

involving the lending or sale of securities that is collateralized by cash delivered to the banking organization, the transaction is deemed to be collateralized by cash on deposit in a subsidiary lending institution for purposes of determining the appropriate risk-weight category, provided that any indemnification is limited to no more than the difference between the market value of the securities and the cash collateral received and any reinvestment risk associated with that cash collateral is borne by the customer.

Attachment III * * *

Category 1: Zero Percent * * *

5. Claims collateralized by cash on deposit in the subsidiary lending institution or by securities issued or guaranteed by OECD central governments or U.S. government agencies for which a positive margin of collateral is maintained on a daily basis, fully taking into account any change in the bank's exposure to the obligor or counterparty under a claim in relation to the market value of the collateral held in support of that claim. * * *

Category 2: 20 Percent * * *

8. The portions of claims that are collateralized³ by cash on deposit in the subsidiary lending institution or by securities issued or guaranteed by the U.S. Treasury, the central governments of other OECD countries, and U.S. government agencies that do not qualify for the zero percent risk-weight category, or that are collateralized by securities issued or guaranteed by U.S. government-sponsored agencies. * * *

Board of Governors of the Federal Reserve System, December 23, 1992.

William W. Wiles,
Secretary of the Board.

[FR Doc. 92-31702 Filed 12-29-92; 8:45 am]
BILLING CODE 6210-01-F

12 CFR Part 264

[Docket No. R-0788]

Employee Responsibilities and Conduct

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is amending its regulations regarding employee responsibilities and conduct by removing the Board's confidential reporting requirements relating to employment and financial interests. These regulations have been superseded by regulations issued by the Office of Government Ethics (OGE) that took effect on October 5, 1992. This rule is

intended to conform the Board's rules to the OGE's regulations.

EFFECTIVE DATE: December 30, 1992.

FOR FURTHER INFORMATION CONTACT: Cary K. Williams, Senior Attorney, (202/452-3295), or Timothy J. Byrne, Attorney, (202/452-3565), Legal Division, Board of Governors of the Federal Reserve System. For the hearing impaired only, Telecommunications Device for the Deaf (TDD), Dorothea Thompson (202/452-3544), Board of Governors of the Federal Reserve System, 20th and C Street, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

The OGE, pursuant to title I of the Ethics in Government Act of 1978, as amended by the Ethics Reform Act of 1989 and related legislation pertaining to executive branch employees and Executive Order 12674, has issued an interim rule that revises the confidential financial disclosure system for the executive branch of the United States government. The interim rule requires executive branch agencies to review their existing confidential financial disclosure regulations to determine if they need to be removed or modified to conform with the new rule. Certain provisions of part 264 of the Board's regulations are superseded by the regulations set forth in subpart I of the interim rule published at 57 FR 11826 on April 7, 1992 (to be codified as subpart I of 5 CFR part 2634). Therefore, the Board has determined that part 264 should be amended by removing the superseded sections.

In accordance with the Administrative Procedure Act (5 U.S.C. § 553), it is the practice of the Board to offer interested parties the opportunity to comment on proposed regulations. Adhering to the normal notice and comment procedures and the 30-day post-publication waiting period is unnecessary in this case because the OGE regulations became effective on October 5, 1992.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. § 601 *et seq.*), the Board certifies that this rule will not have a significant economic impact on a substantial number of small entities. The amendment is a removal of regulations governing employee financial disclosure statements that have been superseded by regulations issued by the OGE that became effective October 5, 1992, and would not have a substantial effect on particular small entities.

List of Subjects in 12 CFR Part 264

Conflicts of interests, Federal Reserve System.

For the reasons set forth in the preamble, and pursuant to the Board's authority under the Ethics Reform Act of 1989, the Board is amending 12 CFR part 264 as follows:

PART 264—EMPLOYEE RESPONSIBILITIES AND CONDUCT

1. The authority citation for part 264 continues to read as follows:

Authority: E.O. 11222, 3 CFR, 1964-1965 Comp.; 5 CFR 735.104.

2. Section 264.735-4 is removed and reserved.

3. Section 264.735-8 is removed.

4. Appendix A to part 264 is removed.

By order of the Board of Governors of the Federal Reserve System, December 23, 1992
William W. Wiles,
Secretary of the Board.

[FR Doc. 92-31703 Filed 12-29-92; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL HOUSING FINANCE BOARD

12 CFR Part 910

[No. 92-750]

Leverage Ratio on Consolidated Federal Home Loan Bank Debt

AGENCY: Federal Housing Finance Board.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Board (Finance Board) is revising its regulations regarding leverage of the Federal Home Loan Bank (FHLBank) System by expanding the definition of debt to include certain senior unsecured liabilities and to increase the permitted debt to capital ratio from 12:1 to 20:1. The revised leverage constraints provide meaningful protection to FHLBank System bondholders. The change will increase the availability of housing finance and increase the attractiveness of System membership.

EFFECTIVE DATE: January 29, 1993.

FOR FURTHER INFORMATION CONTACT: Michael J. Higgins, Director of Strategic Planning, (202) 408-2962, or James H. Gray Jr., Associate General Counsel, (202) 408-2552.

SUPPLEMENTARY INFORMATION:

Discussion

A. Background

Section 702 of the Financial Institutions Reform, Recovery and

³ The extent of collateralization is determined by current market value.

Enforcement Act of 1989, Public Law No. 101-73, 103 Stat. 183 (August 9, 1989) (FIRREA) charges the Federal Housing Finance Board (Finance Board), *inter alia*, with the duty to ensure that the Federal Home Loan Banks (FHLBanks) carry out their housing finance mission and " * * * remain adequately capitalized and able to raise funds in the capital markets * * * " 12 U.S.C. 1422a(a)(3). The Finance Board raises funds through the issuance of consolidated obligations for which the FHLBanks are jointly and severally liable. The funds so raised enable the FHLBanks to make competitively priced advances available to members.

The change in the leverage ratio will provide the FHLBanks with greater flexibility to make more efficient use of their capital. In the view of the Finance Board, this flexibility is necessary for the FHLBanks to continue to provide reasonably priced advances to current and prospective members. This furthers the Finance Board's Congressionally-imposed duties to ensure that the FHLBanks carry out their housing finance mission and remain adequately capitalized and able to raise funds in the capital markets.

Through the first fifteen years of the FHLBank System's existence, the FHLBanks raised funds in the capital markets through the issuance of consolidated debentures under the authority of 12 U.S.C. 1431(b). The proceeds of the consolidated debentures were divided among the twelve FHLBanks to finance their operations. Each FHLBank received a portion of the consolidated debentures based on its anticipated operational needs. However, the ability of the FHLBank System to issue consolidated debentures was limited statutorily to an amount equal to five times the total paid-in capital of the twelve FHLBanks. See 12 U.S.C. 1431(b). Since each FHLBank member could then borrow up to twelve times the amount of its FHLBank stock, there was concern that the FHLBank System could become unable to borrow additional funds to meet member advance demand. See 47 Stat. 725, 731 (1932); formerly at 12 U.S.C. 1431(c) (repealed by Pub. L. No. 97-320, sec. 352, 96 Stat. 1507 (October 15, 1982)).

In 1946, the former Federal Home Loan Bank Administration (Bank Administration), the predecessor to the former Federal Home Loan Bank Board (Bank Board), retired the consolidated debentures issued pursuant to 12 U.S.C. 1431(b) to allow for the issuance of

consolidated bonds pursuant to 12 U.S.C. 1431(c).¹

In connection with these changes, the former Bank Administration promulgated regulations which set forth the conditions and limitations under which it would issue FHLBank consolidated bonds. The regulations were first published at § 4.3(a) and § 4.3(f) of title 24 of the Code of Federal Regulations in substantially the same form as they remain today. See 11 FR 9925 (Sept. 10, 1946). More recently, these conditions were codified in the former Bank Board's regulations at 12 CFR 506.1 and 506.6 (1989 redesignated). After the enactment of FIRREA, the Bank Board's regulations were redesignated as § 910.1 and § 910.6 of the regulations for the newly created Finance Board. The only revision to the regulations at that time was the change in the agency's name. See 54 FR 36757 (Sept. 5, 1989).

Under the current regulations, there are two conditions for the issuance of consolidated obligations. First, there is a "leverage ratio requirement" in § 910.1 that dictates that the Finance Board cannot issue consolidated obligations in excess of 12 times the FHLBanks' total paid-in capital stock and reserves set out in 12 U.S.C. 1436. In addition to the leverage ratio requirement, § 910.1 also requires that the FHLBanks hold eligible assets, free and clear of any liens or pledges, in an amount greater than or equal to the amount of consolidated obligations outstanding (the "negative pledge requirement"). Although the Finance Board is making changes in both the leverage ratio and negative pledge requirements, the Finance Board is retaining both. Along with the FHLBanks' excellent credit record of never having suffered a credit loss, these limitations will continue to provide substantial protection to FHLBank System bondholders. These are in addition to the protections provided by the FHLBank System's strong capital position.

B. Comments on the Proposed Rule

On May 11, 1992, the Finance Board published a proposed rule and solicited public comment on all aspects of the proposed rule. See 57 FR 20061. The Finance Board received two comment letters. Comments were submitted by one financial trade association, and one non-FHLBank government-sponsored enterprise. Both commentators generally supported the proposed revisions. For

example, one commentator stated that it "strongly endorses the thrust of the proposal and supports its immediate adoption." The commentator, however, suggested some minor modifications.

Both commentators found the increase in the leverage ratio to be appropriate. One commentator suggested that "relying solely on a leverage ratio could be unwise" because such a capital standard may not fully account for risk. The commentator proffered, as an example, that a significant increase in off-balance sheet obligations would increase risk but would not affect the capital required under the leverage ratio. To ensure that risks are fully identified, this commentator encouraged the Finance Board to consider adopting a dynamic risk-based capital standard similar in concept to that in the recently enacted government-sponsored enterprises legislation that will apply to the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. Currently, the FHLBank System's off-balance sheet obligations are relatively small compared to its on-balance sheet obligations. Should that situation change, the final rule would permit migration to a new or supplemental capital standard.

Concern was expressed by one commentator over the proposed definition of capital accounts eligible to meet the leverage limit. This commentator thought that such accounts should be limited to paid-in capital and retained earnings. The commentator stated that "the role of loss reserve accounts should be to meet a companion risk-based capital requirement that would * * * consider the exposure from off-balance sheet liabilities."

The Finance Board sees merit in this comment and it has decided to specifically exclude loss reserves and deposit reserves set out in 12 U.S.C. 1431(g) from the definition of capital. The Finance Board also has made an conforming change to § 910.0(d) to clarify that allowances for losses for off-balance sheet obligations are excluded from the scope of liabilities covered by this leverage ratio. Thus, loss reserves are excluded from both the numerator and the denominator of the leverage ratio.

One commentator noted certain changes in the revised negative pledge requirement. This commentator assumed that appropriate Generally Accepted Accounting Principles (GAAP) for balance sheet carrying values would apply and that these items would be subject to prudent regulation

¹ 12 U.S.C. 1431(c) authorizes the Finance Board to issue consolidated bonds only if there are no outstanding debentures at the time of the issuance of consolidated bonds or if consolidated bonds are issued to refund all outstanding debentures.

by the Finance Board for the individual FHLBanks. This assumption is correct.

The language describing the required defeasance amount was questioned by one commentator who believed that the reinvestment income from the government bonds should be included when computing the required amount. In fact, investment income from the original investment was taken into account by the proposed rule. The Finance Board believes that the mechanism to defease the bonds without taking into consideration further investment or reinvestment income is the most prudent defeasance approach and provides the most security to the bondholders. The Finance Board has decided to retain the wording in the proposed rule.

Both commentators mentioned the provisions of § 910.6(b)(2), which describe the circumstances under which the Finance Board may further amend the leverage requirements. One commentator found the proposed rule language, "materially adverse effect on creditworthiness," to be ambiguous as to whether the investment banker certification provision should be interpreted as permitting no rating downgrade or as only assuring the continuation of current debt service and repayment of principal at maturity. The other commentator urged the Finance Board not to adopt § 910.6(b)(2). This commentator stated that responsibility for regulating the capital adequacy of government-sponsored enterprises should "remain in the public sector and not, in effect, be delegated to private firms with no public responsibility or accountability."

Changes may be made in the leverage requirements if the Finance Board receives either: (i) Written evidence from at least one major nationally recognized securities rating agency that the proposed change will not result in the lowering of its then-current rating or assessment on FHLBank senior bonds outstanding or next to be issued, or (ii) a written opinion from an investment banking firm that the proposed change would not have a materially adverse effect on the creditworthiness of FHLBank senior bonds. The Finance Board intends for materially adverse effect on creditworthiness to be interpreted as a lowering in the then-current rating or assessment on FHLBank senior bonds.

Despite these safeguards which ensure that any further changes in the leverage requirements will be safe changes, the Finance Board continues to see itself as the entity with primary responsibility for assuring a manageable debt level and overall safety and

soundness. No amendment to the leverage requirements will be made except with the approval of the Finance Board and the Finance Board will not approve any change which is unsound.

One commentator also suggested that the Finance Board consider the definition of "mortgage assets" for purposes of the one percent portfolio-based requirement applicable to non- or low-users of the advances window. The Commentator did recognize that any major adjustment on this issue would require statutory revision.

C. Changes to the Current Regulations

The Finance Board appreciates the thoughtful comments on the proposed rule and has made adjustments in the final rule as a result of the comments. The Finance Board has determined that the FHLBank System needs the ability to increase the FHLBank System's leverage. Increasing the FHLBank System's ability to leverage its capital will enable the FHLBanks to offer lower advance rates, in turn making advances more attractive and enabling the FHLBank System to better accomplish its housing finance mission.

Section 910.0 defines certain terms. "Senior bonds" are the bonds subject to the leverage ratio, which currently includes all consolidated bonds outstanding. "Unsecured, senior liabilities" refers to certain obligations, such as deposits, that are accounted for as liabilities under GAAP. However, certain other liabilities, such as allowances for losses for off-balance sheet obligations, are specifically excluded from the definition. The Finance Board wishes to make it clear that, for purposes of the leverage ratio requirement and the negative pledge requirement, consolidated bonds and unsecured, senior liabilities are not deemed to be outstanding and are not taken into account in applying these requirements if such bonds or debts are deemed to be extinguished either through a legal defeasance or an insubstance defeasance.

Section 910.1 of the final regulations will increase the leverage ratio ceiling from 12:1 to 20:1. In addition, the debt component of the ratio is being changed to include not only senior bonds, but also unsecured, senior liabilities. The senior bonds in the debt component of the ratio specifically excludes any liabilities subordinated to the then-outstanding consolidated obligations.

The debt component of the leverage ratio is being changed to more accurately reflect the FHLBank System's current liability structure. In 1946, when the current regulations were originally promulgated, consolidated

obligations comprised virtually all of the obligations of the FHLBank System. However, as the services offered by the FHLBanks have evolved over the last 45 years, member deposits have become a more significant item of the balance sheet. By modifying the leverage formula to take into account senior bonds and unsecured, senior liabilities, the revised rule provides a more comprehensive debt limitation test than current § 910.1. This enhances bondholder protection.

The final rule also changes the definition of capital for purposes of this calculation to include all paid-in capital stock, retained earnings and reserves (excluding loss reserves and section 11 reserves), rather than just paid-in capital stock and reserves under 12 U.S.C. 1436 as in the current regulation. The only change from the proposed rule is a clarification of the meaning of "reserves."

The final rule does not make any change in the Finance Board's control over the issuance of FHLBank obligations, including the terms of issuance. However, the final rule clarifies that the Finance Board can delegate this issuance responsibility.

To account for certain conservative investment opportunities that have emerged since 1946, § 910.1(c) of the final rule increases the types of assets that qualify for the negative pledge requirement. The final rule adds assets that are suitable investments for the FHLBanks under 12 U.S.C. 1436(a). These assets include: Obligations, participations or other instruments of or issued by the Federal National Mortgage Association or the Government National Mortgage Association; mortgages, obligations or other securities which are or ever have been sold by the Federal Home Loan Mortgage Corporation; and such securities as fiduciary and trust funds may invest in under the laws of the state in which the FHLBank holding the investment is located.

Section 910.1(c)(6) adds an additional category of qualifying assets which permits the use of these other assets to meet the negative pledge requirement. The requirement that such investments have a rating or assessment at least equal to senior bonds, which currently enjoy the highest investment rating, provides bondholders with assurance that these investments will have a relatively conservative risk profile.

Finally, under the last clause of § 910.1(c), any assets securing certain obligations may be used to meet the negative pledge requirement. This final clause acknowledges that assets committed or pledged to the repayment of any consolidated obligations, whether

issued before or after these amendments, reduce, dollar for dollar, the amount of consolidated obligations to be repaid from unpledged assets.

