

Dated: April 24, 1991.

F. Henry Habicht II,

Acting Administrator.

Accordingly, 40 CFR chapter I, subchapter E, part 152 is proposed to be amended as follows:

PART 152—[AMENDED]

1. The authority citation for part 152 continues to read as follows:

Authority: 7 U.S.C. 136–136y. Subpart U also issued under 31 U.S.C. 9701 and Pub. L. 100–202.

2. In § 152.161 by removing the existing paragraph designations and inserting the following definitions in alphabetical order to read as follows:

§ 152.161 Definitions.

* * * * *

Ground water means water which is below the land surface in a zone of saturation, at or above atmospheric pressure.

Ingredient means any component of a pesticide product or a metabolite or a degradate of any component.

* * * * *

3. In § 152.170, by revising paragraph (a)(1) and adding paragraph (b)(3) to read as follows:

§ 152.170 Criteria for restriction to use by certified applicators.

(a) * * *

(1) It exceeds one or more of the specific criteria in paragraph (b) or (c) of this section, or evidence described in paragraph (d) of this section substantiates that the product or use poses a serious hazard that may be mitigated by restricting its use;

* * * * *

(b) * * *

(3) A pesticide product intended for outdoor use will be considered for restricted use classification if an ingredient of the product meets or exceeds the criteria in paragraph (b)(3)(i) or (b)(3)(ii) of this section:

(i)(A) Based on studies conducted in accordance with the Pesticide Assessment Guidelines Subdivision N or other reliable scientific data, it has any soil-water partition coefficient (K_d) less than or equal to 5 mL/kg, any carbon referenced sorption coefficient (K_{oc}) less than or equal to 500 mL/g, or it has been

detected below 75 centimeters in the soil profile, and

(B) Based on studies conducted in accordance with the Pesticide Assessment Guidelines Subdivision N or other reliable scientific data, it has any experimentally determined half-life greater than 3 weeks as shown from laboratory aerobic soil metabolism studies or field dissipation studies, or it has any experimentally determined resistance to hydrolytic degradation, or photolytic degradation on soil or in water, under any conditions, resulting in degradation of less than 10 percent in a 30-day period.

(ii) Based on studies conducted in accordance with the Pesticide Assessment Guidelines Subdivision N or other reliable scientific data, it has been detected in ground water in at least three counties, unless those detections have been shown not to be a result of pesticidal activities including, but not limited to mixing, loading, application or disposal.

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**Monday
May 13, 1991**

Part VII

Department of Housing and Urban Development

Office of the Secretary

24 CFR Part 4

**Prohibition of Advance Disclosure of
Funding Decisions; Final Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 4

[Docket No. R-91-1491; FR-2305-F-02]

RIN 2501-AB02

Prohibition of Advance Disclosure of Funding Decisions

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This rule implements section 103 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December 15, 1989) (Reform Act). Section 103 proscribes the communication of certain information by HUD employees to persons not authorized to receive that information during the selection process for the award of assistance from the Department. Section 103 also authorizes the Department to impose civil money penalties on employees who knowingly violate the prohibitions in the section and to impose other sanctions upon applicants for assistance who may benefit from the proscribed communications. The purpose of section 103 is to strengthen HUD's controls over the conduct of participants in its programs, and to avoid unfair competition, by controlling the flow and timing of information from the Department to the participants.

EFFECTIVE DATE: June 12, 1991.

FOR FURTHER INFORMATION CONTACT: Arnold J. Haiman, Director, Office of Ethics, room 2158, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Telephone number (202) 709-3815. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Introduction

This rule implements an important part of the Department of Housing and Urban Development Reform Act of 1989 by specifying what types of information employees may not disclose in connection with the Department's selection of applicants for assistance. The proposed rule in this proceeding was published on November 23, 1990 (55 FR 49012).

The rule specifies which employees may or may not be subject to civil money penalties for improper disclosure of that information. Also, it provides that applicants for and recipients of assistance may be subject to sanctions other than civil money penalties if the Department believes that an employee

has breached the disclosure proscriptions under this rule. The objective of this rule is to preclude any person from receiving or obtaining information from the Department that would give an applicant an unfair advantage over other applicants who are competing for the assistance. A detailed discussion follows.

The Selection Process and Covered Selection Information

The type of activity to which this rule applies is described generally as follows: The Department makes available funds for certain purposes either on an annual or a special basis. Those funds are the "assistance" with which this rule is concerned. The Department announces the availability of funding through a publication in the *Federal Register*, usually in the form of a Notice of Fund Availability (NOFA). Through publication of the NOFA, eligible persons are invited to apply for the assistance. After evaluating the applications, the Department selects one or more applicants to receive assistance. It is the improper disclosure of information regarding the selection that this rule is designed to proscribe and sanction. The Department will include in future NOFAs a section that alerts applicants to the requirements and consequences of this rule. Thus, even if a potential applicant might not be aware of this rule upon its implementation, the applicant will learn of it while reviewing the NOFA for a program in which it has an interest.

The critical time period for the rule's objective is the "selection process" discussed above. The statute defines the "selection process" as

the period with respect to a selection for assistance that begins with the development, preparation, and issuance of a solicitation or a request for applications for the assistance and concludes with the selection of recipients of assistance, and includes the evaluation of applications.

However, since "development" and "issuance" are terms that are at opposite ends of a spectrum, the rule defines the selection process as beginning at the time when the HUD official who is responsible for a given assistance program forwards a written request (or a draft NOFA) to the relevant office within the Office of General Counsel for preparation of a solicitation (in whatever format) for publication in the *Federal Register*. This decision point is strictly an internal function and will occur before the publication of the solicitation in the *Federal Register*.

The proposed rule contained a provision for internal notification of

particular employees to alert them to the beginning of a selection process and of the applicability of this rule's requirements. This provision (§ 4.100(b) in the proposed rule) has been stricken because the Department believes that the proposed procedure would be an infeasible means of notifying all potentially affected employees. Although the rule provides adequate notice to all HUD employees of their obligations under section 103, it will be augmented by internal instructions and training.

The types of assistance that are covered by this rule are extensive and are subject to change with the enactment of legislation that might amend current programs. Thus, this rule identifies the programs to which the rule currently will be applied, but cautions that the list is not exclusive. New funding programs will be added to the rule as they come into existence, but a new program (for example, a demonstration program) not codified in HUD regulations will be subject to the rule's prohibitions, whether or not the program appears in the listing contained in today's document.

This assistance is also of the type that entails a competition for its distribution. Thus, the Department's mortgage insurance programs and any contracts that are subject to the Federal Acquisition Regulation are excluded.

The information that is prohibited from being disclosed during the selection process is "covered selection information." As can be seen from its definition in § 4.5, "covered selection information" includes any information contained in an application and any information regarding the decision to select an applicant. The prohibition against disclosure applies to any HUD "employee", a term that is defined to include consultants or others who are retained on a contractual basis. However, "employee" does not include an independent contractor who is working under a procurement contract.

Excluded from "covered selection information" is information about program requirements, or about the timing of the decision points in the selection process. There are other items of information that are excluded from "covered selection information" as well. For example, employees may inform an applicant of its failure to qualify after a preliminary review for eligibility and completeness of its application, and about the reasons for the failure to qualify, but only employees who are authorized to have that information in the first instance may make the disclosure (§ 4.105(b)). An authorized

employee is one who is officially involved in the selection process. The rule also permits an authorized employee to contact an applicant to obtain clarification of the application. Clarification would include a request by the employee for information, for example, to assure that the employee understood the terms of the application or that all applications were complete. Section 4.105(a) lists a number of permissible disclosures that employees may make, whether or not they are "authorized employees."

The rule defines "covered selection information" in part to mean any information "otherwise used in arriving at the Secretary's decision to make assistance available, unless that information is generally available to the public." (The statute defines "covered selection information" in part to mean "any information regarding the decision of the Secretary to make available assistance or other information that is determined by the Secretary to be information that is not generally available to the public * * *".) If information is generally available to the public, its disclosure to a given applicant should afford no special benefit to that applicant, and an employee will not be subject to sanctions for having disclosed it.

The final rule sets out, in §§ 4.100 and 4.105, the circumstances under which disclosures may be made during the selection process. The Secretary has not chosen to provide in the rule for any other exercise of his discretionary power to permit disclosures to persons other than those described in the rule. Should the Secretary choose at a future time to enlarge the class of persons authorized to receive covered selection information, it would be necessary to amend part 4 to accomplish this purpose.

Prohibitions, Penalties and Procedures

This rule would subject a HUD employee to civil money penalties for knowingly and materially violating any prohibition against disclosing "covered selection information" during the selection process. It also would subject an employee to other available sanctions, regardless of the materiality of the disclosures made. To constitute a violation, the disclosure must have been made to a person not authorized to have the information, and any person who is not officially involved in the selection process is an unauthorized person. Thus, the unauthorized person could be someone within or outside the Department.

In the normal course of events, the employee who makes a disclosure

would be an authorized employee, because an authorized employee is the person most likely to have covered selection information in the first instance. However, it is not the intention of this rule to impose absolute liability on employees, whether or not they are authorized employees. There will be situations in which disclosures to employees who are not involved in the selection process are necessary, or even routine. For example, to the extent that clerical staff might not be considered officially involved in the selection process, disclosures of covered selection information to them to accomplish clerical work would not subject the disclosing employee to a sanction of this rule. (Of course, a supervisor assigning work that includes sensitive information will be expected to alert the clerical employee to its confidential nature.) It is reasonable to expect that a HUD attorney, other than one who regularly advises authorized employees, might have need of covered selection information. A similar need might be warranted for an auditor or investigator of the Inspector General who is conducting an audit, inquiry or investigation. These are situations in which disclosure is proper, and the rule recognizes this. (§ 4.105).

Since it is the Department's policy to address conferences and meetings of potential applicants as part of its educational mission to inform the public of new programs, disclosures regarding program requirements that might not have been made public because they are recently formulated policy positions sometimes will be made. For the purpose of this rule, those types of disclosures, made at conferences, will be considered to be public statements.

Before the Department may refer an employee's case to the Departmental Civil Penalties Panel (a panel described in the proposed rule published on September 10, 1990, (55 FR 37290) to be codified at 14 CFR part 30) with a request to propose a civil money penalty, the Department must have made an initial determination through its Office of Ethics that the disclosure was made knowingly and materially. (The Office of Ethics was recently created by Secretary Kemp and charged with oversight responsibility for employee conduct.) "Knowingly" is a term used and defined throughout the Reform Act; it will be satisfied if the employee has actual knowledge of the violation. Also, it will be satisfied if the employee either acts with deliberate ignorance of, or with reckless disregard for, a prohibited disclosure. "Materially" is defined in this rule, and criteria for determining materiality are set forth at

§ 4.130(d). Further, a civil money penalty may be imposed only after an opportunity for a hearing before an administrative law judge pursuant to the provisions of proposed 24 CFR part 30.

Because of the variety of programs affected by this rule, it is not possible to identify specific bits of information that would be prohibited from being disclosed. However, the Department believes that this rule provides sufficient notice to employees of what conduct is unlawful through the definition of covered selection information and the examples of prohibited disclosures. Nevertheless, the Office of Ethics will publicize the requirements of this rule within the Department and conduct training for those employees who are likely to be directly affected by it.

This rule establishes a procedure to assure that an employee charged with a violation would receive fair treatment and procedural protection during the investigatory phase. The procedures prescribed by this rule call for a review of any alleged violation by the Office of Inspector General, which would conduct the appropriate investigations and provide the Office of Ethics with a report of the investigations. The Office of Ethics would then perform its own review and, among other options, would have the authority to discuss the violation with the employee alleged to have committed it. After concluding its review, the Office of Ethics could close the matter or refer it to the Departmental Civil Penalties Panel (DCPP) to consider the case for a civil money penalty. The Office of Ethics may refer the case to an appropriate HUD official for additional or alternative sanctions whether or not the violation is material (§ 4.130(e)).

Applicant Sanctions

Although this rule does not provide for civil money penalties with respect to applicants for assistance (none having been authorized by section 103 of the Reform Act), it does provide for other sanctions, for example, debarment, in the event of an employee's unlawful disclosure of information. Section 103 states that if the Secretary has information providing a reasonable basis to believe that an employee has violated the section—

the Secretary shall (1) in the case of a selection that has not been made, determine whether to terminate the selection process or take other appropriate action; and (2) in the case of a selection that has been made, determine whether to impose certain sanctions or take any other actions that the Secretary considers appropriate.

The statutory language is so flexible that the Department has decided to treat these matters on a case-by-case basis. However, the rule does provide guidance to the officials who will consider whether to impose other sanctions. That guidance is provided in the form of factors required to be considered in making the sanction decision (§ 4.200(c)).

The Reform Act provides no "linkage" between a sanction against an applicant and a referral for consideration of a civil money penalty against an employee. Accordingly, the rule provides that an action to sanction an applicant is independent of a decision by the DCPD to seek a civil money penalty against an employee. However, since the authorization to sanction an applicant is triggered by the Secretary's conclusion that there is a "reasonable basis" to believe that an employee has violated this rule (§ 4.200), and the same "reasonable basis" test exists under which the Office of Ethics is authorized to refer an employee case for a sanction (§ 4.130 (c) and (e)), a referral by the Office of Ethics for any type of authorized sanction may be a predicate for action to sanction an applicant.

Public Comments

The Department did not receive any public comments on its proposed rule.

Findings and Certifications

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk at the above address.

This rule does not constitute a "major rule" as that term is defined in section 1(d) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it will not (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have 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.

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the

undersigned hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule provides for the imposition of sanctions on persons determined to have engaged in prohibited conduct, but these sanctions are not directed at small entities *per se*.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule regulates or prohibits certain kinds of conduct by employees of the Department and by persons who are made privy to information from these employees.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or on their relationship with the Federal government, or on the distribution of power and responsibilities between them and others levels of government. The rule primarily will affect HUD employees and have negligible effect on States or their political subdivisions.

This rule was not listed in the Department's Semiannual Agenda of Regulations published on April 22, 1991 (56 FR 17373) in accordance with Executive Order 12291 and the Regulatory Flexibility Act.

Accordingly, the Department amends title 24 of the Code of Federal Regulations by adding a new part 4, to read as follows:

PART 4—PROHIBITION OF ADVANCE DISCLOSURE OF FUNDING DECISIONS

Subpart A—General Provisions

Sec.

4.1 Purpose.

4.5 Definitions.

4.10 Scope.

Subpart B—Prohibitions and Procedures

4.100 Prohibition of advance disclosure of funding decisions.

4.105 Permissible disclosures.

4.110 Civil penalties.

4.115 Procedure upon discovery of a violation.

4.120 Investigation by Office of Inspector General.

4.125 Review of Inspector General's Report by Office of Ethics.

4.130 Action by the Office of Ethics.

Subpart C—Applicant Sanctions

4.200 Administrative remedies.

Authority: Secs. 7(d) and 12(f), Department of Housing and Urban Development Act (42 U.S.C. 3535(d), 3537a).

Subpart A—General Provisions

§ 4.1 Purpose.

This part proscribes direct or indirect communication of certain information during the selection process by HUD employees to persons within or outside of the Department who are not authorized to receive that information. The purpose of the proscription is to preclude giving an unfair advantage to applicants who would receive information not available to other applicants or to the public. This part also authorizes the Department to impose a civil money penalty on a HUD employee who knowingly discloses protected information, if the violation of this part is material, and authorizes the Department to sanction the person who received information improperly by, among other things, denying assistance to that person.

§ 4.5 Definitions.

Applicant means any person that is being considered for or receiving assistance.

Application means a written request for assistance regardless of whether the request is in proper form or format.

Assistance means any grant, loan, subsidy, guarantee, or other financial assistance under a program administered by the Department that provides by statute, regulation, or otherwise for the competitive distribution of assistance. The term does not include any mortgage insurance provided under a program administered by the Department or any contract (e.g., a procurement contract) that is subject to the Federal Acquisition Regulation (FAR) (48 CFR Ch. 1). The term includes those elements of the programs listed below that provide for the competitive distribution of assistance. (Because a competitive assistance program might be established after June 12, 1991, the effective date of this regulation, the list cannot be considered an exclusive one. The list included in this rule will be amended from time to time to reflect the addition of new competitive programs. However, the fact that a new competitive program has not yet been added to the list by a conforming amendment to the rule will not create the implication that the new program is outside the reach of the prohibitions on

advance disclosure contained in this rule.)

(1) Section 312 Rehabilitation Loans under 24 CFR part 510 (except loan amounts less than \$200,000 and loans for single family properties).

(2) Rental Rehabilitation Grants under 24 CFR part 511 (only HUD-administered grants under subpart F and technical assistance under subpart A).

(3) The following programs under title I of the Housing and Community Development Act of 1974:

(i) Community Development Block Grants under 24 CFR part 570 (only the HUD-administered Small Cities program under subpart F).

(ii) Special Purpose Grants (only technical assistance and assistance for Historically Black Colleges) under section 105 of the Department of Housing and Urban Development Reform Act of 1989.

(iii) The Work Study program under section 107(c) of the Housing and Community Development Act of 1974, and

(iv) Community Development Block Grants to Indian Tribes under title I of the Housing and Community Development Act of 1974.

(4) Emergency Shelter Grants under 24 CFR part 576 (only HUD reallocations under §§ 576.63 through 576.67).

(5) Transitional Housing under 24 CFR part 577.

(6) Permanent Housing for Handicapped Homeless Persons under 24 CFR part 578.

(7) Section 8 Housing Assistance Payments—Existing Housing and Moderate Rehabilitation under 24 CFR part 882 (including the Moderate Rehabilitation program for Single Room Occupancy Dwellings for the Homeless under subpart H).

(8) Loans for Housing for the Elderly or Handicapped under section 202 of the Housing Act of 1959 (including operating assistance for Housing for the Handicapped, as authorized by section 162 of the Housing and Community Development Act of 1987; and Seed Money Loans under section 106(b) of the Housing and Urban Development Act of 1968).

(9) Section 8 Housing Assistance Payments—Loan Management Set-Aside under 24 CFR part 886, subpart A (except when used as an incentive in connection with an approved Plan of Action under the Emergency Low Income Housing Preservation Act of 1987, as amended).

(10) Flexible Subsidy under 24 CFR part 219—both Operating Assistance under subpart B and Capital Improvement Loans under subpart C (except when used as an incentive in connection with an approved Plan of

Action under the Emergency Low Income Housing Preservation Act of 1987, as amended).

(11) Housing Vouchers under 24 CFR part 887.

(12) Low-Rent Housing Opportunities under 24 CFR part 904.

(13) Indian Housing under 24 CFR part 905.

(14) Public Housing Development under 24 CFR part 941.

(15) Comprehensive Improvement Assistance under 24 CFR part 968.

(16) Resident Management under 24 CFR part 964, subpart C.

(17) Neighborhood Development Demonstration under section 123 of the Housing and Urban-Rural Recovery Act of 1983.

(18) Nehemiah Grants under 24 CFR part 280.

(19) Research and Technology Grants under title V of the Housing and Urban Development Act of 1970.

(20) Congregate Services under the Congregate Housing Services Act of 1978.

(21) Counseling under section 106 of the Housing and Urban Development Act of 1968.

(22) Fair Housing Initiatives under 24 CFR part 125.

(23) Public Housing Drug Elimination Grants under section 5129 of the Anti-Drug Abuse Act of 1988.

(24) Fair Housing Assistance under 24 CFR part 111.

(25) Public Housing Early Childhood Development Grants under section 222 of the Housing and Urban-Rural Recovery Act of 1983.

(26) Supplemental Assistance for Facilities to Assist the Homeless under 24 CFR part 579.

(27) Shelter Plus Care Assistance under section 837 of the Cranston-Gonzalez National Affordable Housing Act.

(28) Planning and Implementation Grants for HOPE for Public and Indian Housing Homeownership under title IV, subtitle A, of the Cranston-Gonzalez National Affordable Housing Act.

(29) Planning and Implementation Grants for HOPE for Homeownership of Multifamily Units under title IV, subtitle B, of the Cranston-Gonzalez National Affordable Housing Act.

(30) Implementation Grants for HOPE for Homeownership of Single Family Homes under title IV, subtitle C, of the Cranston-Gonzalez National Affordable Housing Act.

(31) HOPE for Elderly Independence Demonstration under section 803 of the Cranston-Gonzalez National Affordable Housing Act.

(32) Capital advances (and project rental assistance) for Housing for the

Elderly under section 202 of the Housing Act of 1959, as amended by section 801 of the Cranston-Gonzalez National Affordable Housing Act, or for Housing for Persons with Disabilities under section 811 of that Act.

Authorized employee means an employee whose responsibilities in connection with the selection process require that the employee have covered selection information to perform his or her official duties.

Covered selection information means any information

(1) That is required by statute, regulation, or order to be confidential;

(2) That is contained in an application or request for assistance;

(3) That is otherwise used in arriving at the Secretary's decision to make assistance available, unless that information is generally available to the public.

Department or HUD means the Department of Housing and Urban Development.

Disclose means providing information directly or indirectly to a person through any means of communication.

Employee includes persons employed on a full-time, part-time, or temporary basis, and to special government employees as defined in 18 U.S.C. 202. The term applies whether or not the employee is denoted as an officer of the Department. "Employee" is to be construed broadly to include persons who are retained on a contractual or consultative basis under an Office of Personnel and Training appointment. However, "employee" does not include an independent contractor, e.g., a firm or individual working under the authority of a procurement contract.

Knowing or knowingly means having actual knowledge of, or acting with deliberate ignorance or of reckless disregard for, the requirements of § 4.100.

Material or materially means in some influential or substantial respect or having to do more with substance than with form.

NOFA means Notice of Fund Availability—a notice published in the Federal Register which announces the availability of assistance.

Person means an individual, corporation, company, association, authority, firm, partnership, society, State, local government, or any other organization or group of people.

Secretary means the Secretary of Housing and Urban Development.

Selection means the determination of which applicant or applicants for assistance are to receive assistance

under the program for which assistance is sought.

Selection Official means the person within the Department who makes the final decision to provide assistance in response to an application or applications for assistance. The Selection Official may be denominated as Assistant Secretary, a Grant Officer or any other HUD employee authorized to make the decision.

Selection process means the period with respect to a selection for assistance that begins when the HUD official responsible for awarding the assistance involved, or his or her designee, makes a written request (which includes the selection criteria to be used in providing the assistance) to the Office of General Counsel (OGC) to prepare the NOFA, solicitation, or request for applications for assistance for publication in the *Federal Register*. The period includes the evaluation of applications, and concludes with the announcement of the selection of recipients of assistance.

§ 4.10 Scope.

(a) *Coverage*. The prohibitions against improper disclosure of covered selection information apply to any person who is an employee of the Department.

(b) *Applicability*. The prohibitions contained in this part apply to conduct occurring on or after June 12, 1991.

Subpart B—Prohibitions and Procedures

§ 4.100 Prohibition of advance disclosure of funding decisions.

(a) *In general*. Except as otherwise provided in § 4.105, during the selection process an employee shall not knowingly disclose any covered selection information regarding the selection process to any person other than an employee authorized to receive that information.

(b) *Examples of prohibited disclosures*. There are many disclosures that will be prohibited by this section, but since they will be fact-specific to a particular program, they cannot be specified here. However, the following are examples of types of information, the disclosure of which shall be a violation of this section:

- (1) Information regarding any applicant's relative standing;
- (2) The amount of assistance requested by any applicant;
- (3) The identity of any applicant;
- (4) The number of applicants;
- (5) Any information contained in an application.

§ 4.105 Permissible disclosures.

(a) Notwithstanding the provisions of § 4.100, an employee is permitted to

disclose information during the selection process with respect to:

- (1) The requirements of a HUD program or programs, including unpublished policy statements, provided that the requirements or statements are disclosed on a uniform basis to any applicant;
- (2) The dates by which particular decisions in the selection process will be made;
- (3) Any information which has been published in the *Federal Register* in a NOFA or otherwise;
- (4) Any information which has been made public through means other than the *Federal Register*;
- (5) An official audit, inquiry or investigation, if the disclosure is made to an auditor or investigator authorized by the HUD Inspector General to conduct the audit or investigation;
- (6) Legal activities, including litigation, if the disclosure is made to an attorney who is representing or is otherwise responsible to the Department in connection with the activities; or
- (7) Procedures that are required to be performed to process an application, e.g., environmental or budget reviews.

(b) An authorized employee, during the selection process, may contact an applicant for the purpose of:

- (1) Communicating the fact of the applicant's failure to qualify, after a preliminary review for eligibility and completeness with respect to his or her application, and the reasons for the failure to qualify;
- (2) Communicating the fact of the applicant's failure to be determined to be technically acceptable after a full review; or
- (3) Seeking a clarification of the terms of the applicant's application. A clarification, for the purpose of this paragraph, may include a request for additional information consistent with regulatory requirements.

§ 4.110 Civil penalties.

(a) *In general*. Whenever any employee knowingly and materially violates the prohibition in § 4.100, the Secretary may propose a civil money penalty on the employee through the Departmental Civil Penalties Panel in accordance with the provisions of 24 CFR part 30.

(b) *Amount*. The amount of the penalty, as determined by the Secretary, may not exceed \$10,000 for each violation.

(c) *Cumulative remedy*. A civil money penalty may be sought in addition to any other available civil remedy or any available criminal penalty and may be imposed whether or not the Secretary imposes other administrative sanctions.

§ 4.115 Procedure upon discovery of a violation.

(a) *In general*. When an alleged violation of § 4.100 comes to the attention of any person, including an employee, he or she may either—

(1) Contact the HUD Office of Ethics to provide information about the alleged violation; or

(2) Contact the HUD Office of Inspector General to request an inquiry of investigation into the matter.

(b) *Office of Ethics*. When the Office of Ethics receives information concerning an alleged violation of § 4.100, it shall refer the matter to the Inspector General stating the facts of the alleged violation and requesting that the Inspector General make an inquiry or investigation into the matter.

(c) *Inspector General*. When the Inspector General receives information concerning an alleged violation of § 4.100, he or she shall notify the Office of Ethics when the Inspector General begins an inquiry or investigation into the matter.

(d) *Protection of employee complainants*. (1) No official of the Office of Ethics, after receipt of information from an employee stating the facts of an alleged violation of this part, shall disclose the identity of the employee without the consent of that employee. The Inspector General, after receipt of information stating the facts of an alleged violation of this part, shall not disclose the identity of the employee who provided the information without the consent of that employee, unless the Inspector General determines that disclosure of the employee's identity is unavoidable during the course of an investigation. However, any employee who reports an alleged violation of this part known to that employee to be false, or made with willful disregard for the truth, is not so protected and may be subject to disciplinary action.

(2) Any employee who has authority to take, direct others to take, recommend or approve a personnel action is prohibited from threatening, taking, failing to take, recommending, or approving any personnel action as reprisal against another employee for providing information to investigating officials.

§ 4.120 Investigation by Office of Inspector General.

The Office of Inspector General shall undertake a review of every matter or complaint alleging a violation of § 4.100. If after a review the Office of Inspector General determines that further investigation is not warranted, it shall notify the Office of Ethics of that

determination. If, after a review, the Office of Inspector General determines that additional investigation is warranted, it shall conduct the investigation and upon completion issue a report of the investigation to the Office of Ethics as to each alleged violation.

§ 4.125 Review of Inspector General's report by Office of Ethics.

After receipt of the Inspector General's report, the Office of Ethics shall review the facts and circumstances of the alleged violations. In addition, the Office of Ethics may—

- (a) Return the report to the Inspector General with a request for further investigation;
- (b) Discuss the violation with the employee alleged to have committed the violation; or
- (c) Interview any other person, including employees who it believes will be helpful in furnishing information relevant to the inquiry.

§ 4.130 Action by the Office of Ethics.

(a) After review of the Inspector General's report, the Office of Ethics shall determine whether or not there is sufficient information providing a reasonable basis to believe that a violation of § 4.100 has occurred.

(b) If the Office of Ethics determines that there is no reasonable basis to believe that a violation of § 4.100 has occurred, it shall close the matter and send its determination to the Office of Inspector General.

(c) If the Office of Ethics determines that there is sufficient information to provide a reasonable basis to believe that a violation of § 4.100 has occurred, it shall:

- (1) Send its determination to the Office of Inspector General; and
- (2) Refer the matter to the Departmental Civil Penalties Panel (DCPP) for review as to whether to impose a civil money penalty in accordance with 24 CFR part 30; *provided*, however, that the Office of Ethics shall not make a civil money penalty recommendation unless it finds the violation to have been knowing and

material. The DCPD may consider whether to impose a civil money penalty in a particular matter only upon referral from the Office of Ethics.

(d) In determining whether a violation is material, the Office of Ethics shall consider the following factors, as applicable:

- (1) The content of the disclosure and its significance to the person to whom the disclosure was made;
 - (2) The time during the selection process when the disclosure was made;
 - (3) The person to whom the disclosure was made;
 - (4) The dollar amount of assistance requested by the person to whom the disclosure was made;
 - (5) The dollar amount of assistance available for a given competition or program;
 - (6) The benefit, if any, received or expected by the employee, the employee's relatives or friends, or any other person with whom the employee is affiliated;
 - (7) The potential injury to the Department; for example, the opportunity for litigation or administrative contest against the Department or the likelihood of the violation's bringing the Department into disrepute.
- (e) If the Office of Ethics determines that there is sufficient information to provide a reasonable basis to believe that a violation of § 4.100 has occurred, it may, in addition to referring the matter to the DCPD, refer the matter to an appropriate HUD official for consideration of any other available disciplinary action. Any referral authorized by this paragraph shall be reported to the Inspector General and may be reported to the employee's supervisor.

Subpart C—Applicant Sanctions

§ 4.200 Administrative remedies.

If the Department receives or obtains information providing a reasonable basis to believe that a violation of § 4.100 has occurred, the Department may impose a sanction, as determined

to be appropriate, upon an applicant for or a recipient of assistance who has received covered selection information.

(a) In the case of a selection that has not been made, the Secretary shall determine whether to terminate the selection process or take other appropriate actions.

(b) In the case of a selection that has been made, the Secretary shall determine whether to:

- (1) Void or rescind the selection, subject to review and determination on the record after opportunity for a hearing;
- (2) Impose sanctions upon the violating applicant selected, subject to review and determination on the record after opportunity for a hearing; for example, the Secretary may seek to debar the applicant after an opportunity for a hearing before an administrative law judge pursuant to 5 U.S.C. 554, et seq. and 24 CFR part 26;
- (3) Permit the violating applicant selected to continue to participate in the program; or
- (4) Take any other actions that the Secretary considers appropriate.

(c) In determining whether a sanction is appropriate and if so which sanction or sanctions should be sought, the Secretary shall give consideration to the applicant's conduct with respect to the violation. In so doing, the Secretary shall consider the factors listed at § 4.130(d), as well as any history of prior violations in any HUD program, the benefits received or expected, deterrence of future violations and the extent of any complicity in the violation.

(d) The Secretary may impose a sanction authorized by this section whether or not the Office of Ethics refers a case to the DCPD, or the DCPD proposes a civil money penalty against an employee.

Dated: April 25, 1991.

Jack Kemp,
Secretary.

[FR Doc. 91-11260 Filed 5-10-91; 8:45 am]

BILLING CODE 4210-32-M

Federal Register

**Monday
May 13, 1991**

Part VIII

Environmental Protection Agency

40 CFR Subchapter R

**Comprehensive Review of Lead in the
Environment under TSCA; Advance
Notice of Proposed Rulemaking**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Subchapter R

[OPTS-62094; FRL-3797-9]

Comprehensive Review of Lead in the Environment under TSCA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance notice of proposed rulemaking (ANPR).

SUMMARY: EPA is exploring the desirability and feasibility of various approaches under the Toxic Substances Control Act (TSCA) to significantly reduce any unreasonable risks to human health and the environment from exposures to lead (Pb) as part of an Agency-wide initiative to control unacceptable Pb risks. For purposes of this ANPR, Pb will refer to elemental Pb and Pb-containing compounds. This regulatory investigation will explore use of TSCA section 6 to determine if uses of Pb present unreasonable risks. To that end, the Office of Toxic Substances intends to: (1) Control existing or new uses of Pb which pose an unreasonable risk of injury to health or the environment; and (2) explore the desirability and feasibility of discouraging overall consumption of Pb in general, while encouraging environmentally sound recycling of Pb products. The regulatory investigation will evaluate specific market approaches, such as fees and marketable permits where appropriate, which may offer more efficient ways of achieving the same goals.

EPA is issuing this ANPR to invite comment and to request information on the issues outlined in this document in order to determine if the risks are unreasonable. Discussion of issues relating to abatement of Pb already in the environment is beyond the scope of this document. However, these issues, along with the activities included in this ANPR and other Agency-wide activities, are discussed at length in the Agency's Strategy to Reduce Lead Exposures. To receive more information on the Agency Strategy or to receive a copy of the Strategy document, contact the office listed under "FOR FURTHER INFORMATION CONTACT."

DATES: Written comments must be received by the Agency no later than August 12, 1991.

ADDRESSES: Comments should be submitted in triplicate to: The TSCA Docket Office (TS-793), Office of Toxic Substances, Environmental Protection Agency, rm. NE-G004, 401 M St., SW.,

Washington, DC 20460, Attention: OPTS-62094.

Comments containing confidential business information (CBI) should be submitted in triplicate to: The Document Processing Center (TS-790), Office of Toxic Substances, Environmental Protection Agency, rm. E-105, 401 M St., SW., Washington, DC 20460, Attention: OPTS-62094. A sanitized copy of confidential comments must be provided in triplicate to the TSCA Public Docket Office.

FOR FURTHER INFORMATION CONTACT:

David Kling, Acting Director, Environmental Assistance Division, Office of Toxic Substances, Environmental Protection Agency, rm. E-543, 401 M St., SW., Washington, DC 20460, 202/554-1404, TDD: 202/554-0551.

SUPPLEMENTARY INFORMATION: EPA is considering proposing rules to control Pb exposures, if unreasonable risks are present, under TSCA to:

1. Limit or, if appropriate, ban new or existing uses of Pb in specific products which present an unreasonable risk of injury to health or the environment.
2. Limit or, if appropriate, severely restrict overall Pb mining, importation, manufacturing, processing and distribution.
3. Limit or prohibit methods of disposal other than recycling for certain Pb products.

Rules based on (or using) economic incentives (as well as command and control rules) may achieve the goals of all the regulatory approaches mentioned above. Some examples of economic incentive approaches include a marketable permit system involving allocation by EPA (or by government-run auction or sale) of rights to produce or use Pb or fees on such production or use. EPA invites comment generally on the feasibility and desirability of promulgating economic incentive based rules to reduce the unreasonable risks posed by Pb in the environment. In addition, EPA invites comments on methods of integrating TSCA with other statutory authorities to achieve the goal of controlling unreasonable risks.

I. Regulatory Framework

This document announces initiation of a regulatory investigation of Pb under TSCA, and solicits comment on several regulatory approaches under consideration. The legal framework within which these approaches will be considered is described below.

TSCA conveys authority to regulate chemical substances. To regulate under section 6, TSCA requires a finding that there is a reasonable basis to conclude that activities involving the chemical

substance, in this case Pb, present or will present an unreasonable risk of injury to health or the environment. The finding of unreasonable risk reflects a general cost/benefit analysis, in which the adverse health and environmental effects resulting from exposure to a substance are found to outweigh its overall societal benefits. Finding a risk "unreasonable" would involve weighing the health and environmental benefits of reducing specific Pb exposures—e.g., by limiting, or, if appropriate, banning particular Pb uses or products—against the societal costs of substituting other products or processes. EPA will also consider the desirability of overall reductions in Pb production and use if the Agency determines that the introduction of Pb into the environment, in general, presents unreasonable risks.

The regulatory initiatives discussed in this notice will be coordinated, within the framework of an overall Agency strategy to reduce unacceptable Pb exposures, with several other ongoing EPA research and control activities. These other activities include reviews of existing standards regarding Pb exposure under the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation and Liability Act. Potential actions include revision of the national primary drinking water regulations for Pb; an ANPR to solicit comments on options to encourage recycling; review of the New Source Performance Standard for secondary smelters; issuance of a Notice of Proposed Rulemaking on the National Ambient Air Quality Standards for Pb; promulgation of regulations for the use/disposal of sewage sludge; research to evaluate critical Pb issues such as the impact of abating Pb-contaminated soil on children's blood lead (PbB) levels; and a joint Agency effort to develop a program to reduce unacceptable exposures to Pb.

II. Background

Over the last two decades EPA has taken a number of actions to control exposure to Pb because of its toxic properties. Most notable of these actions has been the virtual removal of Pb from gasoline. As a result of this action, along with the voluntary phase-out of Pb solder in food cans by domestic manufacturers, the average PbB level in U.S. children has declined from about 17 micrograms per deciliter ($\mu\text{g}/\text{dl}$) to between approximately 4 and 6 $\mu\text{g}/\text{dl}$ over the past decade.

A. Human Health Effects

Exposure to Pb can produce a spectrum of human health effects across a wide range of exposure levels. Recent studies indicate that these toxic effects may occur at exposure levels considerably lower than previously recognized. PbB is the most common index of Pb exposure. The current PbB level of concern may be reduced as more is learned about Pb toxicity.

Young children and fetuses are especially vulnerable to Pb. High PbB levels ($> 40\text{--}60$ in $\mu\text{g/dl}$) in children are associated with anemia, mental retardation, encephalopathy, and at extremely high levels ($> 100 \mu\text{g/dl}$), even death. There is also concern that high Pb exposures might play a role in spontaneous abortions. Even at low doses, where impacts are more subtle, Pb exposure has been associated with a variety of effects including slight increases in blood pressure in adults, and subtle deficits in attention span, hearing, learning abilities, and heme synthesis and vitamin D metabolism in children. Pb exposure is also associated with reproductive effects in men and women, and with decreased birth weight and decreased physical and mental development in neonates. Recent studies suggest that even children with subclinical effects (i.e., no obvious symptoms) might suffer significant and persistent changes.

While Federal government interest in Pb poisoning has focused on children, there is substantial evidence that exposed adults also face health risks. Since Pb is stored in bone, it may be mobilized during periods of stress or greater metabolic demands for calcium such as pregnancy and in individuals suffering from osteoporosis.

B. Environmental Effects

Pb is one of the most common toxicants in large and small animals. Pb poisoning is the most frequently diagnosed toxicological problem in veterinary medicine; its occurrence has been reported in all domestic species and in several species of zoo animals. Pb poisoning has also affected every major species of waterfowl in North America and has been reported in many birds elsewhere in the world. Sources of these exposures have typically included Pb wastes, Pb paint, spent Pb shot, fishing sinkers, and contaminated forage near Pb smelters.

Laboratory and field data show that at high concentrations, Pb can affect certain plants and inhibit photosynthesis, reduce growth, and alter species composition. Other studies also indicate that high Pb concentrations

alter the composition of soil microbial communities and inhibit invertebrate activity resulting in delayed decomposition of organic matter, reduced nutrient supply, and altered soil properties, such as lower organic content.

Pb is toxic to all phyla of aquatic biota. Water Pb concentrations as low as 19 to $30 \mu\text{g/l}$ have been associated with increased mortality and impaired reproduction in aquatic invertebrates. Vertebrates (i.e., fish) appear even more sensitive. Studies have shown that freshwater vertebrates and invertebrates are more sensitive to Pb in soft than in hard water.

C. Current Uses of Pb

Some uses of Pb have the potential to be replaced by substitutes for a reasonable cost. Other uses, such as Pb-acid batteries and radiation shielding, may not be easily replaced. Given Pb's toxicity and persistence, EPA plans a comprehensive life cycle review of all uses of Pb to identify further steps which might be taken to reduce any unreasonable human and environmental risks. EPA requests information on the range of specific current uses of Pb, the amounts of Pb involved in each of these uses, and the potential risks associated with the uses and the cost of substitutes. Specific types of information requested are listed under Unit III.

III. Summary of TSCA Pb Pollution Prevention Regulatory Plan

This summary includes a description of activities the Agency is currently exploring under TSCA section 6 to reduce unreasonable risks from Pb uses, with the exception that Pb-acid battery recycling is not discussed here. The battery initiative was described in a separate Federal Register notice (55 FR 52884, December 24, 1990) and is currently the subject of an ongoing regulatory negotiation. Questions on the battery recycling regulatory negotiation should be addressed to Nancy Laurson, U.S. EPA (TS-794), 401 M St., SW., Washington, DC 20460, telephone (202) 382-3945.

A. Phase-out of Current Uses of Pb Posing Unreasonable Risks

Initiative. EPA will initiate a regulatory investigation under TSCA section 6(a) to determine whether any of several specific current uses of Pb pose unreasonable risks. Specific uses or products tentatively identified for consideration include, but are not necessarily limited to: brass and bronze plumbing fittings and fixtures (e.g., faucets), Pb solder used to join pipes carrying drinking water, and Pb in

nonresidential paint (e.g. for bridges, water towers, and roads).

Rationale. Several current uses of Pb have the potential to generate high human or environmental risk during or after use. For instance, new brass plumbing fixtures and Pb solder used to join pipes carrying drinking water can be major sources of Pb contamination of drinking water. It is also believed that Pb solder, banned from use in potable water supplies in a 1986 amendment to the Safe Drinking Water Act, is still being used by a number of professional plumbers and "do-it-yourselfers." Removal of Pb-based paint from bridges and similar structures can contribute to high human and environmental risks. EPA intends to investigate such uses, considering the benefits of each product relative to the risk, in order to determine if they pose an unreasonable risk, and, if necessary, control their use under TSCA.

EPA requests comments and information pertinent to brass and bronze plumbing fittings and fixtures, illegally installed Pb solder, Pb in nonresidential paint, and other high exposures, including: Actual exposures associated with these Pb uses and products, typical and high end PbB levels as well as exposure histories in workers and others exposed in each of the major use categories, environmental and ecosystem effects, annual volume of Pb consumption for each use, benefits of Pb in each use, available substitutes for Pb for each use, comparative health and environmental effects of the substitutes, the effectiveness of the current ban on Pb solder in drinking water systems and mechanisms to improve it, and other high exposure uses and products.

B. General Pb Reduction

Initiative. EPA is exploring, after considering the range of lead products, the possibility of using TSCA to limit or reduce general Pb production if the Agency determines that use of Pb presents an unreasonable risk of injury to health and the environment. Possible TSCA section 6(a) rules to achieve this end, based on a balancing of the benefits to society of various reductions against their associated costs, include: (1) Limitations or, if appropriate, bans on certain Pb uses and/or categories of uses; (2) restrictions on general consumption of Pb; and (3) economic incentives for reducing Pb use.

Under TSCA, the basis for any or all of these actions would be that continued environmental loading of Pb presents an unreasonable risk of injury to health and the environment. The finding of unreasonable risk reflects cost/benefit

analysis in which EPA would be required to demonstrate that benefits to society of the exposure reduction actions exceed the cost of such controls. The Agency requests comments on the level (e.g., lifecycle, product category, or product) it should use for the cost-benefit analysis.

EPA also requests comment on the feasibility of the following approaches to reduce unreasonable risks from overall Pb production and use, which include but are not limited to the following:

1. EPA could focus on specific uses, or categories of uses, of Pb. This approach could be similar to the approach used for the phase-out of current Pb uses described above, or additional criteria could be used. EPA requests comment on the criteria which should be used in selecting uses for reductions, on examples of uses which might satisfy these criteria, and information on exposure and risk associated with various products and/or product categories, and the cost and risk of substitutes.

2. EPA could focus on reducing the use of Pb through market incentives. This approach could result in less toxic materials being substituted for Pb in products where those substitutions seem most feasible, without further EPA intervention. EPA requests comment on the feasibility of this approach, including whether these market incentives should focus only on virgin Pb or on all Pb, ways for EPA to estimate potential benefits (reductions in risk) likely to be achieved through this approach, whether this approach is likely to address the uses of greatest concern and, if those uses are not adequately addressed, ways to modify this approach so that the uses of greatest concern will be addressed.

3. EPA could focus on mandating recycling. EPA requests comment on the feasibility of this approach for uses other than batteries, including the questions noted below.

To further help EPA decide whether or not to limit production, consumption or use of Pb that pose unreasonable risks, the Agency requests comment and information on the following:

1. *Reducing the volume of Pb introduced into the environment.* i. The nature and strength of the relationship between general consumption of Pb under current and anticipated future patterns of usage and current and/or future human and environmental exposure.

ii. The effect of restricting the amount of virgin Pb refined and introduced into

the environment on other metals which are coproduced with Pb.

2. *Current and future Pb use and consumption posing unreasonable risks.*

i. The identity of current Pb uses, including specific products, and the amount of Pb used in specific products.

ii. The availability of feasible substitutes, and the cost increases and risks associated with such substitutes.

iii. Ongoing or planned research to identify substitutes for Pb in products.

3. *Recycling Pb.* i. The desirability of regulations to encourage recycling of Pb products in addition to Pb-acid batteries.

ii. The effectiveness of restricting production of virgin Pb as a means to encourage recycling.

iii. The relative effects of restricting virgin Pb versus restricting consumption of all Pb as a means of encouraging recycling.

4. *Product stewardship.* i. Identification of the life cycle of Pb (including Pb-containing products).

ii. Current industry procedures and practices to minimize exposure to Pb for each major use, from mining to disposal.

iii. Effectiveness of the above procedures and practices, including weaknesses either because of the inherent weakness of the practice or because of significant potential for people to fail to follow procedures.

iv. The effectiveness of various waste disposal methods for controlling unreasonable risks for discarded Pb products.

v. The extent/rate to which natural processes can be expected to reduce human or environmental exposure.

vi. Amount of Pb and risk, by product category, disposed of in municipal solid waste landfills.

5. *Means to reduce any unreasonable risks from Pb uses.* For any of the possible goals named above (regarding specific products or overall Pb use), identify:

i. Market mechanisms or economic incentives that could be applied to achieve them.

ii. Regulatory mechanisms that could be implemented to achieve them.

iii. Pollution prevention approaches.

iv. Methods of dealing with imports into the U.S. and exports of Pb and Pb-containing products under any of the above approaches to reducing unreasonable risks from Pb uses.

IV. Rulemaking Record

EPA has established a record for this advanced notice of proposed rulemaking (docket control number OPTS-82094). A public version of the record, without any

confidential business information, is available in the TSCA Public Docket Office, from 8 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday, except legal holidays. The TSCA Public Docket Office is located in Room NE-G004, 401 M St., SW., Washington, DC.

The following supporting documentation for this ANPR is available upon request from the address listed above:

1. Davis, J. Michael and David J. Svendsgaard, "Lead and Child Development," *Nature*, 329, (September 24, 1987): 297-300.

2. USDHHS, PHS, *Healthy People 2000: National Health Promotion and Disease Prevention Objectives*, February 1991.

3. USDHHS, PHS, Agency for Toxic Substances and Disease Registry (ATSDR), *The Nature and Extent of Lead Poisoning in Children in the United States: A Report to Congress*, July 1988.

4. USEPA, *Strategy for Reducing Lead Exposures*, February 21, 1991.

5. USEPA, OAQPS, AQMD, *Review of the National Ambient Air Quality Standards for Lead: Assessment of Scientific and Technical Information*, OAQPS Staff Paper, June 1989.

6. USEPA, ORD, OHEA, ECAO, *Air Quality Criteria for Lead: Volume I*, EPA/600/8-83/028aF, June 1986.

7. USEPA, ORD, OHEA, ECAO, *Air Quality Criteria for Lead, Volume II*, EPA/600/8-83/028bF, June 1986.

8. USEPA, ORD, OHEA, ECAO, *Air Quality Criteria for Lead, Volume III*, EPA/600/8-83/028cF, June 1986.

9. USEPA, ORD, OHEA, ECAO, *Air Quality Criteria for Lead, Volume IV*, EPA-600/8-83/028dF, June 1986.

10. USEPA, ORD, OHEA, *Supplement to the 1986 EPA Air Quality Criteria for Lead - Volume I Addendum*, EPA/600/8-89/049F, August 1990.

11. USEPA, ORD, OHEA, *Evaluation of the Potential Carcinogenicity of Lead and Lead Compounds: In Support of Reportable Quantity Adjustments Pursuant to CERCLA Section 102, Review Draft*, EPA/600/8-89/045A, March 1989.

Dated: May 3, 1991.

Linda J. Fisher,

Assistant Administrator for Pesticides and Toxic Substances.

[FR Doc. 91-11293 Filed 5-10-91; 8:45 am]

BILLING CODE 6560-50-F

Register

Monday
May 13, 1991

Part IX

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

**Migratory Bird Hunting: Nationwide
Requirement To Use Nontoxic Shot for
the Taking of Waterfowl, Coots and
Certain Other Species Beginning in the
1991-92 Hunting Season; Final Rule**

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

RIN 1018-AA93

Migratory Bird Hunting: Nationwide Requirement To Use Nontoxic Shot for the Taking of Waterfowl, Coots, and Certain Other Species Beginning in the 1991-92 Hunting Season

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The use of lead shot in waterfowl hunting poses an unnecessary risk to certain migratory birds because when the spent shot is consumed it often produces lead poisoning and death. Accordingly, this rule concludes the implementation program that began in 1986 to phase-in nationwide the requirement to use nontoxic shot for all taking of waterfowl, coots and certain other species by the 1991-92 hunting season.

EFFECTIVE DATE: September 1, 1991.

FOR FURTHER INFORMATION CONTACT: Dr. Keith A. Morehouse, Staff Specialist, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, room 634, Arlington Square, Washington, DC 20240 (703/358-1773), or write Director (FWS/MBMO), U.S. Fish and Wildlife Service, Department of the Interior, 634 Arlington Square, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: This rule implements the final year (1991-92) of the 5-year component of the strategy to phase-in a nontoxic shot requirement for waterfowl hunting nationwide by the 1991-92 season, as set out by the preferred alternative of the Final Supplementary Environmental Impact Statement (SEIS) on the Use of Lead Shot for Hunting Migratory Birds in the United States. This SEIS was published in June 1986 (FES 86-16). The SEIS and consequent rulemakings imposing nontoxic shot requirements result from the Secretary of the Interior's responsibilities under the Migratory Bird Treaty Act, as amended (16 U.S.C. 701 *et seq.*; 40 Stat. 755), and the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531-1543; 87 Stat. 884), to decide whether, where and how migratory bird hunting will be allowed. A critical element in the Department of the Interior's deliberations and decision to implement and enforce regulations establishing nontoxic shot zones nationwide has been the determination that lead poisoning resulting from waterfowl hunting is a significant

annual mortality factor in certain migratory birds.

Information detailing the scientific basis for concluding that lead shot from waterfowl hunting is causing lead poisoning in certain migratory birds and the development of the strategy to eliminate lead toxicity as a major mortality factor, including discussions of the issues for and against lead/steel shot, appears in the SEIS and the preamble to the proposed rule on the criteria and schedule for implementing nontoxic shot zones for 1987-88 and subsequent years published in the *Federal Register* on June 27, 1986 (51 FR 23444). The final rule for that proposed rule was published in the *Federal Register* on November 21, 1986 (51 FR 42103). Information on the justification for selecting this strategy has also been set out in the Final SEIS (Alternative VII), the June 27, 1986, proposed rule and in the Record of Decision confirming the preferred alternative published in the *Federal Register* on August 20, 1986 (51 FR 29673). Additional information relating to the imposition of nontoxic shot zones nationwide, according to the 5-year schedule, is contained in the final rules for the 1987-88, 1988-89, 1989-90 and 1990-91 waterfowl hunting seasons published in the *Federal Register* on Tuesday, July 21, 1987 (52 FR 27352), Tuesday, June 28, 1988 (53 FR 24284), Thursday, April 13, 1989 (54 FR 14814) and Thursday, August 16, 1990 (55 FR 33626), respectively.

The remaining counties scheduled by the implementation plan to convert in their entirety to nontoxic shot use in the 1991-92 waterfowl season are those counties having had an average annual waterfowl harvest of 5 or less per square mile over the 10-year period 1971-80, as referenced by Carney *et al.* 1983 (Distribution of waterfowl species harvested in States and counties during 1971-80 hunting seasons. U.S. Fish Wildl. Serv., Spec. Sci. Rpt.—Wildl. No. 254, Washington, DC 20240). Counties converting in the last year of implementation are not listed in Appendix N of the SEIS, as they were for previous years. All counties, and other areas referenced in this rulemaking, are converted to nontoxic shot use for waterfowl and coot hunting in the 1991-92 hunting season. Thus, in this coming season, all of the waterfowl and coot harvest will occur in zones established for nontoxic shot.

The public is reminded here that 50 CFR 20.101, (Seasons, limits and shooting hours for Puerto Rico and the Virgin Islands); 20.102, (Seasons, limits and shooting hours for Alaska); and 20.105, (Seasons, limits and shooting hours for waterfowl, coots and

gallinules), have provisions for nontoxic shot use that take effect in the 1991-92 waterfowl hunting season. Hunters in Puerto Rico and the Virgin Islands will be required to use nontoxic shot for hunting waterfowl, coots and certain other species (as applicable). The State of Alaska will convert statewide to nontoxic shot use for waterfowl hunting. Section 20.105 of 50 CFR provides that " * * * areas of the United States outside of State boundaries, i.e., the United States' territorial waters seaward of county boundaries, and including coastal waters claimed by the separate States, if not already included under the zones contained in § 20.108, are designated for the purposes of § 20.21(j) as nontoxic shot zones for waterfowl hunting beginning in the 1991-92 season."

Also, this final rulemaking contains a typographical error correction for 50 CFR 20.105, Seasons, limits and shooting hours for waterfowl, coots and gallinules. The reference, therein, to § 20.2(j) should have been instead to § 20.21(j), which appears under subpart C—Taking.

Summary of General Public Comment on the Proposed Rule

Aside from official State responses, only three letters of comment were received on the proposed rule (56 FR 1446), for this final rule, during the announced 30-day comment period that closed on February 13, 1991. One of the letters was submitted by a private individual, a waterfowl hunter in Jackson, Mississippi. This letter is in opposition to the proposed action. The other 2 letters were sent by officials representing the Humane Society (Society) of the United States and the North American Wildlife Foundation (Foundation). The letter from the Foundation stated a cautionary position, and the letter from the Society supported the action, with further recommendations.

The Mississippi hunter wrote to protest the proposed requirement for use of nontoxic shot for waterfowl hunting " * * * anywhere in the United States except for areas of extreme hunting pressure over shallow water with nonpermeable soils. (Namely, public refuges and other similar hunting facilities.)" The writer prefers this "hotspot" approach to requiring the use of nontoxic shot. This individual continued by stating his opposition to steel shot because of its "ineffectiveness" in taking waterfowl, and that in his experience " * * * losses from crippling with steel shot far exceed dubious losses from waterfowl ingestion

of lead shot." He stated that his comments apply to close range hunting over decoys. In addition, he advanced the argument that much of the hunting in the South is done over seasonally flooded areas that through normal agricultural practices are turned annually, and that many of these seasonally flooded areas are hunted infrequently and usually not every season. The Mississippi hunter closes by saying that "[T]hose of us in the conservation community have long been suspect of the so called [sic] 'scientific basis' used to justify the outlawing [of] lead shot. I challenge you and your Agency to conduct a new, fair and impartial study of the question and abide by its results."

The comments of the Foundation largely echoed the "ineffectiveness of steel" and "hotspot" themes contained in the Mississippi letter. The Foundation letter reports that there is a widespread perception in the waterfowling community that steel shot is inferior to lead shot and that more waterfowl, particularly geese, are being lost due to an increased crippling rate than were dying from lead shot ingestion. The Foundation's concern is for the " * * * overall impact of the widespread use of steel shot on waterfowl populations due to potentially increased crippling losses." The Foundation encouraged the Service to undertake research to determine if the change from lead to steel has actually reduced overall waterfowl mortality.

The Service response here addresses both of the above letters because both essentially raise the same issues. However, one letter does raise an issue not contained in the other, that of the validity of the scientific studies carried out on lead poisoning, that needs to be addressed. The Mississippi letter implies that the conservation community considers the "scientific basis" for the actions taken to eliminate lead poisoning in waterfowl and other migratory birds to be "suspect," and calls for new studies that are "fair and impartial."

On the basis of correspondence and other feedback to the agency from conservation organizations, as well as a series of legal actions, the Service believes that the course being pursued to eliminate the use of lead shot for waterfowl and coot hunting is the correct one. Further, the Service believes that the majority of responsible hunters are convinced of the validity of the scientific evidence gathered on lead poisoning of waterfowl, understand the need for this action and support the conversion of waterfowl and coot

hunting to nontoxic shot. It may be true that a portion of the waterfowl hunting community continues to believe a change to nontoxic shot is not necessary, however, it is apparent that most States and the conservation community as a whole support the Service's conversion of waterfowl hunting from lead to nontoxic shot to eliminate lead poisoning in certain migratory birds.

The preferred alternative of the SEIS, published in 1986 (referenced earlier), originated with the International Association of Fish and Wildlife Agencies as a strategy recommendation to the Service for phasing out the use of lead shot for waterfowling. This came about because the preponderance of scientific evidence, collected by both State and Federal Governments, showed that the loss of waterfowl to lead poisoning was a serious problem. Too, the scientific basis for the actions taken by the Service to phase out lead shot for waterfowl hunting has been reviewed and found adequate by the courts. On September 28, 1987, the Federal District Court for the Eastern District of California affirmed the Service's right to impose nontoxic shot zones over the objections of the California Fish and Game Commission and the National Rifle Association, in part on the weight of the scientific evidence. Later, the Commission's appeal was rejected by the appellate court. Also, in 1989, the National Academy of Science (Academy) was asked by the International Shooting and Hunting Alliance to review the Service's actions and the scientific evidence that served as the basis for the decision to phase out lead shot for waterfowl and coot hunting. After review, the Academy concluded there were no grounds for questioning the scientific evidence, the interpretation of that evidence or the actions of the Service in this matter.

With regard to the ineffectiveness of steel shot/crippling issue, the Service anticipated (and so advised the public) that there would be an initial increase in the unretrieved rates for the waterfowl hunting community as a whole because of hunters having to adjust to the different characteristics of steel shot loads. The Service also anticipated, and advised the public, that unretrieved harvest rates would likely drop again to approximately former levels as hunters made the adjustment. This pattern has been seen thus far in the reports provided by waterfowl hunters. There has been an overall increase in unretrieved harvest rates for ducks and geese over the last 4 hunting years. However, for ducks, the rate appears to

have reached a peak in 1988 and declined in the last reported hunting year. For geese, the rate peaked in 1987 and has declined over the last 2 hunting years. In terms of rates: For ducks, the unretrieved harvest rate (UHR, in birds/total harvest) in 1985 was 16.5 percent, in 1988 was 20.0 percent, and in 1989 was 18.3 percent. For geese, the UHR in 1985 was 12.4 percent, in 1987 was 17.0 percent, and in 1989 was 13.7 percent. However, it remains to be seen whether or not these trends will continue. The source of this information is the annual, Federal hunter questionnaire that is sent out to a sample of the waterfowling community. Obviously, this information is subject to human error and is not an absolute representation of annual unretrieved harvest. Nevertheless, the information is valuable in terms of trends. It should be noted that, historically, early UHR's with lead shot were approximately as high as the more recent ones with steel.

Nevertheless, the slight rate increase in UHR experienced with steel the past few years cannot reasonably be interpreted as a substitution for the lead poisoning loss of previous years. Among other factors, an important consideration is that lead shot kills indiscriminately through ingestion, whether or not a species is legal to hunt, whereas steel shot UHR is incurred by those species in the waterfowl population that management has determined can best sustain harvest. The bulk of lead poisoning losses result from current year hunting; if deposition of lead shot by waterfowlers is discontinued most of the lead poisoning incidence will be stopped. The exception to this is where the substrates do not allow lead shot to sink out of the reach of feeding waterfowl. In these areas it may be many years before lead poisoning is eliminated.

The suggestion that steel shot requirements be limited to certain areas is commonly known as the "hotspot" approach. However, available information and analyses do not support this as the best alternative to eliminate lead poisoning in migratory birds. Many States and other commentators have agreed with this assessment in the past. States (e.g., New Jersey) that managed waterfowl hunting with steel shot on the basis of "hotspots" for a relatively long period of time consider this approach to be unworkable as it results in substantial difficulty in management and enforcement. Too, waterfowl with lead shot embedded from shooting outside of "hotspots" are able to transport a predator lead toxicity

problem into widely dispersed geographic locations.

The (Humane) Society's letter of comment included a statement of strong support for the proposed action to complete implementation of the plan to require nontoxic shot for hunting waterfowl and coot nationwide. However, in pointing out the magnitude of the previous annual migratory bird mortality ascribed to lead poisoning, the Society stated that "[t]hese deaths are . . . also from lead shot spent by upland game hunters." The Society further stated that the potential for lead poisoning in migratory birds would continue while the use of lead shot is legal, and believes the nontoxic shot requirement should be extended to all types of hunting. Additional reference was made by the Society to making lead shot illegal, and it pointed out that the Service has legal responsibility to protect all migratory birds and endangered species under the Migratory Bird Treaties, Migratory Bird Treaty Act and the Endangered Species Act.

The Service's response to the above is that all migratory birds have been and will continue to be afforded necessary protections under the referenced Treaties and Acts. The Service's basic strategy and actions to eliminate lead poisoning in waterfowl and certain other migratory birds are supported by those authorities and others, including the National Environmental Policy Act (NEPA) of 1973, as amended.

While it is true that lead shot is in most instances legal for use by upland game hunters, there is no evidence that such use is inimical to the health and welfare of waterfowl or any other migratory bird population. Also, the Service does not have the authority to make manufacture or use of lead shot illegal, only to make its use illegal for hunting certain migratory birds, i.e., those for which a lead poisoning problem has been scientifically documented. Additionally, the Service does not have the authority to require nontoxic shot for taking many upland game species because many of these are nonmigratory birds and other species that are managed by the States.

State Responses for the Proposed Rule

It has been the policy of the Service to consult each year with the States over identification, implementation and enforcement of nontoxic shot zones. Twelve of the 50 States potentially affected by this final rulemaking responded. Those States (Alabama, Florida, Idaho, Indiana, Iowa, Maryland, Michigan, North Carolina, Oregon, Utah,

Wisconsin and Wyoming) provided letters ranging from a simple nonobjection to those enthusiastically endorsing the conclusion of the nationwide nontoxic shot implementation. All of the other States, as well as Puerto Rico and the Virgin Islands, that failed to provide a response to the proposed rule are assumed not to object to this final rulemaking.

In summary, for the 1991-92 waterfowl hunting season, this rule amends § 20.108 of 50 CFR to expand the existing nontoxic shot requirement nationwide, corrects a regulatory reference mistake in § 20.105, and reminds the waterfowl hunting public of other nontoxic shot-related restrictions that become effective.

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 could 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 Fish and Wildlife 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 will 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(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, consultation was carried out on the potential impacts of the provisions of this rule on bald eagles. The "section 7" biological opinion concluded that implementation of the preferred alternative would not be likely to jeopardize the continued existence of the bald eagle. Also, a "section 7" biological opinion has concluded that the action being carried out is not likely to jeopardize the continued existence of the Aleutian Canada goose.

Authorship

The primary author of this proposed rule is Dr. Keith A. Morehouse, Office of Migratory Bird Management, working under the direction of Thomas J. Dwyer, Chief.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Accordingly, part 20, subchapter B, chapter I of title 50 of the *Code of Federal Regulations* is amended as follows:

PART 20—[AMENDED]

1. The authority citation for part 20 continues to read as follows:

Authority: Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755; 16 U.S.C. 701-711), and the Fish and Wildlife Improvement Act of 1978 (92 Stat. 3112; 16 U.S.C. 712).

2. In § 20.105, the last sentence is amended by changing the reference "§ 20.2(j)" to read "§ 20.21(j)".

3. Section 20.108 is revised to read as follows:

§ 20.108 Nontoxic shot zones.

Beginning September 1, 1991, the contiguous 48 United States, and the States of Alaska and Hawaii, the Territories of Puerto Rico and the Virgin Islands, and the territorial waters of the United States, are designated for the

purpose of § 20.21(j) as nontoxic shot zones for hunting waterfowl, coots and certain other species. "Certain other species" refers to those species, other than waterfowl or coots, that are affected by reason of being included in aggregate bags and concurrent seasons.

Dated: April 12, 1991.

Bruce Blanchard,

Acting Director, Fish and Wildlife Service.

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