c) "Removed for failure to be recertified as a senior executive" means (1) with respect to a member of the Senior Executive Service, removal in accordance with the procedures in subpart C part 359 of this chapter, and (2) with respect to a member of the Defense Intelligence Senior Executive Service or the Senior Cryptologic Executive Service, a certification by the head of the Defense Intelligence Agency or National Security Agency (or their designees) that the employee has been removed for failure to be recertified under 10 U.S.C. 1601(a) or section 12(a)(1) of the National Security Agency Act, respectively.

(d) An annuity payable under paragraph (a) of this section commences on the day after separation from service.

10. In § 842.503 of subpart E, paragraph (b) introductory text and paragraph (b)(4) are revised to read as follows:

Subpart E—Annuity Supplement

§ 842.503 Eligibility for annuity supplement.

* * * * *

(b) An employee or Member who retires under any of the following sections before attaining the minimum retirement age is not entitled to receive an annuity supplement until he or she attains that age:

* * * * *

(4) Section 842.211, except that an individual entitled to an annuity under 5 U.S.C. 8414(a) for failure to be recertified as a senior executive shall be entitled to an annuity supplement without regard to the minimum retirement age.

* * * * *

[FR Doc. 90-16316 Filed 7-11-90; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 340

[Docket No. 90-052]

Genetically Engineered Organisms and Products; Exemption for Interstate Movement of the Genetically-Engineered Plant (Arabidopsis thaliana) Under Specified Conditions

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the regulations pertaining to the introduction of certain genetically engineered organisms and products by exempting from regulation certain genetically engineered plants that are moved interstate under specified conditions. This proposed amendment would remove unnecessary restrictions on the interstate movement of a genetically engineered plant, *Arabidopsis thaliana*, which does not present a risk of plant pest introduction or dissemination.

DATES: Consideration will be given only to comments received on or before August 13, 1990.

ADDRESSES: Send an original and three copies of written comments 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 No. 90-052. 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: Dr. Cathy Joyce, Biotechnologist, Biotechnology, Biologics, and Environmental Protection, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, room 844, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-6789.

SUPPLEMENTARY INFORMATION:

Background

On June 16, 1987, the Animal and Plant Health Inspection (APHIS) published a final rule in the **Federal Register** (52 FR 22892-22915) that established a new part 340 in title 7 of the Code of Federal Regulations (7 CFR part 340), entitled "Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There is Reason to Believe Are Plant Pests" (hereinafter referred to as "the rule"). The rule regulates the introduction (importation, interstate movement, and release into the environment) of genetically engineered organisms and products that are plant pests or for which there is reason to believe are plant pests (regulated articles). The rule sets forth procedures for obtaining a permit for the release into the environment of a regulated article and for obtaining a limited permit for the importation or interstate movement of a regulated article. Such permits are required before a regulated article can be introduced in the United States.

It is APHIS' belief that the rule should be flexible and modified when appropriate to remove unnecessary restrictions. APHIS previously demonstrated its commitment to amend its rule by institution of an exemption for certain microorganisms (*E. coli* strain K-12, sterile strains of *Saccharomyces cerevisiae*, or asporogenic strains of *Bacillus subtilis*) that contain plant pest sequences (52 FR 35921-35923). APHIS believes that when it can be shown that the interstate movement between contained facilities of certain organisms does not present a risk of plant pest introduction or dissemination, the regulations should be amended to exclude such movement from the permit requirements.

In this regard, APHIS is proposing to amend § 340.2(b) of the rule by exempting the interstate movement of genetic material from any plant pest that is incorporated in the genome of the plant *Arabidopsis thaliana*. This proposal would not amend the permit requirements concerning release into the environment or importation.

A. thaliana is a small herbaceous plant in the mustard family (Brassicaceae). Several characteristics make *A. thaliana* a desirable model system for classical genetic studies, and *A. thaliana* has been used in this regard for over 40 years. These characteristics include the small size of the plants, short generation times, high seed set, ease of growth, and ease of either self- or cross-fertilization. More recently, *A. thaliana* has begun to be appreciated as a model organism for molecular genetic studies.

Characteristics of this organism which facilitate molecular genetic analysis are the small genome size, the lack of repetitive DNA in the genome, and the ease with which transformation with *Agrobacterium tumefaciens* can be accomplished. *Arabidopsis* has the smallest known genome among higher plants, with a haploid nuclear genome size of approximately 70,000 kilobase pairs (kb). In comparison, two other plants that are frequently used in plant molecular genetic research, cotton and tobacco, have genomes with 780,000 and 1,600,000 kb, respectively. The small genome size and the low content of repetitive DNA in the genome facilitate the application of many techniques in plant molecular biology including screening of genomic libraries, Southern blot analysis, and "chromosome walking." Because of the above mentioned characteristics, *A. thaliana* is now and is likely to continue to be a widely used organism in plant molecular biology research.

Under the proposed exemption, a limited permit for interstate movement would not be required for genetic material from any plant pest contained in the genome of the plant *A. thaliana*, provided all of the following conditions are met:

(1) The plant or materials are shipped in a container that meets the requirements of § 340.6(b) (1), (2) and (3) of this part;

(2) The cloned genetic material is stably integrated into the plant genome; and

(3) The cloned material does not include the complete infectious genome of a known plant pest.

The rationale for imposing conditions in proposed § 340.2(b)(2) (i), (ii) and (iii) is as follows:

(1) Requiring that the plant or material be shipped in a container that meets the requirements of §340.6(b) (1), (2), and (3) of this part ensures that the organisms will receive adequate physical containment during interstate movement. Furthermore, such container requirements are simply sound and prudent measures that should be employed when shipping contained organisms between laboratories.

(2) Requiring that the cloned genetic material be stably integrated into the plant genome ensures that, in the event of an accidental release, the risk of horizontal movement (the transfer of genetic material between organisms) of the genetic material is negligible.

(3) The condition that the cloned material not include the complete infectious genome of a plant pest ensures that such genetic material would not be able to initiate plant disease. In short, APHIS believes that when plant pest genetic material is moved interstate under the conditions set forth above, this would provide adequate safeguards which would prevent the introduction and dissemination of plant pests.

APHIS proposes to amend the rule in § 340.2(b) by adding a new paragraph, (b)(2), to include the proposed exemption.

This document also proposes to add, to the definition section in 7 CFR 340.1, the term "stably integrated".

Executive Order 12291 and Regulatory Flexibility Act

This proposed rule is issued in conformance with Executive Order 12291 and has been determined not to be a "major rule." Based on information compiled by the Department, it has been determined that this proposed rule would have an effect on the economy of less than a $100 million; would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and would not cause a significant adverse affect 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.

The effect of this proposed rule would be to exempt a person from having to obtain a limited permit when certain genetic material from a plant pest, contained within the genome of the plant *A. thaliana*, is moved interstate. Currently, such a limited permit requires the submission of data regarding the nature of the organism, how it was produced, and a description of the contained facility at destination. Such data should already be available to the researcher. The proposed exemption would relieve a person from having to submit an application to APHIS for a limited permit, resulting in a savings of time that would ordinarily be associated with preparation of such a permit application. Therefore, the deletion of the requirement to submit the data to obtain a limited permit should not have a significant economic impact on a substantial number of small entities.

The conditions that would have to be complied with under the proposed exemption are those that a researcher would normally employ when using *A. thaliana* as an experimental organism. It is expected that this proposed exemption will affect as least several hundred research scientists, some of whom may be operating small businesses that would be deemed small "entities" under the Regulatory Flexibility Act. The proposed regulation would exempt them from the requirement of having to obtain a limited permit under the circumstances described above. Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This proposed rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

List of Subjects in 7 CFR Part 340

Agricultural commodities, Biotechnology, Genetic engineering, Plant diseases, Plant pests, Plants (Agriculture), Quarantine, Transportation.

Accordingly, we are proposing to amend 7 CFR part 340 as follows:

PART 340—INTRODUCTION OF ORGANISMS AND PRODUCTS ALTERED OR PRODUCED THROUGH GENETIC ENGINEERING WHICH ARE PLANT PESTS OR WHICH THERE IS REASON TO BELIEVE ARE PLANT PESTS

1. The authority citation for 7 CFR part 340 would continue to read as follows:

Authority: 7 U.S.C. 150aa–150jj, 151–167, 1622n; 31 U.S.C. 9701; 7 CFR 2.17, 2.51, and 371.2(c).

2. In § 340.1, the following definition would be added in alphabetical order to read as follows:

§ 340.1 Definitions.

* * * * *

Stably integrated. The cloned genetic material is contiguous with elements of the recipient genome and is replicated exclusively by machanisms used by recipient genomic DNA.

* * * * *

3. In § 340.2, a new paragraph (b)(2) would be added to read as follows:

§ 340.2 Groups of organisms which are or contain plant pests and exemptions

* * * * *

(b) * * *

(2) A limited permit for interstate movement would not be required for genetic material from any plant pest contained in the genome of the plant *Arabidopsis thaliana*, provided that all of the following conditions are met:

(i) The plants or plant materials are shipped in a container that meets the requirements of § 340.67(b) (1), (2) and (3) of this part;

(ii) The cloned genetic material is stably integrated into the plant genome;

(iii) The cloned material does not include the complete infectious genome of a known plant pest.

Done in Washington, DC, this 9th day of July 1990

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 90-16228 Filed 7-11-90; 8:45 am]

BILLING CODE 3410-34-M

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9 CFR Part 3

[Docket No. 90-128]

Animal Welfare—Standards for Horses and Other Farm Animals

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of extension of comment period.