The defeasance language in § 910.6 is made more precise in the final rule to clarify that if the Finance Board ever decides to retire bonds by defeasance, it could use a "net defeasance," whereby the anticipated interest on the defeasance escrow would be taken into account in determining the amount of obligations required for defeasance.

In addition to the mechanisms in § 910.6 that have historically permitted limited changes in the leverage ratio or the negative pledge requirement, the final rule allows the Finance Board to make changes in the leverage ratio requirement if the Finance Board receives written evidence from at least one nationally recognized securities rating firm that the change will not cause a reduction in the then current rating of senior bonds issued by the FHLBank System or next to be issued; or a written opinion from an investment banking firm that the proposed change would not have a materially adverse effect on the creditworthiness of senior bonds outstanding or those next to be issued.

The Finance Board has considered a number of alternatives in developing the final rule, including defeasance of the senior bonds and allowing the FHLBanks to issue individual non-consolidated debt pursuant to 12 U.S.C. 1431(a). The Finance Board decided against defeasance of senior bonds because the large dollar value of currently outstanding long-term senior bonds makes the cost of defeasance prohibitively expensive. The Finance Board decided against the issuance of individual FHLBank non-consolidated debt at this time because consolidated FHLBank debt is a strong and well understood product in the public debt markets. While non-consolidated FHLBank debt also would be strong, the Finance Board did not want to undertake the process of familiarizing the market with a new product at this time. The Finance Board believes that the approach selected is the one best suited to accomplish the Finance Board's housing finance mission prescribed by Congress.

Paperwork Reduction Act

No collection of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is contained in the final rule. Consequently, no information has been submitted to the Office of Management and Budget for review.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is certified that this rule would not have a significant economic impact on a substantial number of small entities.

No small entities will be adversely affected by this rule. The FHLBanks, whose ability to raise capital will be enhanced by these changes, are not small entities. The rule increases the funds, in the form of advances, which can be made available to member institutions, including those which are small entities. The rule also provides adequate protection for bondholders, that might be small entities, by ensuring that creditworthiness of senior bonds will not be adversely affected.

List of Subjects in 12 CFR Part 910

Federal home loan banks.

Accordingly, the Federal Housing Finance Board amends title 12, chapter IX, subchapter A, part 910 of the Code of Federal Regulations as set forth below:

PART 910—CONSOLIDATED BONDS AND DEBENTURES

1. The authority citation for part 910 is revised to read as follows:

Authority: Sec. 2B, as added by 103 Stat. 183, 413 (12 U.S.C. 1422b); sec. 11 as amended by 103 Stat. 183, 418 (12 U.S.C. 1431).

2. Section 910.0 is added to read as follows:

§ 910.0 Definitions.

(a) *Board* means the Federal Housing Finance Board.

(b) *Consolidated bonds* means bonds or notes issued on behalf of all Federal Home Loan Banks.

(c) *Senior bonds* means consolidated bonds issued pursuant to 12 U.S.C. 1431 and this part and not defeased, other than bonds specifically subordinated to any then outstanding consolidated bonds.

(d) *Unsecured, senior liabilities* means all obligations of the Banks recognized as a liability under Generally Accepted Accounting Principles, except:

- (1) Liabilities that are covered by a perfected security interest;
- (2) Consolidated bonds;
- (3) Bonds issued pursuant to 12 U.S.C. 1431(a); and
- (4) Allowance for losses for off-balance sheet obligations.

3. Section 910.1 is revised to read as follows:

§ 910.1 Issuance of consolidated bonds.

(a) *General.* The Board will determine and authorize the issuance of all

consolidated bonds, dates of issue, maturities, rates of interest, terms and conditions thereof, and the manner in which such bonds shall be issued, subject to the provisions of 31 U.S.C. 9108. The Board in its discretion may delegate this responsibility.

(b) *Leverage limit.* The Board shall not issue senior bonds, other than bonds issued to refund consolidated bonds previously issued, if, immediately following such issuance, the aggregate amount of senior bonds and unsecured, senior liabilities of the Federal Home Loan Banks exceeds twenty (20) times the total paid-in capital stock, retained earnings and reserves (excluding loss reserves and deposit reserves pursuant to 12 U.S.C. 1431(g)), of all the Federal Home Loan Banks.

(c) *Negative pledge requirement.* The Federal Home Loan Banks shall at all times maintain assets of the following types, free from any lien or pledge, in a total amount at least equal to the amount of senior bonds outstanding:

- (1) Cash;
- (2) Obligations of or fully guaranteed by the United States;
- (3) Secured advances;
- (4) Mortgages as to which one or more Federal Home Loan Banks have any guaranty or insurance, or commitment therefore, by the United States or any agency thereof;
- (5) Investments described in section 16(a) of the Federal Home Loan Bank Act, as amended (12 U.S.C. 1436(a)); and
- (6) Other securities which have been assigned a rating or assessment by a major nationally recognized securities rating agency that is equivalent to or higher than the rating or assessment assigned by such agency on senior bonds outstanding.

Provided, however, that any assets of the types described in paragraphs (c)(1) through (6) of this section which are subject to a lien or pledge for the benefit of the holders of any issue of senior bonds shall be treated as if they were assets free from any lien or pledge for purposes of compliance with this provision.

4. Section 910.6 is revised to read as follows:

§ 910.6 Reservation of right to revoke or amend; limitations thereon.

(a) *General.* The right to revoke or amend this part, or to prescribe and issue supplemental or amendatory rules and regulations thereto, is hereby reserved.

(b) *Limitation on amendment of leverage limit or negative pledge requirement.* No revocation or relaxation of any of the restrictions or

requirements contained in or imposed by § 910.1 (b) or (c) shall be effected except:

(1) If there are no senior bonds then outstanding or if there shall have been deposited with the Treasurer of the United States, noncallable (or called) direct obligations of the United States of America or obligations fully guaranteed by the United States of America of such maturities or redemption dates and interest payment dates, and to bear such interest, as will be sufficient to pay in full (together with any other moneys placed in trust and irrevocably committed for such payment and without further investment or reinvestment of either the principal amount thereof or the interest earnings therefrom) the principal of and interest to date of maturity or to such date designated for redemption and any redemption premium on all senior bonds the holders of which have not consented to such revocation or relaxation; or

(2) Section 910.1(b) may be changed by the Board in any manner if the Board receives either:

(i) Written evidence from at least one major nationally recognized securities rating agency which rates or makes an assessment of the senior bonds that such change in that provision will not result in the lowering of its then-current rating or assessment on senior bonds outstanding or next to be issued; or

(ii) A written opinion from an investment banking firm that such change would not have a materially adverse effect on the creditworthiness of senior bonds outstanding or next to be issued.

By the Federal Housing Finance Board.

Dated: December 21, 1992.

Daniel F. Evans, Jr.,

Chairman.

[FR Doc. 92-31452 Filed 12-29-92; 8:45 am]

BILLING CODE 6725-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Parts 201, 203 and 234

[Docket No. N-92-3525; FR-3366-N-01]

Loan and Mortgage Insurance; Changes to the Maximum Loan and Mortgage Limits for Single Family Residences, Condominiums and Manufactured Homes and Lots

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice of revisions to FHA maximum loan and mortgage limits for high-cost areas.

SUMMARY: This Notice amends the list of areas eligible for "high-cost" loan and mortgage limits under certain of HUD's insuring authorities under the National Housing Act (NHA). The Notice implements provisions of the fiscal 1993 Appropriations Act for the Department of Housing and Urban Development (Pub. L. 102-389, 106 Stat. 1571) approved by the President on October 6, 1992, to provide for increases in maximum loan and mortgage amounts for high-cost areas. This notice increases the single family maximum mortgage limits for Boston, MA PMSA; Brockton, MA PMSA; Lawrence-Haverhill, MA-NHMSA; New Bedford, MA MSA; Salem-Gloucester, MA PMSA; Worcester, MA MSA; Fall River, MA-RI PMSA; Lowell, MA-NH PMSA; Pawtucket-Woonsocket-Attleboro, RI-MA PMSA; New London-Norwich, CT-RI MSA; Providence, RI PMSA; Nashua, NH PMSA; Manchester, NH MSA; Bridgeport-Milford, CT PMSA; Bristol, CT PMSA; Danbury, CT PMSA; Hartford, CT PMSA; Middletown, CT PMSA; New Britain, CT PMSA; New Haven-Meriden, CT MSA; Waterbury, CT MSA; Norwalk, CT PMSA; Stamford, CT PMSA; Poughkeepsie, NY MSA; Nassau-Suffolk, NY PMSA; New York, NY PMSA; Orange County, NY PMSA; Atlantic City, NJ MSA; Monmouth-Ocean, NJ PMSA; Bergen-Passaic, NJ PMSA; Middlesex-Somerset-Hunterdon NJ PMSA; Newark, NJ PMSA; Washington, DC-MD-VA MSA; Baltimore, MD MSA; Aurora-Elgin, IL PMSA; Lake County, IL PMSA; Galveston-Texas City, TX PMSA; Los Angeles-Long Beach, CA PMSA; Oxnard-Ventura, CA PMSA; Santa Barbara-Santa Maria Lompoc, CA MSA; Oakland, CA PMSA; Salinas-Seaside-Monterey, CA MSA; San Francisco, CA

PMSA; San Jose, CA PMSA; Santa Cruz, CA PMSA; Santa Rosa-Petaluma, CA PMSA; Vallejo-Fairfield-Napa, CA PMSA; Redding, CA MSA; Sacramento, CA MSA; San Diego, CA MSA; Anaheim-Santa Ana, CA PMSA; Riverside-San Bernardino, CA PMSA; and Seattle, WA PMSA. Loans and mortgage limits are adjusted in an area when the Secretary determines that middle- and moderate-income persons have limited housing opportunities because of high prevailing housing sales prices. The 1993 Appropriation Act also imposes a 185 percent cap on any increases over basic dollar limits for Title I manufactured home loans.

EFFECTIVE DATE: December 30, 1992.

FOR FURTHER INFORMATION CONTACT:

For single family: Morris Carter, Director, Single Family Development Division, room 9272; telephone (202) 708-2700. For manufactured homes: Robert J. Coyle, Director, Title I Insurance Division, room 9158; telephone (202) 708-2880; 451 Seventh Street, SW., Washington, DC 20410. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Background

The National Housing Act (NHA), U.S.C. 1703 and 1709 *et seq.*, authorizes HUD to insure loans and mortgages for single family residences (from one- to four-family structures), condominiums, manufactured homes, manufactured home lots, and manufactured homes and lots in combination. The NHA permits HUD to adjust the maximum loan and mortgage limits under most of these programs to reflect regional differences in the cost of housing. In addition, section 214 of the NHA provides for special high-cost limits for insured mortgages in Alaska, Guam, Hawaii, and the Virgin Islands.

The last comprehensive list of maximum mortgage limits was published on August 1, 1991 (56 FR 36980), listing all areas eligible for "high-cost" loan and mortgage limits under certain of HUD's insuring authorities under the National Housing Act, and the applicable limits for each area. Amendments to this annual listing were published on December 27, 1991 (56 FR 66975), April 13, 1992 (57 FR 12715) and September 24, 1992 (57 FR 44098).

Amendments to Title II of the NHA

Title II of the HUD Appropriations Act (the Act), amends section 203(b) of the National Housing Act (NHA) to restructure the manner in which maximum single family mortgage amounts are to be determined by HUD.

Under the new law, specific maximum dollar amount limitations are eliminated along with the authority to increase the dollar limitations for high-cost areas. Instead, the Act provides that the maximum loan obligation for mortgages on single family residences insured under the Mutual Mortgage Insurance Fund shall be an amount not to exceed the lesser of 95% of the median one-family house price in the area (with higher percentages provided to take account of the higher costs of two-family, three-family and four-family residences) or \$151,725. The Act also provides a mortgage amount floor so that no area may have a maximum mortgage amount less than the area's current HUD-approved amount.

The Act provides further that the principal obligation on the mortgage loan may not exceed 97% of \$25,000 of the appraised value, 95% of such value in excess of \$25,000 but not exceeding \$125,000, and 90% of such value in excess of \$125,000.

The Department is making a nationwide recalculation of high cost limits currently, and plans to publish, during December 1992, a complete revision of the limits. Additional areas may be the subject of increased limits at that time.

Amendments to Title I of NHA

The HUD Appropriations Act amends section 2(b)(2) of the NHA by establishing a new cap for title I manufactured home loans in high-cost areas. Title I lot loans and combination lot and home loans, under section 2(b)(1)(D) and 2(b)(1)(E) of NHA, may not exceed the lesser of 185 percent of the title I loan amount or the title I loan amount increased by the percentage amount by which the section 203(b) one-family limit (i.e. 95 percent of the median one-family house price in the area) exceeds \$67,500.

To compute the high-cost limit for title I lot and combination loans, follow the examples below; however, in no case may the maximum loan amount exceed 185% of the base title I limits of \$54,000 for a combination manufactured home and lot loan, and \$13,500 for a manufactured home lot loan. For high-cost areas not listed in this notice, a lender can apply the same calculation using the current section 203(b) one-family limits published in August 1, 1991 (56 FR 36980), or the updated limits published for particular areas. (See citations under Background.)

A. Combination manufactured home and lot (excluding Alaska, Guam, Hawaii and the Virgin Islands): To determine the high-cost limit for a combination manufactured home and lot loan, multiply the dollar amount in the "one family" column of this list by .80. However, in no case may this high-cost limit exceed \$99,900 (185% of the base amount of \$54,000). For example, Lawrence-Haverhill MA-NH, PMSA, Rockingham County has a one-family limit of \$151,725. The combination home and lot loan limit is \$99,900 ($\$151,725 \times .80 = \$121,380$).

B. Lot only (excluding Alaska, Guam, Hawaii and the Virgin Islands): To determine the high-cost limit for a lot loan, multiply the dollar amount in the "one-family" column of this list by .20. However, in no case may this high-cost limit exceed \$24,975 (185% of the base amount of \$13,500). For example, Lawrence-Haverhill MA-NH, PMSA, Rockingham County has a one-family limit of \$151,725. The lot-only loan limit is \$24,975 ($\$151,725 \times .20 = \$30,345$).

C. Alaska, Guam, Hawaii and the Virgin Islands limits: The maximum dollar limits for Alaska, Guam, Hawaii and the Virgin Islands remain the same

as provided for in the HUD Federal Register notice published on August 1, 1991 (56 FR 36980).

Accordingly, the dollar limits for Alaska, Guam, and Hawaii are as follows:

1. For manufactured homes: \$56,700 ($\$40,000 \times 140\%$).
2. For combination manufactured homes and lots: \$75,600 ($\$54,000 \times 140\%$).
3. For lots only: \$18,900 ($\$13,500 \times 140\%$).

This Document

Today's document increases high-cost loan and mortgage limits for the areas set forth in the following table. It lists each high-cost area, with applicable limits for single family residences (including condominiums) insured under sections 203(b), 234(d) and 214 of the National Housing Act.

List of Subjects

24 CFR Part 201

Health facilities, Historic preservation, Home improvement, Loan programs—housing and community development, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 203

Hawaiian Natives, Home improvement, Indians—lands, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

24 CFR Part 234

Condominiums, Mortgage insurance, Reporting and recordkeeping requirements.

Accordingly, the Department is publishing the revised dollar limitations as follows:

TITLE II.—UPDATING OF FHA SECTION 203(b), 234(c) AND 214 AREAWIDE MORTGAGE LIMITS

Mortgage limits

Market area designation and local jurisdictions	1-family and condominium unit	2-family	3-family	4-family
Region I—HUD Field Office: Bangor Office				
Portsmouth-Dover-Rochester, NH-ME MSA (part): York County, ME	\$101,250	\$114,000	\$138,000	\$160,500
HUD Field Office: Manchester Office				
Lawrence-Haverhill, MA-NH PMSA (part): Rockingham County, NH (part)	151,725	194,100	234,600	291,600
Lowell, MA-NH PMSA: Hillsborough County, NH (part)	151,725	194,100	234,600	291,600
Rockingham County, NH (part)				
Portsmouth-Dover-Rochester, NH-ME MSA (part): Rockingham County (part)	151,725	194,100	234,600	291,600

TITLE II.—UPDATING OF FHA SECTION 203(b), 234(c) AND 214 AREAWIDE MORTGAGE LIMITS—Continued

Mortgage limits				
Market area designation and local jurisdictions	1-family and condominium unit	2-family	3-family	4-family
Stratford County	101,250	114,000	138,000	160,500
Manchester, NH PMSA:				
Hillsborough County (part)	151,725	194,100	234,600	291,600
Merrimack County, NH (part)				
Rockingham County, NH (part)				
Nashua, NH PMSA:				
Hillsborough County (part)	151,725	194,100	234,600	291,600
Rockingham County (part)				
HUD Field Office: Hartford Office				
Bridgeport-Milford, CT PMSA:				
Fairfield County, CT (part)	151,725	194,100	234,600	291,600
New Haven County, CT (part)				
Bristol, CT PMSA:				
Hartford County, CT (part)	151,725	194,100	234,600	291,600
Litchfield County, CT (part)				
Danbury, CT PMSA:				
Fairfield County, CT (part)	151,725	194,100	234,600	291,600
Litchfield County, CT (part)				
Hartford, CT PMSA:				
Hartford County, CT (part)	151,725	194,100	234,600	291,600
Litchfield County, CT (part)				
Middlesex County, CT (part)				
New London County, CT (part)				
Tolland County, CT (part)				
Middletown, CT PMSA: Middlesex County (part)	151,725	194,100	234,600	291,600
New Britain, CT PMSA: Hartford County	151,725	194,100	234,600	291,600
New Haven-Meriden, CT MSA:				
Middlesex County, CT (part)	151,725	194,100	234,600	291,600
New Haven County, CT (part)				
New London-Norwich, CT RI MSA (part):				
New London County, CT (part)	151,725	194,100	234,600	291,600
Windham County, CT (part)				
Waterbury, CT MSA:				
Litchfield County (part)	151,725	194,100	234,600	291,600
New Haven County (part)				
Norwalk, CT PMSA: Fairfield County (part)	151,725	194,100	234,600	291,600
Stamford, CT PMSA: Fairfield County (part)	151,725	194,100	234,600	291,600
HUD Field Office: Boston Office				
Boston, MA PMSA:				
Bristol County, MA (part)	151,725	194,100	234,600	291,600
Essex County, MA (part)				
Middlesex County, MA (part)				
Norfolk County, MA (part)				
Plymouth County, MA (part)				
Suffolk County, MA				
Worcester County, MA (part)				
Brockton, MA PMSA:				
Bristol County, MA (part)	151,725	194,100	234,600	291,600
Norfolk County, MA (part)				
Lawrence-Haverhill, MA-NH MSA (part):				
Essex County, MA (part)	151,725	194,100	234,600	291,600
New Bedford, MA MSA:				
Bristol County, MA (part)				
Plymouth County, MA (part)				
Salem-Gloucester, MA PMSA: Essex County, MA (part)				
Worcester, MA MSA: Worcester County (part)	151,725	194,100	234,600	291,600
Fall River, MA-RI PMSA (part): Bristol County, MA (part)	151,725	194,100	234,600	291,600
Lowell, MA-NH PMSA (part): Middlesex County, MA (part)	151,725	194,100	234,600	291,600
Pawtucket-Woonsocket-Attleboro, RI-MA PMSA (part):				
Bristol County, MA (part)	151,725	194,100	234,600	291,600
Norfolk County, MA (part)				
Worcester County, MA (part)				
HUD Field Office: Providence Office				
Fall River, MA-RI PMSA (part): Newport County, RI	151,725	194,100	234,600	291,600
Pawtucket-Woonsocket-Attleboro, RI-MA PMSA (part): Providence County (part)	151,725	194,100	234,600	291,600
New London-Norwich, CT-RI (part): Washington County, RI (part)	151,725	194,100	234,600	291,600
Providence, RI PMSA:				
Bristol County, RI	151,725	194,100	234,600	291,600

TITLE II.—UPDATING OF FHA SECTION 203(b), 234(c) AND 214 AREAWIDE MORTGAGE LIMITS—Continued

Mortgage limits

Market area designation and local jurisdictions	1-family and condominium unit	2-family	3-family	4-family
Kent County, RI (part) Newport County, RI (part) Providence County, RI (part) Washington County, RI (part)				

Region II—HUD Field Office: Albany Office

Poughkeepsie, NY MSA: Dutchess County	151,725	194,100	234,600	291,600
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HUD Field Office: New York Office

Nassau-Suffolk, NY PMSA:				
Nassau County	151,725	194,100	234,600	291,000
Suffolk County				
New York, NY PMSA:				
Bronx County	151,725	194,100	234,600	291,000
Kings County				
New York County				
Putnam County				
Queens County				
Richmond County				
Rockland County				
Westchester County				
Orange County, NY PMSA: Orange County	151,725	194,100	234,600	291,000

HUD Field Office: Newark Office

Bergen-Passaic, NJ PMSA:				
Bergen County	151,725	194,100	234,600	291,600
Passaic County				
Middlesex-Somerset-Hunterdon, NJ PMSA:				
Hunterdon County	151,725	194,100	234,600	291,600
Middlesex County				
Somerset County				
Newark, NJ PMSA:				
Essex County	151,725	194,100	234,600	291,600
Morris County				
Sussex County				
Union County				
Monmouth-Ocean, NJ PMSA (part): Monmouth County	138,250	155,700	189,150	218,300

HUD Field Office: Camden Office

Atlantic City, NJ MSA:				
Atlantic County	136,800	154,100	187,250	216,050
Cape May County				
Monmouth-Ocean, NJ PMSA (part): Ocean County	138,250	155,700	189,150	218,300

Region III—HUD Field Office: Baltimore Office

Baltimore, MD MSA:				
Baltimore City	142,500	160,500	195,000	225,000
Anne Arundel County				
Baltimore County				
Carroll County				
Harford County				
Howard County				
Queen Anne's County				
Washington, DC-MD-VA MSA (part):				
Charles County, MD	151,725	194,100	234,600	291,600
Calvert County				
Frederick County				

HUD Field Office: Washington, DC Office

Washington, DC-MD-VA MSA (part):				
District of Columbia	151,725	194,100	234,600	291,600

TITLE II.—UPDATING OF FHA SECTION 203(b), 234(c) AND 214 AREAWIDE MORTGAGE LIMITS—Continued

Mortgage limits				
Market area designation and local jurisdictions	1-family and condominium unit	2-family	3-family	4-family
Montgomery County, MD Prince Georges County, MD Alexandria City, VA Arlington County, VA Fairfax County, VA Falls Church City, VA Loudon County, VA Manassas City, VA Manassas Park City, VA Prince William County, VA				
HUD Field Office: Richmond Office				
Washington, DC-MD-VA MSA (part): Stafford County, VA	151,725	194,100	234,600	291,600
Region V—HUD Field Office: Chicago Office				
Aurora-Elgin, IL PMSA: Kane County	127,110	143,150	173,900	200,700
Kendall County				
Lake County, IL PMSA: Lake County	151,725	194,100	234,600	291,600
Region VI—HUD Field Office: Houston Office				
Galveston-Texas City, TX PMSA: Galveston County	145,300	163,650	198,800	229,400
Region IX—HUD Field Office: Los Angeles Office				
Los Angeles-Long Beach, CA PMSA: Los Angeles County	151,725	194,100	234,600	291,600
Oxnard-Ventura, CA PMSA: Ventura County	151,725	194,100	234,600	291,600
Santa Barbara-Santa Maria-Lompoc, CA MSA: Santa Barbara County	151,725	194,100	234,600	291,600
HUD Field Office: San Francisco Office				
Oakland, CA PMSA: Alameda County	151,725	194,100	234,600	291,600
Contra Costa				
Salinas-Seaside-Monterey, CA MSA: Monterey County	151,725	194,100	234,600	291,600
Marin County	151,725	194,100	234,600	291,600
San Francisco County				
San Mateo County				
San Jose, CA PMSA: Santa Clara County	151,725	194,100	234,600	291,600
Santa Cruz, CA PMSA: Santa Cruz County	151,725	194,100	234,600	291,600
Santa Rosa-Petaluma, CA PMSA: Sonoma County	151,725	194,100	234,600	291,600
Vallejo-Fairfield-Napa, CA PMSA: Napa County	151,725	194,100	234,600	291,600
Solano County				
HUD Field Office: Sacramento Office				
Redding, CA MSA: Shasta County	151,725	194,100	234,600	291,600
Sacramento, CA MSA: El Dorado County	151,050	170,100	206,700	238,500
Placer County				
Sacramento County				
Yolo County				
HUD Field Office: San Diego Office				
San Diego, CA MSA: San Diego County	151,725	194,100	234,600	291,600
HUD Field Office: Santa Ana Office				
Anaheim-Santa Ana, CA PMSA: Orange County	151,725	194,100	234,600	291,600
Riverside-San Bernardino, CA PMSA: Riverside County	151,525	170,650	207,350	239,250

TITLE II.—UPDATING OF FHA SECTION 203(b), 234(c) AND 214 AREAWIDE MORTGAGE LIMITS—Continued

Mortgage limits				
Market area designation and local jurisdictions	1-family and condominium unit	2-family	3-family	4-family
San Bernardino County				
Region X—HUD Field Office: Seattle Office				
Seattle, WA PMSA:				
King County	143,450	161,550	196,300	226,500
Snohomish County				

Dated: December 16, 1992.
 Arthur J. Hill,
 Assistant Secretary for Housing—Federal
 Housing Commissioner.
 [FR Doc. 92-31480 Filed 12-29-92; 8:45 am]
 BILLING CODE 4210-27-M

DEPARTMENT OF THE TREASURY Internal Revenue Service

26 CFR Part 1
 [T.D. 8457]

RIN 1545-AP74

Taxation of Fringe Benefits and Exclusions From Gross Income of Certain Fringe Benefits

AGENCY: Internal Revenue Service,
 Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final amendments to the fringe benefit regulations relating to the valuation of fringe benefits under section 61 and the exclusion of certain benefits as working condition fringes under section 132(a)(3) of the Internal Revenue Code of 1986. The final amendments: (1) Eliminate the requirement that employers must notify their employees of the election to use a special valuation rule, (2) clarify the requirements for using the special valuation rules, (3) provide additional rules for local transportation provided to government employees because of bona fide business-oriented security concerns, and (4) clarify the treatment of bona fide volunteers who perform services for exempt organizations or for a Federal, state, or local government unit. The final amendments affect any person providing or receiving these fringe benefits and provide these persons with the guidance necessary to comply with the law.

DATES: These rules are effective on December 30, 1992, except for the revision of § 1.61-21(c)(3)(ii) which is effective January 1, 1989, and the removal of § 1.61-21(c)(3)(ii) which is effective January 1, 1985. However, taxpayers may treat the rules as

applicable to benefits provided on or after January 1, 1989.

FOR FURTHER INFORMATION CONTACT:

Marianna Dyson, at 202-622-4606 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On September 25, 1991, the Treasury Department and the Internal Revenue Service published proposed amendments (56 FR 48465) to the final working condition fringe benefit regulations under section 132(d) of the Internal Revenue Code of 1986 (Code). The proposed amendments provide additional rules for transportation provided to government employees because of bona fide business-oriented security concerns and clarify the treatment of bona fide volunteers who perform services for exempt organizations or for a Federal, state, or local government unit. In addition, the notice of September 25, 1991, invited comments concerning the requirements under § 1.61-21(c) of the regulations, which sets forth the rules for notifying employees of the employer's election to use a special valuation rule for valuing a benefit in lieu of using the general valuation rules based on facts and circumstances.

Comments were received from the public, and on January 30, 1992, the Internal Revenue Service held a public hearing concerning the proposed amendments. In response to the comments and a statement made at the public hearing, this Treasury decision adopts the proposed amendments to the fringe benefit regulations as revised.

The amendments to the final regulations under section 61 are contained in § 1.61-21. The amendments to the final regulations under section 132 are contained in §§ 1.132-0, 1.132-1, and 1.132-5.

Summary of Comments and Explanation of Provisions

1. Use of Special Valuation Rules

Under section 61 of the Code and the income tax regulations thereunder, a fringe benefit provided by an employer is presumed to be income to the recipient-employee, unless it is specifically excluded from gross income by another section in subtitle A of the Code. The employee is required to include in gross income the fair market value of the benefit after subtracting amounts paid, by or on behalf of the employee, for the benefit, as well as amounts excluded from income by another section of the Code. See § 1.61-21(b)(1) of the regulations.

In general, the regulations require that the fair market value of a fringe benefit be determined based on all the facts and circumstances. As an alternative, § 1.61-21(c) provides that certain commonly provided fringe benefits may be valued using the special valuation rules set forth in § 1.61-21 (d) through (j). The option to use a special valuation rule is the employer's, but if a special valuation rule is used by the employer to value the benefit for reporting purposes, that rule is the only special valuation rule that may be used by either the employer or employee for any purpose. However, the employee may always use the general valuation rules based on facts and circumstances.

If an employer elects to use a special valuation rule, the existing rules in § 1.61-21(c)(3) require the employer to notify employees of the election. If the employer does not provide notice in the time and manner prescribed by § 1.61-21(c)(3)(ii), the employer is prohibited from using special valuation and, instead, must use the general valuation rules based on facts and circumstances. Correspondingly, the employee is restricted to using those rules.

Explanation

The notice of September 25, 1991, invited comments concerning the notice requirements generally under § 1.61-

21(c). In response to a comment, this Treasury Decision amends the regulations by eliminating the notice requirements of §§ 1.61-21(c)(3)(ii) and 1.61-27(c)(3)(ii), effective January 1, 1989, and January 1, 1985, respectively. In addition, the amendments clarify the remaining requirements for using the special valuation rules in the future.

For benefits provided after December 31, 1992, the final amendments provide that neither the employer nor the employee may use special valuation unless one of the following four conditions is satisfied: (1) The employer treats the value of the benefit as wages (for reporting purposes) within the prescribed time; (2) the employee includes the value of the benefit in income within the prescribed time; (3) the employee is not a control employee, as defined in § 1.61-21(f)(5) and (f)(6); or (4) the employer demonstrates a good faith effort to treat the benefit correctly for reporting purposes. If none of the conditions for using special valuation is met, both the employer and employee must use the general valuation rules based on facts and circumstances.

The amendments do not change the rule that the decision to use a special valuation rule remains with the employer. Furthermore, the amendments retain the rule that the employee generally may use a special valuation rule only if the employer uses the rule. Under the final amendments, however, an employee may use a special valuation rule not used by the employer, but only if the employer does not treat the value of the benefit as wages for reporting purposes within a prescribed time and one of the other conditions described above is met.

This Treasury decision also amends § 1.61-21 to correctly reference paragraph (k), the special valuation rule for transportation provided to certain employees, which was added to the fringe benefits regulations by Treasury Decision 8389 on January 15, 1992.

2. Employer-Provided Transportation for Security Concerns Background

As discussed in the preamble to the proposed amendments issued on September 25, 1991, sections 61 and 132 of the Code provide that the value of employer-provided transportation must be included in the employee's gross income unless the transportation is provided in connection with the employer's business. Because commuting and other personal use of employer-provided transportation by an employee is not transportation provided in connection with the employer's business, the value of the transportation

is included in the employee's gross income as a fringe benefit.

If an employee or a member of the employee's immediate family is transported to and from work in the employer's vehicle because of threats made against them, the value of the local transportation used for commuting and other personal purposes will also be included in the employee's gross income. However, under § 1.132-5(m) of the regulations, if the employer provides transportation to an employee because of a "bona fide business-oriented security concern" which results in an "overall security program" being provided to the threatened employee, the employee may exclude from gross income the value of any special security designs on the vehicle (e.g., bullet-proof glass) and the services of a chauffeur/bodyguard, even though the transportation is used for personal purposes.

In addition to demonstrating the existence of a bona fide business-oriented security concern under § 1.132-5(m), the employer must establish an overall security program with respect to the threatened employee. An employer not meeting the requirements for an overall security program under § 1.132-5(m)(2)(iii)(A) of the regulations (e.g., 24-hour protection is not provided) will be treated as having an overall security program only if protection is provided pursuant to the recommendations of an "independent security study" performed by a private security consultant. See § 1.132-5(m)(2)(iv).

Explanation

The final fringe benefit regulations under sections 61 and 132 of the Code were issued on July 6, 1989, and were effective January 1, 1989 (54 FR 28576). As explained in the preamble to the previously proposed amendments to § 1.132-5(m) published on September 25, 1991, the final fringe benefit regulations as applied to Federal, state, and local government employees, particularly those involved in law enforcement, may create unintended tax consequences. Thus, the notice of September 25, 1991, proposes special rules for application to government employers and employees when a bona fide business-oriented security concern exists with respect to a particular employee and the government employer transports the employee by vehicle as part of an overall security program. The notice also proposes special rules relating to the government employer's notification to the employee of its election to use a special valuation rule. Consistent with the stated objective of

addressing the tax problems that may result when government employers are faced with the urgent need to protect employees and their families under specific, imminent threats, the proposed amendments are finalized with modification as explained below.

Comments concerning the proposed regulations suggest that employers may be taking the position that "a bona fide business-oriented security concern" exists in the absence of any specific basis for concern regarding the employee's safety. To avoid any uncertainty concerning the application of the regulations, the final regulations clarify that a bona fide business-oriented security concern does not exist with respect to either a non-government or government employee unless the facts and circumstances establish a specific basis for concern regarding the safety of the employee. A specific basis for concern may be established, for example, by threats of death, serious bodily harm, or kidnapping or by a recent history of terrorist activity in the geographic area. A generalized security concern is not sufficient to establish a bona fide business-oriented security concern. In addition, even though a bona fide business-oriented security concern is determined to exist with respect to a particular employee, the employer remains responsible for periodically evaluating the facts and circumstances to determine whether the bona fide business-oriented security concern still exists.

The Service has also received comments which reveal the need for clarification of certain of the proposed rules. The proposed amendments provide detailed rules permitting a security study performed by the government employer itself to qualify as an independent security study if certain conditions are met. The final amendments retain the proposed rules, but clarify that the independent security study must be performed with respect to each employee who is provided protection, and that a security study must include an estimate of the length of time protective services will be necessary and of the extent to which employer-provided transportation may be necessary during the period of protection.

The final regulations also clarify that the exclusion for personal use, other than commuting, applies only to local vehicle transportation. The exclusion does not apply to employer-provided aircraft. In addition, the proposed amendments relating to the government employer's notice requirement are not adopted because of the revision to § 1.61-21(c) as explained, above.

The final amendments to § 1.132-5(m) are effective on December 30, 1992; however, taxpayers may treat the rules as applicable to benefits provided on or after January 1, 1989.

2. Volunteers

Background

Public comments were received by the Service expressing concern about the application of section 132 to volunteers who perform services for organizations exempt under section 501(a) of the Code and who receive directors' and officers' liability insurance protection (D&O insurance) from those organizations.

Section 132(a) of the Code excludes certain fringe benefits from gross income. Generally, these fringe benefits are excludable by an "employee," whether the employee is compensated or is working as a volunteer. For certain purposes, the term "employee," which is defined in § 1.132-1(b), includes independent contractors. For purposes of sections 132(a) (1) and (2) (relating to no-additional-cost services and qualified employee discounts), however, independent contractors are not treated as "employees." Thus, under section 132(a), bona fide volunteers, like their paid counterparts, may not exclude no-additional-cost services and qualified employee discounts from gross income unless the exempt organization or government employer has the right to direct and control the volunteer's services (i.e., there is an employer-employee relationship).

Although volunteers who are employees may exclude from gross income the fringe benefits listed above, and all volunteers (including independent contractors) may exclude de minimis fringe benefits, the language of § 1.132-1(b) relating to working condition fringes does not encompass bona fide volunteers.

Section 132(d) of the Code and § 1.132-5(a)(1) of the income tax regulations provide that a "working condition fringe" is any property or service provided to an employee of an employer to the extent that, if the employee paid for the property or service, the amount paid would be allowable as a deduction under section 162 or 167. (For purposes of the working condition fringe exclusion, the term "employee" is defined broadly to include employees, partners, directors and independent contractors).

Section 162 of the Code provides a deduction for all the ordinary and necessary expenses paid or incurred in carrying on a trade or business. An individual engaged in carrying on a

trade or business has a profit motive for purposes of section 162. An individual who performs services as a bona fide volunteer does not have a profit motive and thus cannot claim a deduction under section 162 for expenses incurred in connection with such volunteer work. For example, the value of D&O insurance provided to the volunteer would not be excludable as a working condition fringe benefit, even though the same insurance coverage would be excludable from the income of a paid employee or director who has a profit motive.

To correct this technical problem, the Service, pursuant to the authority granted in section 132(k), proposed an amendment to the regulations which was published in the *Federal Register* on September 25, 1991 (56 FR 48465). As stated in the preamble, the proposed amendment is intended to ensure that, like their paid counterparts, bona fide volunteers may exclude working condition fringe benefits, including D&O insurance, from gross income.

The proposed amendment provides that, solely for purposes of section 132(d), a bona fide volunteer, including a director or officer, who performs services for an organization that is exempt from tax under section 501(a), or for a Federal, state, or local government unit, is deemed to have a profit motive for purposes of section 162. Under the proposed amendment, an individual who provides services (including services as an officer, trustee, or director) is, for purposes of section 132(d), a "bona fide volunteer" for an exempt organization or government unit only if the total value of the benefits provided with respect to the volunteer services is substantially less than the total value of the volunteer services the individual provides to the organization. The value of liability insurance coverage is deemed, under the proposed regulation, to be substantially less than the value of the individual's volunteer services to the organization, provided the insurance coverage is limited to acts performed in the discharge of official duties or the performance of services on behalf of the exempt organization or government employer.

Explanation

All of the comments praised the proposed amendment concerning the treatment of bona fide volunteers and urged final adoption quickly. Some of the comments also suggested that the scope of the proposed amendment be expanded and/or clarified to ensure that various issues are addressed.

A few of the comments requested clarification that the receipt of nominal

amounts of compensation for services does not disqualify bona fide volunteers from taking advantage of the section 132(a)(3) working condition fringe exclusion. This concern is addressed not only by the definition of a "bona fide volunteer" in the final amendments, but by the general definition of a working condition fringe in section 132(d).

The final regulations provide that a bona fide volunteer is someone who does not have a profit motive under section 162, but is deemed to have a profit motive only for purposes of the working condition fringe exclusion. The most typical example is the unpaid individual who performs services for an exempt organization or government employer and may receive benefits, but the total value of the benefits provided by the exempt organization or government employer is substantially less than the total value of the volunteer services that the individual provides to the organization. The receipt of D&O liability insurance by the bona fide volunteer, or an exempt organization or government employer's undertaking to indemnify the volunteer for liability, does not by itself confer a profit motive on the volunteer, provided the insurance coverage or indemnification relates to acts performed by the volunteer in the discharge of duties, or the performance of services, on behalf of the exempt organization or government employer. In the case of such a bona fide volunteer, new paragraph (r) of § 1.132-5 deems the volunteer to have a profit motive and thus insures that the volunteer may exclude the value of the D&O insurance provided by the exempt organization or government employer as a working condition fringe.

If it is determined that the individual does, in fact, have a profit motive within the meaning of section 162 and is not a "bona fide volunteer" within the meaning of § 1.132-5(r), the value of the D&O insurance provided by the organization is excludable from the individual's gross income as a working condition fringe by application of section 132(a)(3). This is because, under section 132(d), a payment for D&O insurance by an individual with a profit motive would be allowable as a deduction under section 162 had he or she paid for it directly. To summarize, as a result of this Treasury Decision in conjunction with existing statutory provisions, the value of D&O insurance and of other working condition fringes provided to an individual who performs services for a tax-exempt organization or government employer is excludable as a working condition fringe whether or not the individual has a profit motive.

One comment suggested that indemnification payments permitted by law, whether made by an insurer or directly by the employer, should be treated in the same manner as D&O insurance premiums. The final regulations adopt this suggestion.

A few comments suggested that the final regulations address the application of the self-dealing rules of section 4941, as well as the application of Rev. Rul. 82-223, 1982-2 C.B. 301, to private foundations' D&O insurance premiums and indemnification payments. The resolution of this issue is not possible in the context of this final regulation, but will be addressed separately.

Like other tax-exempt organizations, private foundations need not allocate portions of D&O insurance premiums to individual directors and officers or include any such allocable amounts in Form 1099 or W-2, provided such amounts are excludable from gross income under the final regulations. Whether or not such allocable amounts need to be treated as compensation for the limited purpose of section 4941, no employer should issue a Form 1099 or W-2 for any such amount that is excludable from gross income as a working condition fringe benefit described in section 132(d).

Finally, in response to one comment, an example is included to illustrate the provisions of the final regulation.

The rules of § 1.132-5(r) are effective on December 30, 1992; however, taxpayers may treat the rules as applicable to benefits provided on or after January 1, 1989.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Marianna Dyson, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the

Service and Treasury Department participated in their development.

List of Subjects in 26 CFR 1.61-1 Through 1.133-1T

Income taxes, Reporting and recordkeeping requirements.

Adoption of the Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

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

Authority: 26 U.S.C. 7805 * * *

§ 1.61-2T [Amended]

Par. 2. Section 1.61-2T is amended as follows:

1. Paragraph (c)(3)(ii) is removed.
2. The heading for paragraph (c)(3)(i) is removed and paragraph (c)(3)(i) is redesignated as paragraph (c)(3).

§ 1.61-21 [Amended]

Par. 3. Section 1.61-21 is amended as follows:

1. Paragraph (a)(7) is amended by revising the entry for § 1.61-21(c)(3).
2. Paragraph (a)(7) is amended by adding an entry for § 1.61-21(k).
3. Paragraph (c)(1) is revised.
4. Paragraph (c)(2)(i) is amended by revising the paragraph heading and adding a new sentence at the end.
5. Paragraphs (c)(2)(ii) and (c)(2)(iii) are redesignated (c)(2)(iii) and (c)(2)(iv), respectively.
6. A new paragraph (c)(2)(ii) is added.
7. The headings for paragraphs (c)(3) and (c)(3)(i) are revised and a new sentence is added at the end of paragraph (c)(3)(i).
8. Paragraph (c)(3)(ii) is revised.
9. The first sentence of paragraph (c)(7) is revised.
10. In paragraph (c)(4), the reference to paragraph "(j)" in the first sentence is removed and "(k)" is added in its place.
11. The revisions and additions read as follows:

§ 1.61-21 Taxation of fringe benefits.

- (a) * * *
- (7) * * *

§ 1.61-21(c) Special valuation rules.

* * * * *

(3) Additional rules for using special valuation.

* * * * *

§ 1.61-21(k) Commuting valuation rule for certain employees.

- (1) In general.
- (2) Trip-by-trip basis.

- (3) Commuting value.
- (4) Definition of employer-provided transportation.
- (5) Unsafe conditions.
- (6) Qualified employee defined.
- (7) Examples.
- (8) Effective date.

(c) *Special valuation rules*—(1) *In general.* Paragraphs (d) through (k) of this section provide special valuation rules that may be used under certain circumstances for certain commonly provided fringe benefits. For general rules relating to the valuation of fringe benefits not eligible for valuation under the special valuation rules or fringe benefits with respect to which the special valuation rules are not used, see paragraph (b) of this section.

(2) *Use of the special valuation rules*—(i) *For benefits provided before January 1, 1993.* * * * The provisions of this paragraph are effective for benefits provided before January 1, 1993.

(ii) *For benefits provided after December 31, 1992.* The special valuation rules may be used for income tax, employment tax, and reporting purposes. The employer has the option to use any of the special valuation rules. An employee may use a special valuation rule only if the employer uses that rule or the employer does not meet the condition of paragraph (c)(3)(ii)(A) of this section, but one of the other conditions of paragraph (c)(3)(ii) of this section is met. The employee may always use general valuation rules based on facts and circumstances (see paragraph (b) of this section) even if the employer uses a special rule. If a special rule is used, it must be used for all purposes. If an employer properly uses a special rule and the employee uses the special rule, the employee must include in gross income the amount determined by the employer under the special rule reduced by the sum of—

(A) Any amount reimbursed by the employer to the employee; and

(B) Any amount excludable from income under another section of subtitle A of the Internal Revenue Code of 1986. If an employer properly uses a special rule and properly determines the amount of an employee's working condition fringe under section 132 and § 1.132-5 (under the general rule or under a special rule), and the employee uses the special valuation rule, the employee must include in gross income the amount determined by the employer less any amount reimbursed by the employer to the employee. The employer and employee may use the special rules to determine the amount of the reimbursement due the employer by

the employee. Thus, if an employee reimburses an employer for the value of a benefit as determined under a special valuation rule, no amount is includible in the employee's gross income with respect to the benefit. The provisions of this paragraph are effective for benefits provided after December 31, 1992.

(3) *Additional rules for using special valuation—(i) Election to use special valuation rules for benefits provided before January 1, 1993.* * * * The provisions of this paragraph are effective for benefits provided before January 1, 1993.

(ii) *Conditions on the use of special valuation rules for benefits provided after December 31, 1992.* Neither the employer nor the employee may use a special valuation rule to value a benefit provided after December 31, 1992, unless one of the following conditions is satisfied—

(A) The employer treats the value of the benefit as wages for reporting purposes within the time for filing the returns for the taxable year (including extensions) in which the benefit is provided;

(B) The employee includes the value of the benefit in income within the time for filing the returns for the taxable year (including extensions) in which the benefit is provided;

(C) The employee is not a control employee as defined in paragraphs (f)(5) and (f)(6) of this section; or

(D) The employer demonstrates a good faith effort to treat the benefit correctly for reporting purposes.

(7) *Special accounting rule.* If the employer is using the special accounting rule provided in Announcement 85-113 (1985-31 I.R.B. 31, August 5, 1985) (see § 601.601(d)(2)(ii)(b) of this chapter) (relating to the reporting of and withholding on the value of noncash fringe benefits), benefits which are deemed provided in a subsequent calendar year pursuant to that rule are considered as provided in that subsequent calendar year for purposes of the special valuation rules.

Par. 4. Section 1.132-0 is amended as follows:

1. The entry for § 1.132-5(m)(6) is revised; and the entries for paragraphs (m)(7) and (m)(8) are added.

2. An entry for § 1.132-5(r) is added.

3. The revisions and additions read as follows:

§ 1.132-0 Outline of regulations under section 132.

§ 1.132-5(m) Employer-provided transportation for security concerns.

(6) Special valuation rule for government employees.

(7) Government employer and employee defined.

(8) Examples.

§ 1.132-5(r) Volunteers.

(1) In general.

(2) Limit on application of this paragraph.

(3) Definitions.

(4) Example.

Par. 5. Section 1.132-1(g) is amended by adding two sentences after the first sentence to read as follows:

§ 1.132-1 Exclusion from gross income for certain fringe benefits.

(g) * * * Furthermore, in § 1.132-5, the eleventh sentence of paragraph (m)(1), *Examples 6 and 7 in paragraph (m)(8), and paragraphs (m)(2)(i), (m)(2)(v), (m)(3)(iv), (m)(6), (m)(7), and (r) are effective on December 30, 1992; however, taxpayers may treat the rules as applicable to benefits provided on or after January 1, 1989. For the applicable rules relating to employer-provided transportation for security concerns prior to December 30, 1992, see § 1.132-5(m) (as contained in 26 CFR part 1 (§§ 1.61 to 1.169) revised April 1, 1992).*

Par. 6. Section 1.132-5 is amended as follows:

1. A new sentence is added between the tenth and eleventh sentences of paragraph (m)(1).

2. Paragraph (m)(2)(i) is revised.

3. Paragraphs (m)(2)(v) and (m)(3)(iv) are added.

4. Paragraph (m)(6) is redesignated as paragraph (m)(8) and *Examples 6 and 7* are added.

5. Paragraphs (m)(6) and (m)(7) are added.

6. Paragraph (r) is added.

7. The revisions and additions read as follows:

§ 1.132-5 Working condition fringes.

(m) * * *

(1) * * * However, if an independent security study meeting the requirements of paragraph (m)(2)(v) of this section has been performed with respect to a government employee, the government employee may exclude the value of the personal use (other than commuting) of the employer-provided vehicle that the security study determines to be reasonable and necessary for local transportation.

(2) * * *

(i) *In general.* For purposes of this paragraph (m), a bona fide business-oriented security concern exists only if the facts and circumstances establish a specific basis for concern regarding the safety of the employee. A generalized concern for an employee's safety is not a bona fide business-oriented security concern. Once a bona fide business-oriented security concern is determined to exist with respect to a particular employee, the employer must periodically evaluate the situation for purposes of determining whether the bona fide business-oriented security concern still exists. Example of factors indicating a specific basis for concern regarding the safety of an employee are—

(A) A threat of death or kidnapping of, or serious bodily harm to, the employee or a similarly situated employee because of either employee's status as an employee of the employer; or

(B) A recent history of violent terrorist activity (such as bombings) in the geographic area in which the transportation is provided, unless that activity is focused on a group of individuals which does not include the employee (or a similarly situated employee of an employer), or occurs to a significant degree only in a location within the geographic area where the employee does not travel.

(v) *Independent security study with respect to government employees.* For purposes of establishing the existence of an overall security program under paragraph (m)(2)(ii) of this section with respect to a particular government employee, a security study conducted by the government employer (including an agency or instrumentality thereof) will be treated as a security study pursuant to paragraph (m)(2)(iv) of this section if, in lieu of the conditions of paragraphs (m)(2)(iv)(A) through (D) of this section, the following conditions are satisfied:

(A) The security study is conducted by a person expressly designated by the government employer as having the responsibility and independent authority to determine both the need for employer-provided security and the appropriate protective services in response to that determination;

(B) The security study is conducted in accordance with written internal procedures that require an independent and objective assessment of the facts and circumstances, such as the nature of the threat to the employee, the appropriate security response to that threat, an estimate of the length of time

protective services will be necessary, and the extent to which employer-provided transportation may be necessary during the period of protection;

(C) With respect to employer-provided transportation, the security study evaluates the extent to which personal use, including commuting, by the employee and the employee's spouse and dependents may be necessary during the period of protection and makes a recommendation as to what would be considered reasonable personal use during that period; and

(D) The employer applies the specific security recommendations contained in the study to the employee on a consistent basis.

(3) * * *

(iv) *Spouses and dependents of government employees.* The security rules of this paragraph (m)(3) apply to the spouse and dependents of a government employee. However, the value of local vehicle transportation provided to the government employee's spouse and dependents for personal purposes, other than commuting, during the period that a bona fide business-oriented security concern exists with respect to the government employee will not be included in the government employee's gross income if the personal use is determined to be reasonable and necessary by the security study described in paragraph (m)(2)(v) of this section.

* * *

(6) *Special valuation rule for government employees.* If transportation is provided to a government employee for commuting during the period that a bona fide business-oriented security concern under § 1.132-5(m) exists, the commuting use may be valued by reference to the values set forth in § 1.61-21(e)(1)(i) or (f)(3) (vehicle cents-per-mile or commuting valuation of \$1.50 per one-way commute, respectively) without regard to the additional requirements contained in § 1.61-21 (e) or (f) and is deemed to have met the requirements of § 1.61-21(c).

(7) *Government employer and employee defined.* For purposes of this paragraph (m), "government employer" includes any Federal, State, or local government unit, and any agency or instrumentality thereof. A "government employee" is any individual who is employed by the government employer.

(8) * * *

Example (6). J is a United States District Judge. At the beginning of a 3-month criminal trial in J's court, a member of J's

family receives death threats. M, the division (within government agency W) responsible for evaluating threats and providing protective services to the Federal judiciary, directs its threat analysis unit to conduct a security study with respect to J and J's family. The study is conducted pursuant to internal written procedures that require an independent and objective assessment of any threats to members of the Federal judiciary and their families, a statement of the requisite security response, if any, to a particular threat (including the form of transportation to be furnished to the employee as part of the security program), and a description of the circumstances under which local transportation for the employee and the employee's spouse and dependents may be necessary for personal reasons during the time protective services are provided. M's study concludes that a bona fide business-oriented security concern exists with respect to J and J's family and determines that 24-hour protection of J and J's family is not necessary, but that protection is necessary during the course of the criminal trial whenever J or J's family is away from home. Consistent with that recommendation, J is transported every day in a government vehicle for both personal and business reasons and is accompanied by two bodyguard/chauffeurs who have been trained in evasive driving techniques. In addition, J's spouse is driven to and from work and J's children are driven to and from school and occasional school activities. Shortly after the trial is concluded, M's threat analysis unit determines that J and J's family no longer need special protection because the danger posed by the threat no longer exists and, accordingly, vehicle transportation is no longer provided. Because the security study conducted by M complies with the conditions of § 1.132-5(m)(2)(v), M has satisfied the requirement for an independent security study and an overall security program with respect to J is deemed to exist. Thus, with respect to the transportation provided for security concerns, J may exclude as a working condition fringe the value of any special security features of the government vehicle and the value attributable to the two bodyguard/chauffeurs. See *Example (1)* of this paragraph (m)(8). The value of vehicle transportation provided to J and J's family for personal reasons, other than commuting, may also be excluded during the period of protection, because its provision was consistent with the recommendation of the security study.

Example (7). Assume the same facts as in *Example (6)* and that J's one-way commute between home and work is 10 miles. Under paragraph (m)(6) of this section, the Federal Government may value transportation provided to J for commuting purposes pursuant to the value set forth in either the vehicle cents-per-mile rule of § 1.61-21(e) or the commuting valuation rule of § 1.61-21(f). Because the commuting valuation rule yields the least amount of taxable income to J under the circumstances, W values the transportation provided to J for commuting at \$1.50 per one-way commute, even though J is a control employee within the meaning of § 1.61-21(f)(6).

* * *

(r) *Volunteers*—(1) *In general.* Solely for purposes of section 132(d) and paragraph (a)(1) of this section, a bona fide volunteer (including a director or officer) who performs services for an organization exempt from tax under section 501(a), or for a government employer (as defined in paragraph (m)(7) of this section), is deemed to have a profit motive under section 162.

(2) *Limit on application of this paragraph.* This paragraph (r) shall not be used to support treatment of the bona fide volunteer as having a profit motive for purposes of any provision of the Internal Revenue Code of 1986 (Code) other than section 132(d). Nothing in this paragraph (r) shall be interpreted as determining the employment status of a bona fide volunteer for purposes of any section of the Code other than section 132(d).

(3) *Definitions*—(i) *Bona fide volunteer.* For purposes of this paragraph (r), an individual is considered a "bona fide volunteer" if the individual does not have a profit motive for purposes of section 162. For example, an individual is considered a "bona fide volunteer" if the total value of the benefits provided with respect to the volunteer services is substantially less than the total value of the volunteer services the individual provides to an exempt organization or government employer.

(ii) *Liability insurance coverage for a bona fide volunteer.* For purposes of this paragraph (r), the receipt of liability insurance coverage by a volunteer, or an exempt organization or government employer's undertaking to indemnify the volunteer for liability, does not by itself confer a profit motive on the volunteer, provided the insurance coverage or indemnification relates to acts performed by the volunteer in the discharge of duties, or the performance of services, on behalf of the exempt organization or government employer.

(4) *Example.* The following example illustrates the provisions of paragraph (r) of this section.

Example. A is a manager and full-time employee of P, a tax-exempt organization described in section 501(c)(3). B is a member of P's board of directors. Other than \$25 to defray expenses for attending board meetings, B receives no compensation for serving as a director and does not have a profit motive. Therefore, B is a bona fide volunteer by application of paragraph (r)(3)(i) of this section and is deemed to have a profit motive under paragraph (r)(1) of this section for purposes of section 132(d). In order to provide liability insurance coverage, P purchases a policy that covers actions arising from A's and B's activities performed as part of their duties to P. The value of the policy and payments made to or on behalf of A

under the policy are excludable from A's gross income as a working condition fringe, because A has a profit motive under section 162 and would be able to deduct payments for liability insurance coverage had he paid for it himself. The receipt of liability insurance coverage by B does not confer a profit motive on B by application of paragraph (r)(3)(ii) of this section. Thus, the value of the policy and payments made to or on behalf of B under the policy are excludable from B's income as a working condition fringe. For the year in which the liability insurance coverage is provided to A and B, P may exclude the value of the benefit on the Form W-2 it issues to A or on any Form 1099 it might otherwise issue to B.

Shirley D. Peterson,

Commissioner of Internal Revenue.

Approved: October 6, 1992.

Fred T. Goldberg, Jr.,

Assistant Secretary of the Treasury.

[FR Doc. 92-30941 Filed 12-29-92; 8:45 am]

BILLING CODE 4830-01-M

26 CFR Parts 1 and 602

[T.D. 8461]

RIN 1545-AO42

Nuclear Decommissioning Fund Qualification Requirements

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the qualification requirements of a nuclear decommissioning fund.

Pursuant to former section 468A(e)(4)(C) of the Internal Revenue Code, current regulations require that nuclear decommissioning funds invest directly in permissible assets and permitted two or more such funds to combine assets for investment purposes. The Comprehensive National Energy Policy Act of 1992 repealed the investment restriction contained in section 468A(e)(4)(C). These final regulations amend the existing regulations to reflect the statutory change.

DATES: These regulations are effective December 30, 1992.

FOR FURTHER INFORMATION CONTACT: Peter C. Friedman of the Office of Assistant Chief Counsel (Passthroughs and Special Industries) at (202) 622-3110 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) to provide rules under section

468A of the Internal Revenue Code of 1986 (Code). Section 468A, relating to nuclear decommissioning costs, was added to the Code by section 91(c) of the Tax Reform Act of 1984 (Pub. L. 98-369, 98 Stat. 609). Section 1917 of the Comprehensive National Energy Policy Act of 1992 (Act) revised section 468A(e)(4) to eliminate the requirement that a nuclear decommissioning fund make investments only in "black lung" assets described in section 501(c)(21)(B)(ii) of the Code. Section 1917 also revised section 468A(e)(2) to reduce the rate of tax on nuclear decommissioning funds.

Explanation of Provisions

As a result of the repeal of the investment restrictions of section 468A(e) of the Code by section 1917 of the Act, these final regulations eliminate from the existing regulations that requirement that nuclear decommissioning funds invest in black lung assets, as well as the requirement that the funds invest directly in those assets. The Treasury Department and the Internal Revenue Service believe that Congress intended the changes made by section 1917 to shift oversight of the type of investments made by nuclear decommissioning funds to the public utility commissions. Nevertheless, when assets of a nuclear decommissioning fund are invested through an arrangement that adds an additional level of corporate tax, the schedule of ruling amounts for the fund is directly affected. These regulations, therefore, allow an electing taxpayer that invests through an unincorporated organization, within the meaning of § 301.7701-2, to request, in connection with the taxpayer's request for a schedule of ruling amounts, a ruling whether the organization is an association taxable as a corporation for federal tax purposes.

The approach in these regulations reflects the Service's response to comments received on previously issued proposed regulations in light of the recent changes to section 468A(e) by the Act. The previous proposed rules permitted black lung assets of nuclear decommissioning funds to be combined for investment purposes if certain requirements were satisfied. See 55 FR 26460 (June 28, 1990) and 56 FR 41102 (August 19, 1991).

Commentators raised two basic issues in connection with the proposed regulations. First, they requested additional guidance on the classification of master trust arrangements for the pooling of assets. Some commentators expressed the view that master trust arrangements do not constitute separate

entities for tax purposes and others suggested that even if the arrangements are entities, they are not associations taxable as corporations. However, based on a sampling of master trust arrangements submitted by the commentators, the Service continues to be of the view that these types of arrangements, as currently drafted, are separate entities for tax purposes and are classified as associations taxable as corporations under §§ 301.7701-2 and 301.7701-3. The Service believes that certain modifications to these arrangements, such as those suggested in the comments received, would cause many of the arrangements to be classified as partnerships for tax purposes, notwithstanding that the arrangements are in the form of trusts. For example, depending on the specifics of a master trust arrangement and applicable local law, changes could be made to the agreement so that the arrangement would terminate at the will of any participant and, thus, would not have the corporate characteristic of continuity of life described in § 301.7701-2(b).

To afford taxpayers time to modify existing pooling arrangements to avoid classification as an association taxable as a corporation, these regulations establish a transition period during which the Service will not challenge the classification of these arrangements. Under the final regulations, the Service will not challenge the classification of an unincorporated organization, established prior to January 1, 1993, through which the assets of a nuclear decommissioning fund are invested, for tax years beginning prior to January 1, 1995. One commentator requested that this transition period be extended to all tax years beginning before an electing taxpayer is required to request a revised schedule of ruling amounts under § 1.468A-3(i). The Service is of the view that this suggested transition period, which could extend for ten years, is too long and would unreasonably differentiate among electing taxpayers on the basis of the dates they received their most recent schedules of ruling amounts.

Second, a number of commentators argued that rulings on the classification of pooling arrangements should not be required. The final regulations adopt this view by permitting, but not requiring, an electing taxpayer for a fund that invests through an unincorporated organization to request a ruling on the classification of that organization.

These final regulations make a number of additional changes to the existing regulations to conform them to

changes made to section 468A(e) by section 1917 of the Act. In addition, these regulations delete an obsolete reference to section 6154. The duty to pay estimated taxes for a fund, as well as the penalty for underpayment are subsumed in the existing reference to section 6655. Finally, the definition of "nuclear decommissioning fund" is clarified to eliminate ambiguities in terminology throughout the regulations.

Because of the changes made by the Act (with respect to the investment restrictions and the reduction in the tax rate), in order to accurately determine a schedule of ruling amounts the Service will, pursuant to § 1.468-3(h)(2)(vi)(B)(8) and (h)(2)(ix)(C), ask all electing taxpayers who request a schedule of ruling amounts to provide information as to the types of investments made by the fund, the expected after-tax rate of return for each category of investment, and the methodology by which the after-tax rate of return was determined.

Special Analysis

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, a copy of these regulations was submitted to the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Peter C. Friedman of the Office of Assistant Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects

26 CFR 1.461-1 Through 1.469-11T

Accounting, Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.468A-0 is amended as follows:

1. The entry for § 1.468A-5(a)(3)(ii) is revised.

2. An entry for § 1.468A-8 (b)(11) is added.

3. The added and revised provisions read as follows:

§ 1.468A-0 Nuclear decommissioning costs; table of contents.

§ 1.468A-5 Nuclear decommissioning fund—miscellaneous provisions.

(a) * * *

(3) * * *

(ii) Definition of administrative costs and expenses.

§ 1.468A-8 Effective date and transitional rules.

(b) * * *

(11) Nuclear decommissioning fund qualification requirements.

Par. 3. Section 1.468A-1(b)(3) is revised to read as follows:

§ 1.468A-1 Nuclear decommissioning costs; general rules.

(b) * * *

(3) The terms "nuclear decommissioning fund" and "qualified nuclear decommissioning fund" mean a fund that satisfies the requirements of § 1.468A-5. The term "nonqualified decommissioning fund" means a fund that does not satisfy those requirements.

§ 1.468A-2 [Amended]

Par. 4. Section 1.468A-2 (d)(2)(i) is amended by removing the reference "(a)(3)(ii)(A)" and adding "(a)(3)(ii)" in its place.

Par. 5. Section 1.468A-3 is amended as follows:

1. The third sentence of paragraph (a)(1) is amended by removing the reference "(a)(3)(ii)(A)" and adding "(a)(3)(ii)" in its place.

2. Paragraph (h)(1)(iii) is revised.

3. Paragraph (h)(2)(xii) is redesignated as (h)(2)(xv).

4. Paragraphs (h)(2)(xii) and (xiii) are reserved, and paragraph (h)(2)(xiv) is added.

5. Paragraph (i)(1)(ii) is redesignated (i)(1)(ii)(A).

6. Paragraph (i)(1)(ii)(B) is reserved.

7. The added and revised provisions read as follows:

§ 1.468A-3 Ruling amount.

(h) * * *

(1) * * *

(iii) Except as provided by § 1.468A-

5 (a)(1)(iv) (relating to certain unincorporated organizations that may be taxable as corporations), a request for a schedule of ruling amounts must not contain a request for a ruling on any other issue, whether the issue involves section 468A or another section of the Internal Revenue Code.

(2) * * *

(xii) [Reserved.]

(xiii) [Reserved.]

(xiv) If the request for a schedule of ruling amounts contains a request, pursuant to § 1.468A-5 (a)(1)(iv), that the Service rule whether an unincorporated organization through which the assets of the fund are invested is an association taxable as a corporation for federal tax purposes, a copy of the legal documents establishing or otherwise governing the organization.

(i) * * *

(1) * * *

(ii) * * *

(B) [Reserved]

* * *

* * *

Par. 6. Section 1.468A-4 is amended as follows:

1. Paragraph (a) is revised.

2. Paragraph (b)(3) is revised.

3. Paragraph (c)(4) is revised.

4. Paragraph (d)(4) is removed.

5. Paragraphs (d)(5) and (d)(6) are designated as (d)(4) and (d)(5), respectively.

6. Newly designated paragraph (d)(5)(ii) is revised.

7. The revised provisions read as follows:

§ 1.468A-4 Treatment of nuclear decommissioning fund.

(a) In general. A nuclear decommissioning fund is subject to tax on all of its modified gross income (as defined in paragraph (b) of this section). The rate of tax is 22 percent for taxable years beginning in calendar year 1994 or 1995, 20 percent for taxable years beginning after December 31, 1995, and the highest rate of tax specified by section 11(b) for other years. This tax is in lieu of any other tax that may be

imposed under subtitle A of the Internal Revenue Code on the income earned by the assets of the nuclear decommissioning fund.

(b) * * *

(3) A deduction is allowed for the amount of an otherwise deductible loss that is sustained by the nuclear decommissioning fund in connection with the sale, exchange or worthlessness of any investment. A loss is otherwise deductible for purposes of this paragraph (b)(3) if such loss would be deductible by a corporation under section 165 (f) or (g) and sections 1211(a) and 1212(a).

(c) * * *

(4) *Other corporate taxes inapplicable.* Although the modified gross income of a nuclear decommissioning fund is subject to tax at the rate specified by section 468A(e)(2) and paragraph (a) of this section, a nuclear decommissioning fund is not subject to the other taxes imposed on corporations under subtitle A of the Internal Revenue Code. For example, a nuclear decommissioning fund is not subject to the alternative minimum tax imposed by section 55, the accumulated earnings tax imposed by section 531, the personal holding company tax imposed by section 541, and the alternative tax imposed on a corporation under section 1201(a).

(d) * * *

(5) * * *

(ii) The taxable income with respect to which the nuclear decommissioning fund's status as a "large corporation" is measured is "modified gross income" (as defined by paragraph (b) of this section).

Par. 7. Section 1.468A-5 is amended as follows:

1. Paragraph (a)(1)(i)(B) is revised.
2. Paragraph (a)(1)(iii) is removed.
3. Paragraph (a)(1)(v) is redesignated as (a)(1)(iii).
4. Paragraph (a)(1)(iv) is revised.
5. Paragraph (a)(3)(i)(C) is revised.
6. Paragraph (a)(3)(ii) is revised.
7. The added and revised provisions read as follows:

§ 1.468A-5 Nuclear decommissioning fund qualification requirements; prohibitions against self-dealing; disqualification of nuclear decommissioning fund; termination of fund upon substantial completion of decommissioning.

(a) * * *

(1) * * *

(i) * * *

(B) One or more funds that are to be used for the decommissioning of a nuclear power plant and that do not qualify as nuclear decommissioning

funds under this paragraph (a) can be established and maintained pursuant to a trust agreement that governs one or more nuclear decommissioning funds.

* * * * *

(iv) If assets of a nuclear decommissioning fund are (or will be) invested through an unincorporated organization, within the meaning of § 301.7701-2 of this chapter, the Internal Revenue Service will rule, if requested, whether the organization is an association taxable as a corporation for federal tax purposes. A request for a ruling may be made by the electing taxpayer as part of its request for a schedule of ruling amounts.

* * * * *

(3) * * *

(i) * * *

(C) To the extent that the assets of the nuclear decommissioning fund are not currently required for the purposes described in paragraph (a)(3)(i) (A) or (B) of this section, to make investments.

(ii) *Definition of administrative costs and expenses.* For purposes of paragraph (a)(3)(i) of this section, the term "administrative costs and other incidental expenses of a nuclear decommissioning fund" means all ordinary and necessary expenses incurred in connection with the operation of the nuclear decommissioning fund. Such term includes the tax imposed by section 468A(e)(2) and § 1.468A-4(a), any State or local tax imposed on the income or the assets of the fund, legal expenses, accounting expenses, actuarial expenses and trustee expenses. Such term does not include decommissioning costs. Such term also does not include the excise tax imposed on the trustee or other disqualified person under section 4951 or the reimbursement of any expenses incurred in connection with the assertion of such tax unless such expenses are considered reasonable and necessary under section 4951(d)(2)(C) and it is determined that the trustee or other disqualified person is not liable for the excise tax.

* * * * *

Par. 8. Section 1.468A-8 is amended by adding paragraph (b)(11) to read as follows:

§ 1.468A-8 Effective date and transitional rules.

* * * * *

(b) * * *

(11) *Nuclear decommissioning fund qualification requirements.* For tax years beginning prior to January 1, 1995, the Service will not assert that an unincorporated organization referred to in § 1.468A-5(a)(1)(iv), established prior

to January 1, 1993, through which the assets of a nuclear decommissioning fund are invested, is an association taxable as a corporation for federal tax purposes.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 9. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 10. Section 602.101(c) is amended by revising the entries for § 1.468A-3 and § 1.468A-8 to read as follows:

§ 602.101 OMB control numbers.

* * * * *

(c) * * *

CFR part or section where identified or described	Current OMB control No.
1.468A-3	1545-1269
1.468A-8	1545-1269

Michael P. Dolan,

Acting Commissioner of Internal Revenue.

Approved: December 14, 1992.

Alan J. Wilensky,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 92-31057 Filed 12-29-92; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 218 and 230

RIN 1010-AB58

Offsetting Incorrectly Reported Production Between Different Federal or Indian Leases (Cross-Lease Netting)

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: The Royalty Management Program of the Minerals Management Service (MMS) is amending its regulations to allow payors to correct reporting errors under certain limited circumstances by offsetting production incorrectly reported and attributed to a Federal or Indian Tribal lease or leases against underreported production on a different Federal or Indian Tribal lease or leases to which it should have been attributed (hereafter referred to as

"cross-lease netting"). The rulemaking, under specified conditions, allows cross-lease netting for purposes of determining whether an underpayment exists on which interest is owed on any Federal or Indian tribal mineral lease or leases. Also, the rulemaking allows cross-lease netting for purposes of determining whether an overpayment exists on a Federal offshore mineral lease or leases which is subject to the filing and reporting requirements of section 10 of the Outer Continental Shelf Lands Act of 1953.

EFFECTIVE DATE: February 1, 1993.

FOR FURTHER INFORMATION CONTACT: Dennis C. Whitcomb, Chief, Rules and Procedures Branch at (303) 231-3432.

SUPPLEMENTARY INFORMATION: The principal authors of this final rule are Mr. Donald T. Sant, Deputy Associate Director for Valuation and Audit, Mr. Peter Schaumburg and Mr. Geoffrey Heath, Office of the Solicitor, Washington, DC.

I. Background

Under the laws, regulations, and lease terms governing the leasing of Federal and Indian lands and the Outer Continental Shelf (OCS) for mineral production, royalty is due and reported based on the particular lease from which oil, gas, or other minerals are produced. See, e.g., the Mineral Leasing Act of 1920, as amended (MLA), 30 U.S.C. 181, et seq.; the Outer Continental Shelf Lands Act of 1953, as amended (OCSLA), 43 U.S.C. 1331, et seq.; the Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351, et seq.; the Geothermal Steam Act of 1970, 30 U.S.C. 1001, et seq.; the Act of March 3, 1909, 25 U.S.C. 396; the Act of May 11, 1938, 25 U.S.C. 396a, et seq.; and regulations at 30 CFR parts 202, 206, 210, 212, 216, and 218, and 25 CFR parts 211 and 212.

Under statutes and regulations, MMS assesses interest on late payments and underpayments of royalties for lease production. See section 111(a) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1721(a), and regulations at 30 CFR 218.54, 218.102, 218.150(d), 218.202, and 218.302. If a royalty payment is attributed to production from a different lease when payment is initially made, and therefore reported as paid for the incorrect lease, a later correction to reduce the reported royalty for the incorrect lease and increase the royalty paid on the correct lease has ordinarily resulted in an assessment for late-payment interest due on the originally underpaid lease. The assessments are issued through the

MMS' Auditing and Financial System (AFS) exception processing. Similar corrections made as a result of an MMS audit have also resulted in an assessment for late-payment interest due for the lease for which the royalty should have been reported.

In the case of offshore leases, an additional requirement is involved. Under section 10(a) of the OCSLA, 43 U.S.C. 1339(a), no refund or credit for an overpayment of royalty for an offshore lease may be made unless such refund or credit is requested within 2 years of the date the payment is made and certain procedural requirements are followed. Correction of errors such as those previously described involves such a credit for the lease for which the royalty was initially and incorrectly reported as paid. Therefore, such corrections are subject to section 10's procedural requirements and the allowed 2-year period.

Because royalty obligations are determined on a lease basis, an overpayment under one lease does not negate the existence of an underpayment under another lease for purposes of determining late-payment interest owed for the underpaid lease. Similarly, in the context of OCSLA section 10, an underpayment under one offshore lease does not negate the existence of an overpayment under another lease for purposes of submitting required requests for refund or credit under OCSLA section 10(a).

The Interior Board of Land Appeals (IBLA) has consistently upheld this principle in both contexts. Overpayments and underpayments for different production months within a single lease account will be offset during an audit by MMS or other authorized audit agencies to determine underpaid amounts on which late-payment interest is due or overpaid amounts for which a request for refund or credit must be submitted under OCSLA section 10. See *Shell Oil Co.*, 80 IBLA 634 (1981). However, IBLA has consistently held, in cases involving both late-payment interest calculations and required refund or credit requests under OCSLA section 10, that such offsetting may only occur within a single lease account during an audit period, and not between leases. Under existing MMS procedures, offsetting of overpayments and underpayments between leases is not permitted (except where both leases are included in the same unitization or communitization agreement). In the late-payment interest context, see *Mesa Petroleum Co.*, 108 IBLA 149 (1989); *Mesa Petroleum Co.*, 111 IBLA 201 (1989); *FMP Operating Co.*, 111 IBLA 377 (1989); and *Mesa*

Operating Limited Partnership, No. IBLA 87-753 (Order issued June 13, 1990). In the OCSLA section 10 context, see *Sun Exploration and Production Co.*, 106 IBLA 300 (1989); *Union Oil Co. of California*, 110 IBLA 62 (1989); *Chevron USA, Inc.*, 111 IBLA 92 (1989); and *Union Exploration Partners, Ltd.*, 113 IBLA 186 (1990).

Allowing offsetting of overpayments and underpayments between leases as a matter of course and on the initiative of the lessee or royalty payor is not feasible given the more than 20,000 leases, many of which have multiple payors, which MMS administers. Permitting offsetting on that basis effectively would require a review of all of that payor's leases (in the case of requests for refund or credit under OCSLA section 10, all of the payor's OCS leases), at least for the production month for which the offset is claimed, before an offset could be allowed. Otherwise, there would be no way of ascertaining whether the payor in fact was overpaid or underpaid, and the system would be subject to the payor's arbitrary selectivity. Such a reconciliation capability is not possible.

Moreover, allowing offsetting between leases as a matter of course could have substantial effects on ultimate recipients of royalty revenue from different categories of leases under established permanent indefinite appropriations. For example, under the MLA, each State receives 50 percent of royalties and other lease revenues (90 percent for Alaska) from leases on the Federal public domain within its boundaries. See 30 U.S.C. 191. Coastal States receive 27 percent of revenues from certain offshore leases located within the zone defined and governed by section 8(g) of OCSLA, 43 U.S.C. 1337(g) (the "8(g) zone"). Other recipients receive various portions of revenues from leases issued under other laws; e.g., the Mineral Leasing Act for Acquired Lands. See 30 U.S.C. 355. Allowing offsetting between leases without restriction as a matter of course may affect the distribution of royalty revenues to the proper recipients.

The MMS recognizes, however, that because many royalty payors report and pay for hundreds and sometimes thousands of leases, some situations arise in which a royalty payment which is otherwise correct and timely is incorrectly reported as attributed to production from one lease, when it should have been reported as attributed to production from a different lease. For example, a lessee may receive from an operator incorrect allocation figures for production from adjacent OCS leases which is commingled into a common pipeline, where the total volume of

production is correct and royalty is timely paid thereon; and subsequently corrections are submitted to revise the allocation of that total between the individual leases.

As another example, a royalty payor may inadvertently invert digits in the lease number for which royalty is being reported, but otherwise pay the royalty correctly and timely. If the incorrect lease number is in fact the number of another valid lease, the royalty report may clear the AFS system edits and the error be discovered only upon later checks or review.

These examples may occur under circumstances where the lessor/royalty owner is the same for the leases involved and the total royalty distribution to recipients of permanent indefinite appropriations is the same regardless of which lease the royalty payment is attributed to. In other words, the leases involved are within the same State in the case of onshore MLA leases (or are in the same county in the case of some leases on acquired lands), or are on the OCS (and, if within the 8(g) zone, are within the 8(g) zone and are offshore of the same coastal state), or are owned by the same Indian lessor. These examples may occur in the context of determining underpayments on which late-payment interest is due or determining overpayments for which a request for refund or credit must be submitted under OCSLA section 10.

These and other examples which could be cited have certain common characteristics which distinguish them from most royalty payment deficiencies. First, the mistake is in the nature of a reporting error rather than a substantively incorrect royalty payment or an untimely royalty payment in the first instance. Second, there is no ultimate loss of time value of money to the lessor when the reporting error is corrected. In addition, one error is the common source of both the overpayment and the underpayment for the respective leases. Moreover, there is no ultimate effect on the distribution of royalty revenues under permanent indefinite appropriations established by law; thus, there is no time value of money loss to these recipients either. Finally, the circumstances are such that the nature of the error can be proven by reliable documentary evidence. Thus, after correcting the reporting error, affected parties would be in the same financial position as if the error had not been committed. Under these circumstances, MMS does not believe that assessing late-payment charges for the underpaid lease, or disallowing a refund or credit, is justified.

The MMS therefore is amending the regulations to allow royalty payors to offset royalty overpayments for a lease or leases against underpayments for a different lease or leases, for purposes of determining the size of an underpayment on which late-payment interest is due, under limited conditions described in the next section of this preamble. Similarly, MMS is amending the regulations to allow payors to offset royalty underpayments for an offshore lease or leases against overpayments for a different offshore lease or leases, for purposes of determining whether and to what extent an overpayment exists for which a refund or credit must be requested, under similar, limited conditions described below. (Allowed offsetting is referred to as "cross-lease netting" in both contexts). Cross-lease netting will be allowed only under the specified conditions. In all other situations, the law as established by the previously cited IBLA decisions will remain unchanged.

II. Comments on Proposed Rule

The proposed rulemaking (56 FR 31891, July 12, 1991) provided for a 60-day public comment period, which ended September 10, 1991. The public comment period was subsequently extended (56 FR 46396, September 12, 1991) to September 30, 1991. Seventeen commenters submitted written comments during this period. The comments are addressed in this section.

General Comments

(a) Some commenters requested that MMS state in the preamble of the rulemaking that the cross-lease netting procedure is only voluntary and does not diminish any of the other rights of lessees to effect offsets within leases under existing law. These commenters stated that the rule should be seen as an option for the lessee to minimize the unfair imposition of late-payment penalties and to streamline offshore royalty reporting. In their view, it should not be a requirement.

Response: The rule as adopted operates to the lessee's benefit. If the lessee does not wish to avail itself of the rule's advantages, it is not required to do so. The rule therefore is already "voluntary." The rule does not govern and does not purport to address issues regarding offsets within a single lease account.

(b) The proposed rulemaking applied to all Federal leases and to all Indian leases. In the proposed rulemaking, MMS requested comments on whether Indian tribal and/or allotted leases should be excluded from the rulemaking. Several commenters from

industry objected to excluding Indian leases from the rulemaking. They argued that harmless errors should be corrected on Indian leases as contemplated by the proposed rule. One commenter stated that there are tribes and individual allottees owning numerous leases where the rule could apply and offer fairness and cost-effectiveness. On the other hand, a commenter from an Indian tribe objected to the rule stating that lease contracts between tribes and the companies create an independent property interest. They argued that failure to maintain separate lease accountability would result in the taking of the Tribe's property interest.

Response: The MMS has reviewed all comments and believes that there is no basis to exclude Indian tribal leases in the rulemaking. Indian allotted leases are excluded from the final rulemaking because there are minimal cases where the individual allottee (lessor) (or the proportion of interests held by more than one individual allottee) is the same for the leases involved. On the other hand, like Federal leases, MMS believes there will be cases where the Indian tribe (lessor) is the same for the leases involved. The rule should apply to all Federal and Indian tribal leases, since under the criteria in the rulemaking, there would be no harm to the lessor.

(c) Several commenters recommended that the rulemaking be expanded to cover lease rental payments. They argue that reporting errors can occur for rental payments and should be covered under the cross-lease netting rulemaking.

Response: The MMS does not agree with the recommendation. The scope of the rulemaking is limited to reporting errors covering production. Failure to pay rental due may result in termination of a lease, and the rental requirements must be strictly construed.

(d) One commenter supported the rule and recommended that the rule be applied retroactively.

Response: The MMS is not making this rule effective retroactively. However, there are many open cases which involve this issue and MMS will apply the policy adopted in this rule as necessary.

(e) One commenter requested that the rule be expanded to include value/price differences.

Response: The rule does not require that the royalty value of the volume erroneously attributed to an incorrect lease be the same under the correct lease as it originally was reported under the incorrect lease. For example, as a result of the same reporting error which caused the production to be attributed to the wrong lease, an incorrect price similarly may have been applied if

production from the two leases was subject to different prices under a sales contract. However, any deficiency owed when the volume is reported for the correct lease will be subject to late payment interest assessments under existing law and regulations.

(f) Several commenters argued that MMS needs to recognize that special problems can occur relative to unit or communitization allocations or adjustments that may involve different payors, different leases, and unequal volumes. Where the payor can prove that adjustments need to be made and that there would be no harm to the lessor, MMS should be able to approve these net adjustments on a case-by-case basis. The regulations should be revised to include such a provision.

Response: Offset of overpayments and underpayments between leases where the leases involved in the adjustment are included in the same unitization or communitization agreement are already permitted under existing MMS procedures.

(g) Some state representatives argued that MMS has only imposed erroneous reporting assessments for errors that prevent timely distribution of royalty revenues. The reporting errors that MMS would allow for purposes of cross-lease netting do not fall within this category. Thus, they concluded that the cross-lease netting rule will encourage, rather than discourage incorrect reporting.

Response: The MMS disagrees with the comments. Payors making cross-lease netting corrections will be subject to late or erroneous reporting assessments under 30 CFR 218.42(d).

Specific Comments

(a) In the preamble to the proposed rule, MMS stated with respect to proposed § 218.42(b): "Therefore, cross-lease netting would be allowed only under all the following conditions * * * 56 FR 31892. Several commenters recommended that MMS make it clear that cross-lease netting would be allowed if all of the following conditions are met.

Response: The MMS agrees with the comment, and it is MMS' intent to allow cross-lease netting in all situations where all the conditions listed in the rule are met.

(b) Several commenters requested MMS to modify 30 CFR 218.42(b) and 230.51(b) regarding the requirement that an error resulting in the wrong payment between two leases must be in the same production month. The commenters argued that royalty attributable to production from one lease may be inadvertently applied to another lease

and mistakenly to another production month. The rule as proposed would prohibit the netting out of these errors, when in fact, it is the same kind of harmless error that may be corrected under the rulemaking if the right month were used. They contend that the proposed restriction to use only the same production month limits the usefulness of the cross-lease netting procedure for harmless errors.

Response: The MMS agrees with the comment. The rule has been changed accordingly.

(c) Some commenters requested that MMS clarify § 218.42(b)(3) and § 230.51(b)(3) regarding the requirement that the payor submit production reports and other documentary evidence pertaining to the reporting error involving specific production. To avoid unnecessary administration, the commenter suggested that the requirement should be that additional documentation be required only on request by MMS where errors cannot be readily substantiated by the data submitted.

Response: The MMS believes that the burden of proof must be on the payor to substantiate the reporting error and assure that any correction qualifies under the cross-lease netting procedure. Therefore, information must be provided to MMS to verify the reporting error at the time of the request for the adjustment.

(d) One commenter contended that for onshore leases, the requirement that the ultimate recipient of royalty revenues be the same where cross-lease netting is contemplated unduly limits the benefits of the proposed rule and should be eliminated in 30 CFR 218.42(b)(5) and 230.51(b)(5). It argued that the recipient is paid by the Federal Government on a periodic, lump-sum basis and the limitation is not necessary because of no harmful effect.

Response: The MMS disagrees with the comments. Revenues from onshore leases are distributed to designated recipients on a monthly basis. Cross-lease netting in situations involving different recipients or permanent definite appropriations plainly would change the disbursement of revenues under those appropriations. In addition, under current law, late-payment interest paid by lessees is paid to the same recipients as the principal royalty revenues. 30 U.S.C. 191, as amended (public domain leases), 30 U.S.C. 191a (all other leases). The MMS believes that as a matter of policy, if one recipient has been deprived of funds, which it otherwise would have received earlier, because of a reporting error which caused an underpayment with respect to

the lease for which the production should have been reported, it is appropriate to continue to require the payor to pay late-payment interest, as provided under existing law and rules, which is then shared proportionately with that recipient.

(e) Some commenters recommended that the requirement to have MMS approval before effecting an offset for a reporting error be eliminated in 30 CFR 230.51(b). The commenter argued that through new accounting codes, any correction on the Report of Sales and Royalty Remittance—Oil and Gas (Form MMS-2014) could be reported and tracked to assure proper internal control. The payor would still be required to maintain sufficient documentation to support the adjustment which could be verified periodically through MMS audit.

Response: The MMS disagrees with the comments. The MMS does not want to add this verification function to the audit function because of the volume of transactions being reported each month. Companies should be required to submit documentation of erroneous reporting at the time of correction of the reports. Prior approval of the adjustments will assure effective internal control, and is not overly burdensome to the payor.

(f) One commenter suggested that if prior approval is required as stated in 30 CFR 230.51(b), then MMS should make a commitment to respond within 60-90 days from receipt of the request for authorization for cross-lease netting. The commenter stated that timely action is important in considering the impact of the accruing late-payment interest expense.

Response: The MMS agrees that the review of the request for cross-lease netting should be timely. The MMS review should be completed within 90 days if the documentation submitted for approval is complete. When a cross-lease netting request meets all of the criteria of this rulemaking, late-payment interest will be assessed only on any net underpayment. However, if cross-lease netting between offshore leases results in a net overpayment on a lease, a refund or credit of the net amount is subject to OCSLA section 10 requirements which cannot be waived.

(g) One commenter objected to the requirement that reporting errors must result in equal volumes between leases in 30 CFR 218.42(b)(1) and 230.51(b)(1). They argue that the sections recognize and accept that valuation may be different, therefore, volume differences should also be acceptable when all other conditions are met and there is no harm caused by the cross-lease netting adjustment.

Response: The MMS disagrees with the comment. The requirement remains that the total volume erroneously reported on the incorrect lease(s) must equal the total volume attributed to the correct lease(s) in the cross-lease netting adjustment, such that the payor can demonstrate that the initial underreporting and overreporting resulted from the same error. The rulemaking is amended to clarify that several leases can be involved in a cross-lease adjustment if all the other conditions are met.

(h) Several commenters objected to the requirement that the payor be the same for leases involved in the cross-lease netting adjustment under 30 CFR 218.42(b)(2) and 230.51(b)(2). They contend that whether or not the payments were by the same payor should not be a controlling factor if there is no harm to the lessor.

Response: The MMS disagrees with the comments. The cross-lease netting requirements are intended to cover reporting errors by one payor. Adjustments between payors are not reporting errors which should be reconciled by MMS. To expand the requirements to cover adjustments between multiple payors is beyond the scope and purpose of the rulemaking.

III. Summary and Discussion of Final Rule

(a) For Calculation of Late-Payment Interest

The MMS final rule will add a new provision to the regulations at 30 CFR part 218, to be designated 30 CFR 218.42, which allows cross-lease netting for purposes of determining an underpayment upon which late-payment interest is due, under certain conditions where the payor can demonstrate a plain reporting error which does not result in any ultimate loss of time value of money to a Federal or Indian lessor and which has no consequence for the ultimate recipients of royalty revenues. Therefore, cross-lease netting will be allowed only if all of the following conditions are met:

(1) The error results from attributing and reporting an equal volume of production produced from a lease or leases during a particular production month to a different lease or leases from which it was not produced for that same or another production month. This condition is necessary to ensure that offsetting will be allowed only when a genuine reporting error has occurred, as opposed to an ordinary royalty underpayment. If unrelated volumes of production from different leases could be offset, particularly if different

production months were involved, there would be no practical way to verify that only a reporting error of the type described is involved or to limit allowed offsets to situations involving such reporting errors. There would be nothing to prevent a lessee or payor from using many royalty overpayments as offsets against other unrelated royalty underpayments on other leases and manipulating corrections to its reports to avoid interest liability.

This condition does not require that the same value of production be involved when the production is re-attributed to the correct lease or leases. Ascribing a particular volume of production to the wrong lease or leases may result in a royalty value under that lease or leases which is different from the correct royalty value when the production is reported under the correct lease or leases. If the royalty attributable to the value of production as reported under the wrong lease or leases is greater than the royalty attributable to the value of production under the correct lease or leases, the lessor has not suffered any loss of time value. (The difference is an overpayment which may be credited or refunded, but subject to OCSLA section 10 limitations for offshore leases.) If the royalty attributable to the value of production under the wrong lease or leases is less than the royalty attributable to the value of production under the correct lease or leases, the lessee or payor owes the difference as additional royalty, plus appropriate late-payment interest on that royalty difference.

(2) The payor is the same for the production attributable to the leases involved. This condition is necessary for practical administration. While an allocation error by a pipeline operator, for example, could result in overreporting production on a lease(s) and underreporting an equal volume of production on another lease(s) which has a different payor and where all other necessary conditions are met, MMS believes this is not a reporting error which should be reconciled by MMS.

(3) The payor submits production reports pipeline allocation reports, or other similar documentary evidence pertaining to the specific production involved which verifies the correct production information. This condition is necessary to limit allowed offsets to the type of reporting error situations previously described by requiring reliable documentary evidence which demonstrates the reporting error. In the absence of this requirement, a payor easily could manipulate corrections to royalty reports and claim that some portion of an overpayment on a

particular lease was due to misreporting production which should have been reported on an underpaid lease, when in fact that was not the case.

(4) The lessor is the same for the leases involved (in the case of Indian tribal leases, the same tribe is the lessor of both leases). This requirement is necessary to ensure that offsetting is not permitted where one lessor has had the advantage of the time value of the overpayment on the wrong lease while a different lessor has lost the time value of the underpayment on the correct lease. In such situations, the payor should be required to pay appropriate late-payment interest to the lessor who should have had the benefit of the funds had the error not occurred and the royalty payment been made correctly.

(5) The ultimate recipients of royalty revenues under permanent indefinite appropriations are the same for, and receive the same percentage of revenue from, the leases involved. The permanent indefinite appropriations referred to include the States' 50 percent share (90 percent for Alaska) of royalties from onshore MLA leases under 30 U.S.C. 191; coastal States' 27 percent share of royalties from offshore leases within the 8(g) zone under 43 U.S.C. 1337(g); counties' 25 percent share of royalties from leases on acquired national grasslands under 30 U.S.C. 355 (incorporating the formula of 7 U.S.C. 1012) (as one example of payments made to States or counties from royalties from leases of acquired land under 30 U.S.C. 355, incorporating the formula applicable to the particular category of acquired land); and the States' 90 percent share of royalties from leases on State selected lands under 43 U.S.C. 852(a)(4) (as one example of payments made under certain specialized statutes providing for mineral leasing of a particular category of lands). While interest on late-payments or underpayments of royalty is owed to the lessor (the United States or an Indian tribe), not to a derivative recipient of royalty revenues under a permanent indefinite appropriation who does not own a property interest in the lease, this condition is appropriate to avoid an analogous inequity to the ultimate recipients of royalty revenues. Particularly since late-payment interest is shared with the ultimate recipient of royalty revenue in the same proportion as the principal royalties (see 30 U.S.C. 191 and Pub. L. 100-524, section 7, 102 Stat. 2607, 30 U.S.C. 191a), if the misreporting of production between different leases resulted in a delay in receipt of revenues by the correct recipient, it is appropriate to prohibit cross-lease netting in that circumstance.

It is the payor's burden to show by satisfactory documentation that each of these conditions has been met. A payor may make that showing either through the administrative appeals procedure of 30 CFR part 290 after receiving an invoice for late-payment interest due, or may submit such documentation to MMS informally to avoid unnecessary clogging of the appeals process where there is no real necessity for a written decision by the MMS Director. In either case, if the documentation submitted is sufficient, the late-payment interest assessment will be canceled.

The final rule applies to all Federal leases, onshore and offshore, and to all Indian tribal leases, for all minerals (oil, gas, coal, other solid minerals, and geothermal steam). As a matter of conforming amendments, MMS is amending the existing provisions at 30 CFR 218.54, 218.102, 218.150, 218.202, and 218.302 to reference the new regulation.

(b) Calculation of Overpayments Under Offshore Leases Subject to OCSLA Section 10 Credit or Refund Requests and 2-Year Allowed Period

Consistent with cross-lease netting for late-payment interest purposes (see section II(a) above of this preamble), MMS is also amending the regulations to allow cross-lease netting in limited circumstances for purposes of determining whether overpayments exist on offshore leases that are subject to the filing and reporting requirements of OCSLA section 10.

The MMS is requiring that the same general requirements for cross-lease netting apply for OCSLA section 10 purposes as are required for late-payment interest purposes. Similar to the conditions identified for late-payment interest purposes, conditions identified for OCSLA section 10 purposes are intended to restrict allowable cross-lease netting to situations where the payor can demonstrate a plain reporting error, rather than an overpayment which must be balanced by granting a refund or credit, and where the correction does not result in any ultimate loss of the time value of money to the Federal lessor and which has no consequence for any ultimate recipient of royalty revenues. Thus, both of the mineral leases must be outside the 8(g) zone, or if they are in the 8(g) zone, they must be offshore of the same coastal State.

Under the final rule at 30 CFR 230.51, cross-lease netting for OCSLA section 10 purposes will be allowed only upon the payor's submission of a written request to MMS for its approval for the payment offset. The payor will be required to

provide adequate documentation to show that all the following conditions have been met before MMS will allow cross-lease netting:

(1) The error results from attributing and reporting an equal volume of production produced from a lease or leases during a particular production month to a different lease or leases from which it was not produced for that same or another production month. This condition is necessary for reasons similar to those for the identical condition for offsetting in the late-payment interest context explained above, i.e., to ensure that offsetting will be allowed only when a genuine reporting error has occurred, as opposed to an ordinary royalty overpayment for which a request for refund and the prescribed procedures are required under OCSLA section 10. If unrelated volumes of production from different leases could be offset, particularly if different production months were involved, there would be no practical way to verify that only a reporting error of the type described is involved or to limit allowed offsets to situations involving such reporting errors. There would be nothing to prevent a lessee or payor from using many royalty underpayments as offsets against other unrelated royalty overpayments on other leases and manipulating corrections to its reports to avoid having to submit requests for refund or credit.

This condition again would not require that the same value of production be involved when the production is reattributed to the correct lease. If the royalty attributable to the production as reported under the wrong lease is greater than the royalty attributable to the production under the correct lease, the payor has not made an excess payment for which a refund or credit would be appropriate to the extent of the royalty owed under the correct lease. The difference is an overpayment which may be credited or refunded; however, the section 10 requirements would apply to that increment. If the royalty as reported under the wrong lease is less than the royalty reported under the correct lease, the lessee or payor would owe the difference as additional royalty, plus appropriate late-payment interest on the royalty difference. The entire royalty attributed to the wrong lease would be offset and no OCSLA section 10 requirements would apply.

(2) The payor is the same for the production attributable to the leases involved. This condition is necessary for practical administration for reasons similar to those for the identical

condition explained above in the late-payment interest context.

(3) The payor submits production reports, pipeline allocation reports, or other similar documentary evidence pertaining to the specific production involved which verifies the correct production information. This condition is necessary to limit allowed offsets to the type of reporting error situations previously described by requiring reliable documentary evidence which demonstrates the reporting error. In the absence of this requirement, a payor easily could manipulate corrections to royalty reports and claim that some portion of an overpayment on a particular lease was due to misreporting production which should have been reported on an underpaid lease, when in fact that was not the case, and thereby effectively nullify the OCSLA section 10 requirements.

(4) In the case of leases which are within the zone defined and governed by section 8(g) of the OCSLA, as amended, 43 U.S.C. 1337(g), the leases are located off the coast of the same State. (There is no necessity for an express condition that the lessor is the same for both leases in this context; the United States is the lessor for all leases on the OCS.) This condition is necessary for reasons similar to those in the late-payment interest context. See paragraph III(a)(5) above of this preamble. It ensures that the ultimate recipients of royalty revenues under OCSLA section 8(g)'s permanent indefinite appropriation are the same for both leases. All coastal States receive the same share, 27 percent, under section 8(g) uniformly. It is appropriate to prohibit cross-lease netting where different coastal States are involved to avoid inequity to the ultimate recipient of a portion of the royalty revenues.

If MMS approves a payor's request for a payment offset, the payor is required to submit an adjusting royalty report (Form MMS-2014) to correct its reporting to MMS' AFS. Royalties attributed to an incorrect lease under the conditions specified above and for which offset is approved by MMS are not, under the final rule, subject to the filing and reporting requirements of OCSLA section 10.

(c) Other Matters

The submission of false production data or other evidence in an attempt to improperly invoke the exception set forth in the final regulations at 30 CFR 218.42 and 230.51, to avoid requesting a refund or credit as required by section 10 of OCSLA, or to avoid payment of late-payment interest due, potentially could result in the assessment of a civil

or criminal penalty for intentional violation under section 109(d) of FOGMA, 30 U.S.C. 1719(d), and 30 CFR 241.51(b)(1)(ii) or (iii).

IV. Procedural Matters

Executive Order 12291 and the Regulatory Flexibility Act

This rulemaking may result in a loss of some revenue to royalty recipients from interest charges currently billed and collected from payors on underpayments on a lease that could be offset against overpayments on a different lease under this rule. However, this rulemaking does not result in a major increase in costs for any Federal, State, or local government agency or any individual industry or have any adverse effects on competition, employment, or productivity. Accordingly, the Department of the Interior (Department) has determined that this rule is not a major rule under Executive Order 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Executive Order 12630

The Department certifies that the rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights."

Executive Order 12778

The Department has certified to the Office of Management and Budget that these final regulations meet the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order 12778.

Paperwork Reduction Act of 1980

The collection of information contained in this rule on Forms MMS-2014 and MMS-4054 has been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance numbers 1010-0022 and 1010-0040.

National Environmental Policy Act of 1969

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment; therefore, a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 [42 U.S.C. 4332(2)(C)] is not required.

List of Subjects in 30 CFR Parts 218 and 230

Coal, Continental shelf, Electronic funds transfers, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Penalties, Petroleum, Public lands-mineral resources, Reporting and recordkeeping requirements.

Dated: August 19, 1992.

Daniel Talbot,

Deputy Assistant Secretary, Land and Minerals Management.

For the reasons set out in the preamble, 30 CFR parts 218 and 230 are amended as set forth below:

PART 218—COLLECTION OF ROYALTIES, RENTALS, BONUSES AND OTHER MONIES DUE THE FEDERAL GOVERNMENT

1. The authority citation for part 218 continues to read as follows:

Authority: 5 U.S.C. 301 et seq.; 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 31 U.S.C. 9701; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

2. A new § 218.42 is added under Subpart A—General Provisions, to read as follows:

§ 218.42 Cross-lease netting in calculation of late-payment interest.

(a) Interest due from a payor on any underpayment for any Federal mineral lease or leases (onshore or offshore) and on any Indian tribal mineral lease or leases for any production month shall not be reduced by offsetting against that underpayment any overpayment made by the payor on any other lease or leases, except as provided in paragraph (b) of this section. Interest due from a payor or any underpayment on any Indian allotted lease shall not be reduced by offsetting against any overpayment on any other Indian allotted lease under any circumstances.

(b) Royalties attributed to production from a lease or leases which should have been attributed to production from a different lease or leases may be offset to determine whether and to what extent an underpayment exists on which interest is due if the following conditions are met:

- (1) The error results from attributing and reporting an equal volume of production, produced from a lease or leases during a particular production month, to a different lease or leases from which it was not produced for the same or another production month;
- (2) The payor is the same for the lease or leases to which production was

attributed and the lease or leases to which it should have been attributed;

(3) The payor submits production reports, pipeline allocation reports, or other similar documentary evidence pertaining to the specific production involved which verifies the correct production information;

(4) The lessor is the same for the leases involved (in the case of Indian tribal leases, the same tribe is the lessor); and

(5) The ultimate recipients of any royalty or other lease revenues under any applicable permanent indefinite appropriations are the same for, and receive the same percentage of revenue from, the leases.

(c) If MMS assesses late-payment interest and the payor asserts that some or all of the interest assessed is not owed pursuant to the exception set forth in paragraph (b) of this section, the burden is on the payor to demonstrate that the exception applies in the specific circumstances of the case.

(d) The exception set forth in paragraph (b) of this section shall not operate to relieve any payor of liability imposed by statute or regulation for erroneous reporting.

3. A new paragraph (e) is added to § 218.54 under Subpart B—Oil and Gas, General, to read as follows:

§ 218.54 Late payments.

(e) An overpayment on a lease or leases may be offset against an underpayment on a different lease or leases to determine a net underpayment on which interest is due pursuant to conditions specified in § 218.42.

4. A new paragraph (d) is added to § 218.102 under Subpart C—Oil and Gas, Onshore, to read as follows:

§ 218.102 Late payment or underpayment charges.

(d) An overpayment on a lease or leases may be offset against an underpayment on a different lease or leases to determine a net underpayment on which interest is due pursuant to conditions specified in § 218.42.

5. A new paragraph (e) is added to § 218.150 under Subpart D—Oil, Gas and Sulfur, Offshore, to read as follows:

§ 218.150 Royalties, net profit shares, and rental payments.

(e) An overpayment on a lease or leases, excluding rental payments, may be offset against an underpayment on a different lease or leases to determine a net underpayment on which interest is

due pursuant to conditions specified in § 218.42.

6. A new paragraph (f) is added to § 218.202 under Subpart E—Solid Minerals—General, to read as follows:

§ 218.202 Late payment or underpayment charges.

* * * * *

(f) An overpayment on a lease or leases may be offset against an underpayment on a different lease or leases to determine a net underpayment on which interest is due pursuant to conditions specified in § 218.42.

7. A new paragraph (f) is added to § 218.302 under Subpart F—Geothermal Resources, to read as follows:

§ 218.302 Late payment or underpayment charges.

* * * * *

(f) An overpayment on a lease or leases may be offset against an underpayment on a different lease or leases to determine a net underpayment on which interest is due pursuant to conditions specified in § 218.42.

PART 230—RECOUPMENTS AND REFUNDS

1. Part 230, previously reserved, is amended by revising the part heading as set forth above, the text to read as follows:

Subpart A—General Provisions

Sec.

230.51 Cross-lease netting in calculation of overpayments under section 10 of the OCSLA.

Subpart B—Oil, Gas, and OCS Sulfur, General—[Reserved]

Subpart C—Federal and Indian Oil—[Reserved]

Subpart D—Federal and Indian Gas—[Reserved]

Subpart E—Solid Minerals, General—[Reserved]

Subpart F—Coal—[Reserved]

Subpart G—Other Solid Minerals—[Reserved]

Subpart H—Geothermal Resources—[Reserved]

Subpart I—OCS Sulfur—[Reserved]

Authority: 5 U.S.C. 301 et seq.; 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 31 U.S.C. 9701; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

Subpart A—General Provisions

§ 230.51 Cross-lease netting in calculation of overpayments under section 10 of the OCSLA.

(a) The amount of any refund or credit for any overpayment for any lease or leases governed by the Outer Continental Shelf Lands Act (OCSLA), as amended, for any production month shall not be reduced by offsetting against that overpayment any reported underpayment by the payor on any other lease or leases, except as provided in paragraph (b) of this section.

(b) Royalties attributed to production from a lease or leases governed by the OCSLA, which should have been attributed to production from a different lease or leases governed by the OCSLA, may be offset without regard to the provisions of OCSLA section 10, 43 U.S.C. 1339, only if the payor submits a written request to Minerals Management Service (MMS), Fiscal Accounting Division, for its approval of the correction and provides adequate documentation to show that the following conditions exist and are met:

(1) The error results from attributing and reporting an equal volume of production, produced from a lease or leases during a particular production month, to a different lease or leases from which that production was not produced for the same or another production month;

(2) The payor is the same for the lease or leases to which the production was attributed and the lease or leases to which it should have been attributed;

(3) The payor submits production reports, pipeline allocation reports, or other similar documentary evidence pertaining to the specific production involved which verifies the correct production information; and

(4) In the case of leases which are within the zone defined and governed by section 8(g) of the OCSLA, as amended, 43 U.S.C. 1337(g), the leases are located off the coast of the same State.

(c) If MMS approves a correction pursuant to paragraph (b) of this section, the payor is required to submit an adjusting royalty report (Form MMS-2014) pursuant to 30 CFR part 210 to correct its reporting to the Auditing and Financial System.

(d) If MMS requires a repayment of principal royalties or assesses late-payment interest as a result of the payor having improperly offset any underpayment against an overpayment and, therefore, having failed to request a refund or credit as required by section 10 of the OCSLA, 43 U.S.C. 1339, and the payor asserts pursuant to 30 CFR

part 290 that some or all of the royalties or interest assessed is not owed pursuant to the exception set forth in paragraph (b) of this section, the burden is on the payor to demonstrate that the exception applies in the specific circumstances of the case.

(e) The exception set forth in paragraph (b) of this section shall not operate to relieve any payor of any liability imposed by statute or regulation for erroneous reporting.

Subpart B—Oil, Gas, and OCS Sulfur, General—[Reserved]

Subpart C—Federal and Indian Oil—[Reserved]

Subpart D—Federal and Indian Gas—[Reserved]

Subpart E—Solid Minerals, General—[Reserved]

Subpart F—Coal—[Reserved]

Subpart G—Other Solid Minerals—[Reserved]

Subpart H—Geothermal Resources—[Reserved]

Subpart I—OCS Sulfur—[Reserved]

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Office of Surface Mining Reclamation and Enforcement

30 CFR Part 914

Indiana Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; Approval of amendment.

SUMMARY: OSM is announcing the approval of proposed amendments to the Indiana permanent regulatory program (hereinafter referred to as the Indiana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendments (Program Amendments Number 91-1 and 91-8, and amendments transferred from 91-7C) consist of proposed changes to the Indiana Surface Mining Statute (IC 13-4.1) and Indiana Surface Mining Rules (310 IAC 12) concerning archaeology and historic preservation. The amendments are intended to provide cultural and historic resources protection provisions which are no less effective than the corresponding Federal requirements.

EFFECTIVE DATE: December 30, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Indianapolis Field Office, Office of

Surface Mining Reclamation and Enforcement, Minton-Capehart Federal Building, 575 North Pennsylvania Street, room 301, Indianapolis, IN 46204, Telephone (317) 226-6166.

SUPPLEMENTARY INFORMATION:

- I. Background on the Indiana Program.
- II. Submission of the Amendment.
- III. Director's Findings.
- IV. Summary and Disposition of Comments.
- V. Director's Decision.
- VI. Procedural Determinations.

I. Background on the Indiana Program

On July 29, 1982, the Indiana program was made effective by the conditional approval of the Secretary of the Interior. Information pertinent to the general background on the Indiana program, including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Indiana program can be found in the July 26, 1982, *Federal Register* (47 FR 32107). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 914.15 and 914.16.

II. Submission of the Amendment

On February 10, 1987, OSM revised its regulations pertaining to cultural and historic resources (52 FR 4244). OSM notified the Indiana Department of Natural Resources (IDNR) of these changes and informed the IDNR that its program would need to be amended to be no less effective than the revised Federal regulations. This notification was provided by letter dated June 9, 1987 (Administrative Record No. IND-0492).

In an attempt to address the requirements of the June 9, 1987, letter, Indiana Senate Enrolled Act (SEA) 121 was signed into law in March of 1988. SEA 121 became Public Law 108-1988. OSM held a public hearing on the proposed amendments on June 6, 1988 (Administrative Record Number IND-0579). By itself, Public Law 108-1988 did not fully address all the issues that had been raised by OSM. The concerns of OSM regarding Public Law 108-1988 were expressed in a memorandum from OSM's Historic and Preservation Officer, to the Director of OSM's Indianapolis Field Office dated July 11, 1988 (Administrative Record No. IND-0597). Nevertheless, IDNR and OSM initially felt that rules could be developed which would address the remaining OSM issues.

A number of meetings occurred between various parties (IDNR, OSM, Indiana's Division of Historic Preservation and Archeology (DHPA), the archeology community, and the coal industry) in an attempt to develop

acceptable rules. In the summer of 1989, OSM reviewed two distinct versions of rules developed to implement Public Law 108-1988. One version was developed jointly by the Division of Reclamation (DOR) and the DHPA. The other version had been developed by the Indiana Coal Council, Inc. By letter dated September 14, 1989 (Administrative Record No. IND-0679), OSM determined that neither of the proposed rules would satisfy the OSM requirements.

IDNR then proposed statutory changes to address the OSM requirements and provide for the development of acceptable implementing rules. These changes were made through SEA 378 (Public Law 104-1990). Regulations to implement the new statutory provisions were to follow.

By letter dated February 15, 1991 (Administrative Record No. IND-0835), the IDNR submitted a proposed amendment (Amendment #91-1) to the Indiana program statutes at the Indiana Code (IC). The proposed amendment is part of Indiana's 1990 Senate Enrolled Act No. 378 (Pub. L. 104-1990). The amendment would make changes to existing sections IC 13-4.1-3-3, IC 13-4.1-3-3.1, IC 13-4.1-4-3.1, and IC 13-4.1-14-1 concerning cultural and historic protection. By undated letter received by OSM on July 10, 1991 (Administrative Record No. IND-0902), the IDNR submitted a proposed amendment (Amendment #91-8) to the Indiana program rules at Indiana Administrative Code (IAC) 310 IAC 12-0.5, 12-2, and 12-3. The proposed amendment is intended to provide State rules to implement and enforce the Indiana archeological and historic preservation statutes at Public Law 108-1988 (SEA 121) as amended by Public Law 104-1990 (SEA 378) and SEA 154 (discussed below). Together, the proposed statutes and rules are meant to provide for the archeological and historic preservation part of the State program to be no less effective than the Federal provisions.

By letter dated June 4, 1991 (Administrative Record No. IND-0894), the IDNR submitted proposed amendment #91-7 to the Indiana program at IC 13-4.1. Two of the proposed amendments, which were enacted as part of Indiana's 1991 Senate Enrolled Act 154, (amendments to IC 13-4.1-4-3.1 and IC 13-4.1-14-1) concern cultural and historic amendments.

The Director's decision concerning these amendments was deferred and these amendments were subsequently transferred by OSM from the June 4, 1991, submittal of amendment #91-7 to

amendment #91-1 and are addressed in this notice (see 57 FR 27928; June 23, 1992).

By letter dated June 15, 1992 (Administrative Record Number IND-1098), the IDNR submitted to OSM, proposed changes to program amendment 91-8 at 310 IAC 12-2-2 and 310 IAC 12-3-112. OSM announced receipt of the proposed changes in the August 19, 1992, *Federal Register* (57 FR 37498), and in the same notice, opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendments. The public comment period ended on September 3, 1992.

By letter dated August 26, 1992 (Administrative Record Number IND-1136), OSM informed the IDNR of several concerns OSM had with the proposed provisions. A meeting was held on September 17, 1992 (Administrative Record Number IND-1155), to discuss and resolve OSM's concerns.

OSM announced receipt of the proposed amendment #91-1 in the March 21, 1991, *Federal Register* (56 FR 11980), and in the same notice, opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period ended on April 22, 1991. The scheduled public hearing was not held as no one requested an opportunity to provide testimony.

OSM announced receipt of the proposed amendment #91-8 in the August 9, 1991, *Federal Register* (56 FR 37868) and in the same notice, opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period ended on September 9, 1991. The scheduled public hearing was not held as no one requested an opportunity to provide testimony.

OSM announced receipt of the proposed amendments submitted under SEA 121 (P.L. 108-1988) in the May 10, 1988, *Federal Register* (53 FR 16560), and in the same notice, opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period ended on June 9, 1988. The scheduled public hearing was held on June 6, 1988.

OSM announced receipt of amendment 91-7 in the July 9, 1991, *Federal Register* (56 FR 31093), and in the same notice, opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period ended on

August 8, 1991. The scheduled public hearing was not held as no one requested an opportunity to provide testimony.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment to the Indiana program. Revisions which are not discussed below concern nonsubstantive wording changes.

1. IC 13-4.1-1-3 Definitions

a. Higher or Better uses

Indiana proposes to add this definition to mean postmining land uses that have a higher economic value or nonmonetary benefit to the landowner or the community than the premining land uses. The Director finds that the proposed definition is identical to and no less effective than the Federal definition of "higher or better uses" at 30 CFR 701.5.

b. Substantial Legal and Financial Commitments in a Surface Coal Mining Operation

Indiana proposes to add this definition to mean, for purposes of IC 13-4.1-14 (the Indiana provisions concerning designation of lands unsuitable for surface coal mining) significant investments that have been made on the basis of a long term coal contract in power plants, railroads, coal handling facilities, preparation facilities, extraction facilities, or storage facilities, and other capital intensive activities, such as the following:

(A) Improvements or modification of coal lands within, for access to, or in support of surface coal mining and reclamation operations.

(B) Acquisition of capital equipment for use in, for access to, or for use in support of surface coal mining and reclamation operations.

The proposed definition is nearly identical to part of the counterpart Federal definition at 30 CFR 762.5, and differs in two respects. The proposed language which provides that significant legal and financial commitments means that significant investments have been made on the basis of a long term coal contract is substantively identical to Federal language at 30 CFR 762.5. The proposed rule differs from the Federal language in that the proposed rule provides examples of "other capital intensive activities" which qualify under the proposed definition because they are based on a long term coal contract. The Federal definition does

not provide such examples. However, the examples provided are not inconsistent with the Federal definition and similar language has been approved by OSM for use in other regulatory programs (for example, Kentucky; 50 FR 47728, November 11, 1985). The Federal definition also contains language which clarifies that costs of acquiring the coal in place, or the right to mine it alone without other significant investments based on a long term contract are not sufficient to constitute substantial legal and financial commitments. The proposed definition does not contain this clarification. However, the implementing definition in the Indiana regulations at 310 IAC 0.5-122 does contain the clarification that costs of acquiring the coal in place or of the right to mine it without significant investments that have been made on the basis of a long term coal contract, alone are not sufficient to constitute substantial legal and financial commitments. Therefore, the Director finds that the proposed definition, in concert with the implementing definition at 310 IAC 0.5-122, is no less effective than the Federal definition.

2. IC 13-4.1-2-4 Petition to Promulgate, Amend or Repeal Rule; