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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Parts 404 and 416

RIN 0960-AC59

Federal Old-Age, Survivors, and Disability Insurance Supplemental Security Income for the Aged, Blind and Disabled; Representation of Parties—Suspension and Disqualification of Representatives

AGENCY: Social Security Administration, HHS.

ACTION: Final Rules.

SUMMARY: These final rules amend the regulations governing the suspension and disqualification of persons who represent claimants in dealings with the Social Security Administration (SSA). The regulations update organizational designations and establish the framework for more efficient processing of possible violations of our rules. The regulations also require that a panel of three Appeals Council members, rather than a single member, will consider a request for review of an administrative law judge's (ALJ) decision on the issue of suspension or disqualification of a representative. The procedures for initiating and processing complaints are largely unchanged but the regulations designate the Deputy Commissioner for Programs, or his or her designee, as the official responsible for issuing complaints.

EFFECTIVE DATE: These final regulations are effective May 29, 1991.

FOR FURTHER INFORMATION CONTACT: Philip Berge, Legal Assistant, 3-B-1 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235 (301) 965-1769.

SUPPLEMENTARY INFORMATION: On February 1, 1990, we published a notice

of proposed rulemaking (NPRM) to provide that, when it appears that a person who represents claimants in dealings with SSA has violated one of our rules, SSA's Associate Commissioner for Hearings and Appeals, or his or her designee, will initiate proceedings to suspend or disqualify the representative. This differed from the regulations then in effect, which provided that the Deputy Commissioner (Operations) or the Director (or Deputy Director), Office of Insurance Programs, would prepare a notice containing a statement of charges that constituted the basis for a proceeding against the representative.

The NPRM also provided that a request for review of the decision issued by the ALJ designated to act as hearing officer would be decided by a panel of three Appeals Council members rather than a single member, as is presently the case. In addition, the NPRM updated organizational designations and clarified the functional responsibility of the designated officials.

Final Regulations

The final regulations:

1. Update organizational designations and establish a framework for more efficient processing of matters involving the possible suspension or disqualification of a representative;
2. Authorize the establishment of a panel of three Appeals Council members who will consider a request for review of an ALJ's decision on the issue of suspension or disqualification of a representative, and
3. Provide that the Deputy Commissioner for Programs, or his or her designee, will initiate proceedings to suspend or disqualify a representative.

The only substantive change in these final regulations from the NPRM is that the Deputy Commissioner for Programs, or his or her designee, will initiate proceedings to suspend or disqualify the representative, rather than the Associate Commissioner for Hearings and Appeals, or his or her designee.

The Deputy Commissioner for Programs has direct authority over the Office of Hearings and Appeals. That office will investigate alleged violations and forward its findings and recommendations to the Deputy Commissioner for Programs who will independently decide whether to issue a notice of charges against a

representative. The Deputy Commissioner for Programs will also consider any answer filed in response to the complaint, and determine whether the complaint should be withdrawn. If the complaint is not withdrawn, the Deputy Commissioner for Programs will request the Associate Commissioner for Hearings and Appeals to designate an ALJ who will serve as hearing officer to hold a hearing on the charges. The Office of Hearings and Appeals' Special Counsel Staff which investigated the alleged violations, will represent the Deputy Commissioner for Programs during all phases of the proceeding.

These procedures will not only have the advantages of efficiency and economy, but will also provide for direct review and oversight of the activities of the Office of Hearings and Appeals by the senior SSA official responsible for overall management of this area of the program. Moreover, the process will allow SSA personnel familiar with the facts to represent the Agency during proceedings on charges and thereby eliminate the duplication of effort that would result from separation of the investigative and prosecutorial functions.

Public Comments and Responses

We received 19 letters in response to the NPRM containing comments from attorneys, claimant representatives, private individuals, and legal aid organizations. We have carefully considered all the comments and, below, have attempted to address all of the significant comments we received, including those that resulted in changes to the rules and those that were rejected. For ease of reference we have grouped the comments according to the issues raised.

Comment: All of the commenters objected in some form to the consolidation within the Office of Hearings and Appeals of all phases of the process involved in the suspension or disqualification of representatives. Some of the commenters believed that the proposed change would violate statutory provisions or deny the representatives due process of law. Each of the commenters cited several of the following factors as representing actual or apparent conflicts of interest because of the perception that there was intermingling of the investigative,

prosecutorial, and adjudicative functions:

1. The Office of Hearings and Appeals would conduct the investigation of suspected violations of the rules governing representatives' conduct;

2. The Associate Commissioner for Hearings and Appeals would issue the notice of charges against a representative;

3. The Associate Commissioner for Hearings and Appeals would assign an ALJ employed by the Agency to conduct the hearing and issue a decision on the charges;

4. Personnel assigned to the Office of Hearings and Appeals would represent the Agency in proceedings to suspend or disqualify representatives;

5. Both the representative and the Office of Hearings and Appeals personnel who prosecuted the charges filed against the representative could request review of the decision issued by the ALJ; and,

6. The Appeals Council, which is a part of the Office of Hearings and Appeals, would consider the request for review of the ALJ's decision.

Response: To avoid even the appearance of impropriety or unfairness, we have modified the proposed regulations to indicate that the Deputy Commissioner for Programs will be the official with the authority to issue notices of charges against representatives. The Deputy Commissioner for Programs has authority over employees working at the Office of Hearings and Appeals, as well as several other components within SSA, with responsibility for formulating the regulations and policies by which SSA administers its benefit programs. As such, the Deputy Commissioner for Programs has the knowledge necessary to evaluate whether a representative has committed a violation with regard to any Social Security program. Further, the broad responsibilities and wider scope of authority of the Deputy Commissioner for Programs emphasize the gravity of a decision to issue a notice of charges. Assigning this authority to the Deputy Commissioner for Programs retains the function at its current organizational placement level.

The propriety of a system in which both investigation/prosecution and adjudication are the responsibility of a single entity, was settled by the United States Supreme Court in *Withrow v. Larkin*, 421 U.S. 35 (1975). In *Withrow*, a state medical board which investigated physician misconduct was also empowered to prosecute and adjudicate in an adversarial proceeding the issue of whether the physician's medical license should be suspended. The primary issue

in the case was whether the combination of investigative and adjudicative functions within a single agency created an unconstitutional risk of bias in the adjudication. The Court advised that mere exposure to evidence obtained during an investigative procedure was insufficient, in itself, to impugn the fairness of the adjudicators at a later adversary proceeding. Without a showing to the contrary, adjudicators were assumed to be persons of "conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances" (421 U.S. at 55). The Court found that the medical board's practice of receiving investigative results, approving the filing of charges or formal complaints, and participating in the ensuing hearings was "very typical" of administrative agencies, and held that such procedures do not violate the Administrative Procedure Act or due process of law.

The American Bar Association has also approved the use of such systems for regulating professional misconduct, as indicated by its formulation and adoption of the model Standards for Lawyer Discipline and Disability Proceedings.

In its 1984 Survey of Lawyer Disciplinary Procedures in the United States, the American Bar Association revealed that lawyer disciplinary procedures in the majority of jurisdictions (36) utilized disciplinary counsel to perform all of the following functions:

1. Screening information;
2. Investigating allegations;
3. Recommending dispositions;
4. Prosecuting matters at all stages;
5. Investigating facts relating to petitions for reinstatement; and
6. Maintaining records of the agency's operations and individual matters processed by the agency.

Accordingly, it is a widely utilized and accepted organizational concept to avoid segmentation of the investigative and prosecutorial functions in dealing with matters involving professional conduct.

The Social Security Act and the Administrative Procedure Act also permit the investigative, prosecutorial, and adjudicative functions to be combined within the same agency, providing that adjudicators are able to function independently, outside the direction or supervision of the agency employees involved in investigative and prosecutorial matters. 42 U.S.C. 405 and 1383(c)(1) and 5 U.S.C. 554(d). The Attorney General's Manual on the Administrative Procedure Act, United

States Department of Justice (1947), commented on this required separation of functions, noting that "[a]s a practical matter this means that an agency's hearing examiners [now ALJs] should be placed in an organizational unit apart from those to which investigative and prosecuting personnel are assigned * * *." Attorney General's Manual on the Administrative Procedure Act at 55-56.

The Agency's organizational structure is consistent with the Court's holding in *Withrow* and satisfies the concerns regarding separation of function noted above. ALJs and Appeals Council members exercise independent authority to adjudicate complaints and are assigned to components distinct and separate from the Office of Hearings and Appeals Special Counsel Staff personnel engaged in investigative and prosecutorial functions on behalf of the Deputy Commissioner for Programs.

We believe that the final rules satisfy procedural safeguards and offer a fair and equitable process for addressing circumstances which, if established, warrant suspending or disqualifying a person from representing Social Security claimants.

Comment: Some of the commenters objected to authorizing the Associate Commissioner for Hearings and Appeals to assign ALJs to act as hearing officers for suspension/disqualification proceedings. See §§ 404.1765(b) and 416.1565(b), as revised. One commenter characterized this authority as the ability to choose a "hanging judge."

Response: ALJs are assigned to cases in rotation so far as practicable. In this type of situation, however, it is not practicable to employ a strict rotation because of variable factors such as: The availability of the ALJ; office workload; individual docket considerations; and the practice of choosing an ALJ stationed outside the geographic area in which the charged representative resides, who does not normally adjudicate cases in which the representative has an interest. Thus, practical concerns mandate a discretionary decision rather than strict mechanical rotation in designating a hearing officer, and officials within the Office of Hearings and Appeals are capable of making this determination.

In addition, the regulations provide a remedy when the representative or any party to the hearing believes that the ALJ who has been assigned to the case is prejudiced against or partial to either party, or has any interest in the matter. The party may file an objection that will be considered by the ALJ. If the ALJ withdraws, another ALJ will be

appointed. If the ALJ refuses to withdraw, the party may upon issuance of the decision present his or her objections to the Appeals Council as a reason why the decision should be revised or assigned to another ALJ for a new hearing. See §§ 404.1765(b) and 416.1565(b), as revised. Accordingly, we do not believe that the authority to designate the ALJ to hear the complaint should be removed from the Associate Commissioner for Hearings and Appeals.

Comment: One commenter noted that the Office of Hearings and Appeals does not have authority over applications for supplemental security income benefits, questionable retirement issues, overpayment issues, and continuing disability reviews and thus would not be in a position to monitor the behavior of representatives appearing on behalf of claimants who have problems in these areas.

Response: We do not agree. Although these issues are often resolved without the need for an ALJ hearing, they clearly may be decided by an ALJ or the Appeals Council. Since most claimants do not obtain representation until review by an ALJ or Appeals Council is requested, most violations of our rules by representatives occur when the claim is being considered by an ALJ or the Appeals Council. Therefore, the Office of Hearings and Appeals is able to identify possible violations, recognize multiple offenders, and undertake the investigation and prosecution of these matters.

Comment: Some commenters were generally critical of the conduct and attitudes of ALJs and expressed concern that the proposed "rules" were not adequately explained, thus allowing ALJs to charge representatives arbitrarily with violations. This in turn, the commenters maintained, would inhibit aggressive representation.

Response: We do not agree. The regulations set forth at §§ 404.1740 and 416.1540 as well as §§ 404.1745 and 416.1545 as amended herein, contain the specific rules governing representatives. In addition, §§ 404.1705 and 416.1505 provide the requisite qualifications for a person to serve as a representative. The above cited regulations provide clear and specific notice of conduct which may lead to a suspension or disqualification.

Apparently, the commenters thought that the proposed regulations, if adopted, would create a new process or establish new procedures permitting ALJs to suspend or disqualify representatives arbitrarily. This is not the case. Other than authorizing the Deputy Commissioner for Programs in

place of the Deputy Commissioner for Operations or the Director or Deputy Director for the Office of Insurance Programs to issue notices of charges, the procedures essentially are not changed by these final rules. As before, ALJs may bring allegations of misconduct to the attention of appropriate Agency officials, but they have no authority under either the amended or prior regulations to issue formal charges or to suspend or disqualify representatives without following the procedures prescribed by the regulations.

Regulatory Procedures

Executive Order No. 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because the issuance of these regulations is not expected to result in significant costs. Therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act

These final regulations impose no new reporting or recordkeeping requirements subject to Office of Management and Budget clearance.

Regulatory Flexibility Act

We certify that these final regulations will not have a significant economic impact on a substantial number of small entities because these rules will affect only individuals. Therefore a regulatory flexibility analysis as provided in Public Law 96-354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Program No. 93.773 and 93.774, Medicare; 93.802-93.805 Social Security; and 93.807 Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Death benefits; Disability benefits; Old-Age, Survivors and Disability Insurance.

20 CFR Part 416

Administrative practice and procedure; Aged, Blind, Disability benefits; Public assistance programs; Supplemental Security Income (SSI).

Dated: December 28, 1990.

Gwendolyn S. King,
Commissioner of Social Security.

Approved: March 27, 1991.

Louis W. Sullivan,
Secretary of Health and Human Services.

For the reasons set out in the preamble, subpart R of part 404 and subpart O of part 416 of chapter III of

title 20 of the Code of Federal Regulations are amended as follows:

PART 404—FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE

1. The authority citation for subpart R of part 404 continues to read as follows:

Authority: Secs. 205(a), 206, and 1102 of the Social Security Act; 42 U.S.C. 405(a), 406, and 1302.

2. The introductory paragraph in § 404.1745 is revised to read as follows:

§ 404.1745 What happens to a representative who breaks the rules.

The Deputy Commissioner for Programs, or his or her designee, may begin proceedings to suspend or disqualify a person from acting as a representative in dealings with us if it appears that he or she—

3. Paragraphs (a), (d) and (e)(2) of § 404.1750 are revised to read as follows and the cross-reference in paragraph (f) of § 404.1750 is changed from § 404.1765(f) to § 404.1765(g):

§ 404.1750 Notice of charges against a representative.

(a) The Deputy Commissioner for Programs, or his or her designee, will prepare a notice containing a statement of charges that constitutes the basis for the proceeding against the representative.

(d) The Deputy Commissioner for Programs, or his or her designee, may extend the 30-day period for good cause.

(e) The representative must—

(2) File the answer with the Social Security Administration, Office of Hearings and Appeals, Attention: Special Counsel Staff, within the 30-day time period.

§ 404.1760 [Removed]

4. Section 404.1760 is removed.

5. In § 404.1765, paragraphs (a) through (n) are redesignated as paragraphs (b) through (o), and a new paragraph (a) is added to read as follows:

§ 404.1765 Hearing on charges.

(a) *Scheduling the hearing.* If the Deputy Commissioner for Programs, or his or her designee, does not take action to withdraw the charges within 15 days after the date on which the representative filed an answer, we will hold a hearing and make a decision on the charges.

6. In § 404.1765, the paragraphs newly redesignated as (b)(1), (c) and (e) are revised to read as follows:

§ 404.1765 Hearing on charges.

(b)(1) *Hearing officer.* The Associate Commissioner for Hearings and Appeals, or his or her designee, shall assign an administrative law judge, designated to act as a hearing officer, to hold a hearing on the charges.

(c) *Time and place of hearing.* The hearing officer shall mail the parties a written notice of the hearing at their last known addresses, at least 20 days before the date set for the hearing.

(e) *Parties.* The representative against whom charges have been made is a party to the hearing. The Deputy Commissioner for Programs, or his or her designee, shall also be a party to the hearing.

7. Paragraph (a) (3) of § 404.1770 is revised to read as follows:

§ 404.1770 Decision by hearing officer.

(a) * * *

(3) The hearing officer shall mail a copy of the decision to the parties at their last known addresses. The notice will inform the parties of the right to request the Appeals Council to review the decision.

8. A new § 404.1776 is added to read as follows:

§ 404.1776 Assignment of request for review of the hearing officer's decision.

Upon receipt of a request for review of the hearing officer's decision, the matter will be assigned to a panel consisting of three members of the Appeals Council none of whom shall be the Chair of the Appeals Council. The panel shall jointly consider and rule by majority opinion on the request for review of the hearing officer's decision, including a determination to dismiss the request for review. Matters other than a final disposition of the request for review may be disposed of by the member designated chair of the panel.

9. Paragraph (e) of § 404.1790 is revised to read as follows:

§ 404.1790 Appeals Council's decision.

(e) The Appeals Council shall make its decision in writing and shall mail a copy of the decision to the parties at their last known addresses.

10. Paragraphs (c) and (e) of § 404.1799 are revised to read as follows:

§ 404.1799 Reinstatement after suspension or disqualification—period of suspension not expired.

(c) The Appeals Council shall allow the Deputy Commissioner for Programs, or his or her designee, upon notification of receipt of the request, 30 days in which to present a written report of any experiences with the suspended or disqualified person subsequent to that person's suspension or disqualification. The Appeals Council shall make available to the suspended or disqualified person a copy of the report.

(e) The Appeals Council shall mail a notice of its decision on the request to the suspended or disqualified person. It shall also mail a copy to the Deputy Commissioner for Programs.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND AND DISABLED

1. The authority citation for subpart O of part 416 continues to read as follows:

Authority: Secs. 1102 and 1631(d) of the Social Security Act; 42 U.S.C. 1302 and 1383(d).

2. The introductory paragraph in § 416.1545 is revised to read as follows:

§ 416.1545 What happens to a representative who breaks the rules.

The Deputy Commissioner for Programs, or his or her designee, may begin proceedings to suspend or disqualify a person from acting as a representative in dealings with us if it appears that he or she—

3. Paragraphs (a), (d) and (e)(2) of § 416.1550 are revised to read as follows and the cross-reference in paragraph (f) of § 416.1550 is changed from § 416.1565(f) to § 416.1565(g):

§ 416.1550 Notice of charges against a representative.

(a) The Deputy Commissioner for Programs, or his or her designee, will prepare a notice containing a statement of charges that constitutes the basis for the proceeding against the representative.

(d) The Deputy Commissioner for Programs, or his or her designee, may extend the 30-day period for good cause.

(e) The representative must—

(2) File the answer with the Social Security Administration, Office of Hearings and Appeals, Attention:

Special Counsel Staff, within the 30-day time period.

§ 416.1560 [Removed]

4. Section 416.1560 is removed.

5. In § 416.1565 paragraphs (a) through (n) are redesignated as paragraphs (b) through (o), and a new paragraph (a) is added to read as follows:

§ 416.1565 Hearing on charges.

(a) *Scheduling the hearing.* If the Deputy Commissioner for Programs, or his or her designee, does not take action to withdraw the charges within 15 days after the date on which the representative filed an answer, we will hold a hearing and make a decision on the charges.

6. In § 416.1565, the paragraphs newly redesignated as (b)(1), (c) and (e) are revised to read as follows:

§ 416.1565 Hearing on charges.

(b)(1) *Hearing officer.* The Associate Commissioner for Hearings and Appeals, or his or her designee, shall assign an administrative law judge, designated to act as a hearing officer, to hold a hearing on the charges.

(c) *Time and place of hearing.* The hearing officer shall mail the parties a written notice of the hearing at their last known addresses, at least 20 days before the date set for the hearing.

(e) *Parties.* The representative against whom charges have been made is a party to the hearing. The Deputy Commissioner for Programs, or his or her designee, shall also be a party to the hearing.

7. Paragraph (a)(3) of § 416.1570 is revised to read as follows:

§ 416.1570 Decision by hearing officer.

(a) * * *

(3) The hearing officer shall mail a copy of the decision to the parties at their last known addresses. The notice will inform the parties of the right to request the Appeals Council to review the decision.

8. A new § 416.1576 is added to read as follows:

§ 416.1576 Assignment of request for review of the hearing officer's decision.

Upon receipt of a request for review of the hearing officer's decision, the matter will be assigned to a panel consisting of three members of the

Appeals Council none of whom shall be the Chair of the Appeals Council. The panel shall jointly consider and rule by majority opinion on the request for review of the hearing officer's decision, including a determination to dismiss the request for review. Matters other than a final disposition of the request for review may be disposed of by the member designated chair of the panel.

9. Paragraph (e) of § 416.1590 is revised to read as follows:

§ 416.1590 Appeals Council's decision.

(e) The Appeals Council shall make its decision in writing and shall mail a copy of the decision to the parties at their last known addresses.

10. Paragraphs (c) and (e) of § 416.1599 are revised to read as follows:

§ 416.1599 Reinstatement after suspension or disqualification—period of suspension not expired.

(c) The Appeals Council shall allow the Deputy Commissioner for Programs, or his or her designee, upon notification of receipt of the request, 30 days in which to present a written report of any experiences with the suspended or disqualified person subsequent to that person's suspension or disqualification. The Appeals Council shall make available to the suspended or disqualified person a copy of the report.

(e) The Appeals Council shall mail a notice of its decision on the request to the suspended or disqualified person. It shall also mail a copy to the Deputy Commissioner for Programs.

[FR Doc. 91-12565 Filed 5-28-91; 8:45 am]

BILLING CODE 4190-29-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Chapter I

Freedom of Information and Privacy Acts; Implementation

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This document transfers 32 CFR parts 284 and 285 from subchapter M to subchapter O and revises the headings of subchapters N and O in order to place the Freedom of Information Program and the Privacy Act Program parts in separate subchapters.

EFFECTIVE DATE: May 29, 1991.

ADDRESSES: Directives Division, Correspondence and Directives Directorate, Washington Headquarters Services, Washington, DC 20301-1155.

FOR FURTHER INFORMATION CONTACT: Ms. L. Bynum, telephone (703) 697-4111.

Accordingly, by the authority of 5 U.S.C. 552 and 552a, title 32, chapter I, of the Code of Federal Regulations is amended as follows:

PARTS 284 and 285—[AMENDED]

1. Subchapter M is amended by transferring parts 284 and 285 to subchapter O.

2. Subchapter N, which is currently reserved is amended by revising the heading to read as follows:

SUBCHAPTER N—PRIVACY PROGRAM—[RESERVED]

3. Subchapter O, consisting of newly transferred parts 284 and 285, is amended by revising the heading to read as follows:

SUBCHAPTER O—FREEDOM OF INFORMATION ACT PROGRAM

Dated: May 22, 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91-12592 Filed 5-28-91; 8:45 am]

BILLING CODE 3810-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3956-6]

Approval and Promulgation of State Implementation Plans; Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: By this notice, EPA is approving an amendment to the State of Washington sulfur dioxide emission limitation as a revision to the Washington state implementation plan (SIP). This amendment was submitted to EPA on April 28, 1983, by the Washington Department of Ecology (WDOE) to satisfy the requirements of section 110 of the Clean Air Act (hereinafter the Act). This amendment clarifies the averaging time for the sulfur dioxide emission limitation in WAC 173-400-040(6).

EFFECTIVE DATE: July 29, 1991.

ADDRESSES: Copies of the materials submitted to EPA may be examined during normal business hours at:

Public Information Reference Unit, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Air Programs Branch, Docket #10A-88-4, Environmental Protection Agency, 1200 Sixth Avenue, AT-082, Seattle, Washington 98101.

Air Programs, Washington Department of Ecology, 4226—6th Avenue SE., Rowe Six, Building #4, Lacey, Washington 98504.

FOR FURTHER INFORMATION CONTACT: David C. Bray, Environmental Protection Agency, 1200 Sixth Avenue, AT-082, Seattle, Washington 98101, telephone: (206) 553-4253, FTS: 399-4253.

SUPPLEMENTARY INFORMATION:

I. Background

On April 27, 1979, the State of Washington Department of Ecology (WDOE) submitted a general emission limitation for sulfur dioxide as a revision to the Washington state implementation plan (SIP). On June 5, 1980 (45 FR 37821), EPA approved this emission limitation on the condition that WDOE submit source test and compliance procedures for enforcing the emission limitation. On July 31, 1980, and January 13, 1981, WDOE submitted source test methods and compliance procedures as revisions to the Washington SIP. EPA approved these revisions to the Washington SIP on September 14, 1981 (45 FR 45607).

On April 28, 1983, WDOE submitted amendments to the regulation for control of sulfur dioxide emissions (WAC 173-400-040(6)) as a revision to the Washington SIP. These amendments clarified the averaging time for the sulfur dioxide emission limitation, and updated, rearranged, and recodified the regulation. On November 7, 1988 (53 FR 44911), EPA proposed to approve the portion of the amendments which clarified the averaging time of the sulfur dioxide emission limitation. However, EPA proposed to take no action on the remaining provisions which provided for the granting of an exception to the general emission limitation and furthermore, proposed to rescind its June 5, 1980, approval of the exception provisions.

II. Response to Comments

EPA received numerous comments on its proposal from state and local air pollution authorities, the National Park Service, and the owners of a large coal-fired power plant. In general, the comments fall into two general categories—the appropriateness of a 60-minute averaging time, and the need for the exception provisions.

The WDOE objected to EPA's proposed disapproval of the exception provision and requested that EPA either withhold action on the submitted revision or approve the revision in its entirety. The WDOE indicated that it was aware of EPA's concerns with the exception provisions and requested an opportunity to revise its regulations through either an informal process or pursuant to a formal SIP call under section 110(a)(2)(H).

EPA agrees that its proposal to rescind the previous approval of the exception provisions in the Washington SIP was premature. Congress provided a process in section 110(a)(2)(H) for EPA to identify deficiencies within SIPs and to provide an opportunity for states to correct such deficiencies. While EPA is not changing its position on the approvability of the exception provisions in the proposed revisions or the current Washington SIP, EPA is not disapproving either sets of exception provisions at this time. Rather, EPA is taking no action on the proposed revisions, thereby leaving the currently approved exception provisions in place. However, EPA intends, in the near future, to make a finding of SIP deficiency pursuant to section 110(a)(2)(H), requiring the revision of the exception provisions.

WDOE emphasized the state's prerogative to establish emission limits and grant exceptions thereto, so long as the requirements of the Clean Air Act were met. Furthermore, the WDOE acknowledged that changes to previously established SIP emission limits, granted through the exception process, would need to be submitted to, and approved by, EPA as a revision to the Washington SIP, even if EPA has approved the exception provisions themselves. In order to clearly indicate the need for case-by-case EPA approval of exceptions granted pursuant to this, or any other exception provision in the Washington SIP, EPA has added a new section to 40 CFR part 52, subpart WW.

The Southwest Air Pollution Control Authority (SWAPCA), a local air pollution control authority in southwest Washington objected to EPA's proposed approval of the 60-minute averaging time and proposed disapproval of the exception provision on a number of grounds, and urged EPA to remand the regulations to the state for reconsideration. First, SWAPCA indicated that the impact of the addition of the 60-minute averaging time was not adequately discussed during the state public hearing process. However, there is no requirement that a portion of a proposed revision be specifically

discussed during the hearing process, if it is not raised by a commenter. As such, EPA finds that the state's public hearing process on this revision was fully adequate.

Second, SWAPCA pointed out a potential conflict between the averaging time specified in the regulation and a table in the Washington SIP which describes the applicable source test methods. Since the table is not regulatory, and is descriptive only, EPA believes that deference must be given to the regulatory provisions in any apparent conflict. However, EPA has taken note of this potential conflict and will request that WDOE revise the table, as appropriate, at the next opportune update of their SIP.

Third, SWAPCA argued that EPA should not approve the 60-minute averaging time because WDOE has not demonstrated that the sulfur dioxide emission limit is adequate to attain and maintain the national ambient air quality standards. However, as described above, the revision only clarifies the averaging time of the existing emission limitation. Since there are currently no designated sulfur dioxide nonattainment areas in Washington, nor are there any areas for which EPA has found the current SIP emission limitations to be substantially deficient to attain and maintain the ambient standards, EPA finds that no demonstration is needed to support the approval of this technical amendment. However, SWAPCA's point regarding the ability of a volumetric concentration standard to ensure attainment and maintenance is well taken. EPA will consider this further in its next assessment of the Washington sulfur dioxide control program.

Finally, SWAPCA argued that the requirements of part C of the Act (prevention of significant deterioration (PSD), visibility protection) only apply to new sources and not to existing sources such that an existing source which applies for an exception would not need to demonstrate compliance with PSD increments or visibility requirements. This comment, however, is contrary to the explicit language in part C of the Act and EPA regulations (40 CFR part 51, subparts I and P). As such, EPA maintains that exception provisions in the proposed revision and the current Washington SIP need to be revised.

The National Park Service supported EPA's proposed action, indicating the need for an enforceable and unambiguous emission limitation.

Seven of the owners of a large coal-fired steam electric generating plant in

southwest Washington, and one of the owners of the adjacent coal mine, submitted comments objecting to EPA's proposed action.

The owners objected to EPA's proposed disapproval of the exception provisions as making the emission limitation more stringent than intended by the state. They contend that the intent of the current provision was to require compliance with the 1000 ppm, 60-minute average limitation only where feasible and to grant exceptions, through the exception provisions, where compliance was not feasible. By disapproving the exception provisions, EPA would be tightening the state's regulation by eliminating the means for revising the emission limit for situations where compliance was not feasible. As discussed above, EPA has decided not to disapprove the exception provisions at this time, leaving the currently approved exception provisions in place. However, as discussed above, EPA intends to make a finding pursuant to Section 110(a)(2)(H) that the existing exception provisions fail to meet all applicable requirements of the Clean Air Act and need to be revised.

The owners further contend that the addition of the 60-minute average is not simply a technical amendment to the current SIP but rather, could be interpreted as a tightening of the current provision. Therefore, EPA's finding that the amended regulation is functionally equivalent to the current SIP was erroneous and its rationale for proposing approval was flawed. However, as discussed above, the state of Washington's control strategy for sulfur dioxide is fully approved and there are currently no known problem areas. If, as the owners contend, this amendment is a tightening of the current SIP provisions, EPA would have no recourse but to approve it, since section 116 of the Clean Air Act allows states to adopt emission limitations which are more stringent than required by EPA. Furthermore, EPA's requirements for SIP emission limitations clearly state that an averaging time must be specified and such averaging time can be no longer than that of any short-term ambient air quality standard. This amendment to the Washington sulfur dioxide emission standard satisfies these requirements and is therefore approvable as a revision to the Washington SIP.

The owners also urge EPA to remand the proposed revision to the WDOE until current studies of the power plant's impact on air quality are completed. The results of these studies will be used by SWAPCA and WDOE to grant an exception under the exception

provisions and to determine appropriate emission limitations for the power plant. However, EPA feels that it is appropriate to take final action on the technical amendment at this time since this emission limitation applies to nearly all sulfur dioxide sources in the state of Washington and not just to one power plant. EPA recognizes that studies are underway which will enable SWAPCA and WDOE to establish appropriate emission limitations for the power plant. Since EPA is not disapproving the current exception provisions, the mechanism for establishing such appropriate limitations remains in place.

The owners felt that the proposed rulemaking was subject to section 3 of Executive Order 12291 and, therefore, should have been required to be reviewed by the Office of Management and Budget (OMB). EPA agrees that the proposed rulemaking should have been reviewed by the OMB since EPA was rescinding its previous approval of the exception provisions in the Washington SIP. However, since EPA is no longer rescinding its previous approval of the exception provisions in the currently-approved Washington SIP, this issue is moot. This final rulemaking is not subject to the requirements of section 3 of Executive Order 12291.

The owners also felt that this rulemaking was incorrectly exempted from Regulatory Impact Analysis and Review requirements of Executive Order 12291, claiming that the action is a "major rule" as defined therein. This claim is based on the highly unlikely scenario that the EPA action would result in the shutdown of the power plant and adjacent coal mine. However, EPA's proposed action would have done nothing to limit the state's authority to grant an exception under its existing regulations, or EPA's authority and obligation to approve such an exception as a revision to the Washington SIP if all of the requirements of the Clean Air Act were met. As such, EPA's proposed action was not a "major rule" as defined in Executive Order 12291, since it, in and of itself, had no direct effect on the ability of any source to obtain an exception to the 1000 ppm, 60-minute average emission limitation. However, since EPA is no longer disapproving the exception provision in the currently-approved Washington SIP, this issue is also moot. This rulemaking is not a "major rule" as defined in Executive Order 12291.

III. Discussion

The Clean Air Act and EPA regulations and guidelines are clear with respect to the need for enforceable emission limitations in the SIP. The Act

defines an emission limitation or emission standard as " * * * a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis * * * " (section 302(k)). For an emission limitation to be approvable as a control measure under sections 110, 161, or 172, it must meet certain requirements. There must be a clear numerical limitation, and an averaging time must be specified which is consistent with that of the national ambient air quality standards the limitation is designed to protect. Furthermore, it must include explicit test methods and procedures adequate to verify compliance.

The 1979 version of WAC 173-400-040(6) did not, in and of itself, include a specified averaging time but instead, relied upon the sampling time and averaging protocol of the source test method. Since this resulted in some ambiguity regarding the applicable averaging time, WDOE amended the regulation in 1983 to explicitly require a 60-minute averaging time, consistent with the State of Washington one-hour ambient air quality standard for sulfur dioxide. Since the addition of the 60-minute averaging time to the regulation fulfills EPA's requirement for an explicit averaging time which is no longer than the averaging time of the applicable ambient air quality standards, EPA finds this amendment to be approvable as a revision to the Washington SIP.

The Act and EPA regulations for state implementation plans (40 CFR part 51) are also clear with respect to the requirements for modifying SIP emission limitations and provisions. Section 110(i) of the Act states that, with certain exceptions, " * * * no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator." One of the listed exceptions is plan revisions under section 110 of the Act.

The exception provisions in WAC 173-400-040(6) fail to meet the requirement of section 110(i) in several ways. First and foremost, they fail to recognize the need for submittal to EPA and EPA approval of any exception granted by the state, before the existing requirement of the state implementation plan could be modified. Second, they would allow the State to grant an exception which fails to comply with the requirements of the Act and as such, could not be approved as a revision to the SIP under section 110. Specifically, the current provisions would allow an

exception based solely on a showing that ambient air quality standards would not be exceeded. This fails to ensure that the requirements for prevention of significant deterioration and visibility in part C of the Act would be met or that ambient standards were not being met as a result of the use of stack heights or dispersion techniques prohibited by section 123 of the Act. Furthermore, the provisions do not ensure that a source would be required to comply with any other applicable requirement, including new source performance standards under section 111, best available control technology under section 165, lowest achievable emission rates under section 173, or best available retrofit technology under section 169A of the Act.

Because the exception provisions in WAC 173-400-040(6) fail to meet Act and EPA requirements, EPA cannot approve the provisions as a revision to the Washington SIP. However, since the current SIP contains nearly identical provisions, disapproving the submittal would not, in and of itself, rectify the SIP deficiency. Rather, EPA is taking no action on the submitted revision and intends to make a SIP call pursuant to section 110(a)(2)(H) in order to provide the State an opportunity to amend the current provisions and submit a revised regulation as a revision to the Washington SIP. This approach differs from EPA's proposal in that it would leave in the SIP, until an amended rule is approved by EPA, the current exception provisions, based on the understanding that WDOE will submit to EPA each exception granted under the current provisions as a case-by-case revision to the SIP. This approach should address the concerns of the state and local agencies and affected industries that EPA's action not constrain the State's ability to grant exceptions to its rules, while at the same time, provide the State an opportunity to ensure that its rule conforms to the Act and EPA requirements.

IV. Summary of Action

EPA is today approving amendments to the State of Washington sulfur dioxide emission limitation, specifically the first uncodified sentence of WAC 173-400-040(6), as a revision to the Washington state implementation plan (SIP). EPA is taking no action on the exception provisions (paragraphs (a) and (b)) in WAC 173-400-040(6), leaving the current SIP provisions (WAC 173-400-040(6)(a) (i) and (ii) and (b)) in place. Note however, that EPA intends to make a SIP call pursuant to section 110(a)(2)(H) of the Act in order to

require revision to the exception provisions in the current regulation for control of sulfur dioxide.

Administrative Review

This action has been classified as a Table 2 action by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225). On January 6, 1989, the Office of Management and Budget waived Table 2 and 3 SIP revisions (54 FR 2222) from the requirements of Section 3 of Executive Order 12291 for a period of two years and has subsequently extended the waiver to April 6, 1991.

The Agency has reviewed this request for revision of the federally-approved State implementation plan for conformance with the provisions of the 1990 Amendments enacted on November 15, 1990. The Agency has determined that this action conforms with those requirements irrespective of the fact that the submittal precedes the date of enactment.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic and environmental factors and in relation to relevant statutory and regulatory requirements.

Under 5 U.S.C. 605(b), I certify that this revision will not have a significant economic impact on a substantial number of small entities (See 46 FR 8709).

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 29, 1991. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

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

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide,

Ozone, Particulate matter, Reporting and Recordkeeping requirements, Sulfur oxides.

Dated: April 23, 1991.

Gerald A. Emison,
Acting Regional Administrator.

Note: Incorporation by reference of the Implementation Plan for the State of Washington was approved by the Director of the Office of Federal Register on July 1, 1982.

Title 40, chapter I of part 52 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7642

Subpart WW—Washington

2. Section 52.2470 is amended by adding paragraph (c)(37) to read as follows:

§ 52.2470 Identification of plan.

(c) * * *

(37) On April 28, 1983, the State of Washington Department of Ecology submitted amendments to the State of Washington sulfur dioxide emission limitation. These amendments clarify the averaging time for the sulfur dioxide emission limitation in WAC 173-400-040(6).

(i) Incorporation By Reference.

(A) Letter dated April 28, 1983, from the Director of the Department of Ecology to EPA Region 10 amending the State of Washington State Implementation Plan.

(B) Washington Administrative Code [WAC] Chapter 173-400 [General Regulations for Air Pollution Sources], - 040 [General Standard for Maximum Emissions], (6) [Sulfur Dioxide] introductory sentence adopted into state law by the State of Washington Department of Ecology on March 30, 1983 and became effective on May 11, 1983.

3. Section 52.2476 is added to read as follows:

§ 52.2476 Discretionary authority.

(a) This section applies to any variance, exception, exemption, alternative emission limitation, bubble, alternative sampling or testing method, compliance schedule revision, alternative compliance schedule, or any other substantial change to a provision of the state implementation plan, granted by the Department of Ecology, the Department of Natural Resources, the Energy Facility Site Evaluation Council, or a local air pollution control

agency in accordance with any discretionary authority granted under its statutes or regulations, regardless of whether such statutes or regulations are part of the state implementation plan.

(b) Any change to a provision of the state implementation plan described in paragraph (a) of this section must be submitted by the state for approval by EPA in accordance with the requirements of 40 CFR 51.104.

(c) Any change to a provision of the state implementation plan described in paragraph (a) of this section does not modify the requirements of the federally-approved state implementation plan or a federally-promulgated implementation plan until approved by EPA as a revision to the state implementation plan in accordance with section 110 of the Clean Air Act.

4. Section 52.2479 is revised to read as follows:

§ 52.2479 Contents of the federally approved, state submitted implementation plan.

The following sections of the Washington State Implementation Plan for Compliance with Requirements of the Federal Clean Air Act (as adopted on the dates indicated) have been approved and are part of the current federally-approved, state-submitted implementation plan.

- (a) Washington Administrative Code.
- WAC 18-04 General Regulations for Air Pollution Sources
- Section 080 Compliance Schedules (1/22/73)
- Section 130 Regulatory Actions (1/22/73)
- Section 140 Appeals (1/22/73)
- WAC 18-08 Emergency Episode Plan (undated, approved 5/31/72)
- WAC 18-16 Grass Seed Field Burning (undated, approved 5/31/72)
- WAC 173-400 General Regulations for Air Pollution Sources
- Section 010 Purpose (4/26/79)
- Section 020 Applicability (8/20/80)
- Section 030 Definitions (8/20/80)
- Section 040 General Standards for Maximum Permissible Emissions (except (6) Sulfur Dioxide and (13), Use of Tall Stacks or Dispersion Techniques) (8/20/80)
- Section 040(6) Sulfur Dioxide (except (b)) (4/15/83)
- Section 050 Minimum Emission Standards for Combustion and Incineration Sources (8/20/80)
- Section 060 Minimum Emission Standards for General Process sources (8/20/80)
- Section 070 Minimum Standards for Certain Source Categories (8/20/80)
- Section 090 Sensitive Area Designation (8/20/80)
- Section 100 Registration (8/20/80)
- Section 110 New Source Review (12/17/80)
- Section 120 Monitoring and Special Report (8/20/80)

Section 160 Maintenance of Pay (4/26/79)
 WAC 173-402 Civil Sanctions under Washington Clear Air Act (6/24/80)
 WAC 173-403 Implementation of Regulations for Air Contaminant Sources
 Section 030 Definitions
 Subsection (2) "Adverse Impact on Visibility" (3/6/85)
 Subsection (9) "Best Available Retrofit Technology (BART)" (3/6/85)
 Subsection (11) "Class I Area" (3/6/85)
 Subsection (24) "Integral Vista" (3/6/85)
 Subsection (25) "Land Manager" (3/6/85)
 Subsection (31) "Natural Conditions" (3/6/85)
 Subsection (42) "Reasonably Attributable" (3/6/85)
 Subsection (46) "Significant Visibility Impairment" (3/6/85)
 Subsection (51) "Visibility Impairment" (3/5/85)
 Subsection (52) "Visibility Impairment of a Class I Area" (3/5/85)
 Section 090 Retrofit Requirements for Visibility Protection (8/26/83)
 WAC 173-405 Kraft Pulping Mills
 Section 012 Statement of Purpose (8/20/80)
 Section 021 Definitions (8/20/80)
 Section 040 Emission Standards
 Subsection (1) "Recovery Furnaces" (8/20/80)
 Subsection (2) "Smelt Dissolver Tank Vent" (8/20/80)
 Subsection (3) "Lime Kilns" (8/20/80)
 Subsection (4) "Other Sources" (8/20/80)
 Subsection (5) "Emission of Particulate Matter" (8/20/80)
 Subsection (6) "Fugitive Emissions" (8/20/80)
 Subsection (17) "Source Testing" (8/20/80)
 Section 072 Monitoring Requirements
 Subsection (1) "Particulate" (8/20/80)
 Subsection (4) "Production" (8/20/80)
 Subsection (5) "Other Data" (8/20/80)
 Section 077 Abnormal Operations or Upset Conditions (8/20/80)
 Section 086 New Source Review (8/20/80)
 Section 101 Exemptions (8/20/80)
 WAC 173-410 Sulfite Pulping Mills
 Section 012 Statement of Purpose (8/20/80)
 Section 021 Definitions (8/20/80)
 Section 040 Emission Standards
 Subsection (1) "Sulfur Dioxide" (8/20/80)
 Subsection (2) "Particulate" (8/20/80)
 Subsection (3) "Fugitive Emissions" (8/20/80)
 Subsection (5) "Fallout" (8/20/80)
 Subsection (16) "Source Testing" (8/20/80)
 Section 062 Monitoring Requirements (except (4)) (8/20/80)
 Section 067 Abnormal Operations or Upset Conditions (8/20/80)
 Section 088 New Source Review (8/20/80)
 Section 090 Operating Permit (8/20/80)
 Section 091 Exemptions (8/20/80)
 WAC 173-415 Primary Aluminum Plants
 Section 010 Statement of Purpose (8/24/80)
 Section 020 Definitions (8/14/80)
 Section 030 Emission Standards
 Subsection (2)(b) "Fluoride" (8/14/80)

Subsection (4) "Visible Emissions" (8/14/80)
 Subsection (5) "Fallout" (8/14/80)
 Subsection (7) "Fugitive Emissions" (8/14/80)
 Subsection (11) "Source Testing" (8/14/80)
 Section 050 New Source Review (8/14/80)
 Section 060 Monitoring and Reporting
 Subsection (1)(c) "Particulate Emissions" (8/14/80)
 Subsection (2) "Other Data" (8/14/80)
 Section 070 Abnormal Operations or Upset Conditions (8/14/80)
 Section 090 Operating Permits (8/14/80)
 WAC 173-420 State Jurisdiction Over Motor Vehicles (3/29/77)
 WAC 173-422 Motor Vehicle Emission Inspection (12/31/81)
 WAC 173-425 Open Burning (10/24/77)
 WAC 173-490 Emission Standards and Controls for Sources Emitting Volatile Organic Compounds
 Section 010 Purpose (8/20/80)
 Section 020 Definitions (8/29/82)
 Section 025 General Applicability (8/29/82)
 Section 030 Registration and Reporting (8/20/80)
 Section 040 Requirements (8/29/82)
 Section 070 Schedule of Control Dates (8/20/80)
 Section 071 Alternative Schedule of Control Dates (8/20/80)
 Section 080 Exceptions (8/29/82)
 Section 090 New Source Review (4/26/79)
 Section 120 Compliance Schedules (4/26/79)
 Section 130 Regulatory Actions (4/26/79)
 Section 135 Criminal Penalties (4/26/79)
 Section 140 Appeals (4/26/79)
 Section 200 Petroleum Refinery Equipment Leaks (8/20/80)
 Section 201 Petroleum Liquid Storage in External Floating Roof Tanks (8/20/80)
 Section 202 Leaks from Gasoline Transport Tanks and Vapor Collection Systems (8/20/80)
 Section 203 Perchloroethylene Dry Cleaning Systems (6/29/82)
 Section 204 Graphic Arts Systems (6/29/82)
 Section 205 Surface Coating of Miscellaneous Metal Parts and Products (6/29/82)
 Section 207 Surface Coating of Flatwood Paneling (8/20/80)
 Section 208 Aerospace Assembly and Component Coating Operations (6/29/82)
 WAC 463-39 General Regulations for Air Pollution Sources
 Section 010 Purpose (7/23/79)
 Section 020 Applicability (7/23/79)
 Section 030 Definitions (except (4), (7), (10), (24), (25), (30), (35), (36)) (7/23/79)
 Section 040 General Standards for Maximum Permissible Emissions (except introductory paragraph) (7/23/79)
 Section 050 Minimum Emission Standards for Combustion and Incineration Sources (7/23/79)
 Section 060 Minimum Emission Standards for General Process Sources (7/23/79)

Section 080 Compliance Schedules (7/23/79)
 Section 100 Registration (7/23/79)
 Section 110 New Source Review (except (1), first two sentences of (3)(b), (3)(c), (3)(d), (3)(e)) (7/23/79)
 Section 120 Monitoring and Special Report (7/23/79)
 Section 130 Regulatory Actions (7/23/79)
 Section 135 Criminal Penalties (7/23/79)
 Section 150 Variance (7/23/79)
 Section 170 Conflict of Interest (7/23/79)

(b) Puget Sound Air Pollution Control Authority—Regulation I.

Article 1 Policy, Short Title & Definitions (except 1.07(s), 1.07(rr) and 1.07(xx)) (12/74)
 Article 1.07(s) General Definitions, "Facility" (10/11/83)
 Article 1.07(rr) General Definitions, "Source" (10/11/83)
 Article 1.07(xx) General Definitions, "Volatile Organic Compound" (10/11/83)
 Article 3 General Provisions (12/74)
 Article 6 Notices of Construction and Orders of Approval (except 6.07(b)(7) and 6.08) (12/74)
 Article 6.07(b)(7) Issuance of Approval or Order (10/11/83)
 Article 6.08 Special Conditions for New Air Contaminant Sources Which Will Significantly Impact A Nonattainment Area (10/11/83)
 Article 9.02 Outdoor Fires (6/13/73)
 Article 9.02A (6/20/74)
 Article 9.03 Emission of Air Contaminant: Visual Standard (1/77)
 Article 9.04 Deposition of Particulate Matter (1/77)
 Article 9.05 Incinerator Burning (1/77)
 Article 9.06 Refuse Burning Equipment: Time Restriction (1/77)
 Article 9.07(c) Emission of Sulfur Dioxide (8/12/70)
 Article 9.07(d) Emission of Sulfur Dioxide (1/77)
 Article 9.07(e) Emission of Sulfur Dioxide (1/77)
 Article 9.09 Emission of Particulate Matter: Weight Rate Standard (1/77)

(c) Puget Sound Air Pollution Control Authority—Regulation II.

Article 1 Purpose, Policy, Short Title and Definitions (except 1.02) (4/8/82)
 Article 1, Section 1.02 Policy (12/13/84)
 Article 2 Volatile Organic Compound Emission Standards Group 1 (except 2.13) (4/8/82)
 Article 2, Section 2.13 Schedule of Control Dates (12/13/84)
 Article 3 Volatile Organic Compound Emission Standards—Group 2 (except 3.11) (4/8/82)
 Article 3, Section 3.11 Schedule of Compliance Dates (12/13/84)
 Article 4 General Provisions (except 4.02) (4/8/82)
 Article 4, Section 4.02 Scope, Registration, Reporting and Notice of Construction (12/13/84)

(d) Northwest Air Pollution Authority—Regulations.

Article 455.11 Particulate Matter Standard (8/9/78)

(e) Spokane County Air Pollution Control Authority—Regulation II.

Article IV, Section 4.01 Particulate Emissions—Grain Loading Restrictions (1/6/75)

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40 CFR Parts 148 and 268

[FRL-3959-4]

Underground Injection Control Program: Hazardous Waste Disposal Injection Restrictions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action to grant a case-by-case extension.

SUMMARY: The EPA is granting final approval to E.I. du Pont de Nemours & Co., Inc., in Orange, Texas for a case-by-case extension for specific injected wastes which were impacted by the August 8, 1990, ban date (California listed wastes, solvents less than one (1) percent solvent constituents and First Third wastes). This action responds to the petition submitted under 40 CFR 148.4 according to procedures set out in 40 CFR 268.5, which allows any person to request that the Administrator grant, on a case-by-case basis, an extension of the applicable effective date based on a showing that the petitioner has entered into a binding contractual commitment to construct or otherwise provide adequate alternative treatment, recovery, or disposal capacity for the petitioner's waste. The Agency proposed action on this request in a July 5, 1990, Federal Register notice at (55 FR 27659). The Agency stated in an October 2, 1990, Federal Register notice at (55 FR 40229), that it was taking no action at that time on the proposed Dupont-Orange case-by-case extension because Dupont had not yet demonstrated that the no migration standard of the land disposal restrictions could be met. Dupont has now met this no migration standard through a chemical transformation demonstration for its acidic waste. In addition, Dupont will complete its containment demonstration for all its waste within the next few weeks. The EPA anticipates issuing a proposed decision on Dupont's no migration demonstration once Dupont completes its containment demonstration. Therefore, the EPA is granting Dupont-Orange a case-by-case extension. By granting this approval, Dupont-Orange can inject the above

identified wastes through August 7, 1991, but not later than this date without being subject to the prohibitions applicable to such wastes.

DATES: This action is effective May 20, 1991.

ADDRESSES: The docket for this action is located at the EPA Region 6 library, 1445 Ross Avenue, Dallas, Texas 75202, and is open during normal business hours, 8 a.m. through 4 p.m., Monday through Friday. The public can review all docket materials by visiting the library.

FOR FURTHER INFORMATION CONTACT: For information contact Oscar Cabra, Jr., Chief Municipal Facilities Branch, EPA Region 6, 1445 Ross Avenue, Dallas, Texas, 75202-2733 or telephone (214) 655-7110, FTS 255-7110.

SUPPLEMENTARY INFORMATION:

I. Summary of Proposal and Response to Comments

A. Background

A more complete discussion of the Hazardous and Solid Waste Amendments (HSWA) of 1984 to amend the Resource Conservation and Recovery Act (RCRA), may be found in previous rulemakings by the Agency. See (55 FR 22520), June 1, 1990.

On July 26, 1988, EPA promulgated a final rule (53 FR 28118, effective August 8, 1988), that established an effective date of August 8, 1990 for injected spent F001-F005 solvent wastes containing less than 1 percent solvent constituents. An August 8, 1990, effective date was established for specified California list wastes that are deep well injected. See (53 FR 30908), effective August 8, 1988.

Section 3004(m) requires the Agency to set levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized. Wastes that meet treatment standards established by EPA are no longer prohibited and may be land disposed.

Section 3004(d), (e), (f), and (g) also allows the applicant to demonstrate to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous. The no migration petition process has been established by the Agency for injected wastes under 40 CFR part 148 subpart C. See (53 FR 28118), July 26, 1988.

Congress recognized that adequate alternative treatment, recovery, or

disposal capacity any of which is protective of human health and the environment may not be available by the applicable statutory effective dates and authorized EPA to grant a variance (based on the earliest dates that such capacity will be available) from the effective date which would otherwise apply to specific hazardous wastes (RCRA section 3004(h)(2) and (h)(3)). In addition, under section 3004(h)(3), the Agency can grant case-by-case extensions of the statutory deadlines for up to one year beyond the applicable deadlines. These extensions are renewable once for up to one additional year.

On November 7, 1986, EPA published a final rule (51 FR 40572) establishing the regulatory framework to implement the land disposal restrictions program including procedures for submitting case-by-case extensions under § 268.5. On July 26, 1988, EPA published a final rule (53 FR 28118) establishing restrictions and requirements for Class I hazardous waste injection wells, including the framework for the no migration petition process and allowing case-by-case extensions under § 148.4 following § 268.5 procedures.

B. Demonstration Requirements

1. Summary of Requirements

Case-by-case extension applications must satisfy the requirements outlined in 40 CFR 268.5. These requirements include those specified in RCRA Section 3004(h)(3). The applicant must have entered into a binding contractual commitment to construct or otherwise provide alternative capacity (40 CFR 268.5(a)(2)), but due to circumstances beyond his control, this alternative capacity cannot reasonably be made available by the applicable effective date (40 CFR 268.5(a)(3)).

In addition, EPA has established by regulation the following requirements: The applicant must demonstrate that he has made a good faith effort to locate and contract with treatment, recovery, or disposal facilities nationwide to manage his waste (40 CFR 268.5(a)(1)). Again, the applicant must demonstrate why this nationwide capacity cannot reasonably be made available by the effective date.

Additional requirements for case-by-case demonstrations are summarized in the July 5, 1990, proposal to today's rulemaking. See 55 FRL-3805-7.

2. Commitment to Provide Protective Disposal Capacity

EPA believes that the applicant for a case-by-case extension has shown the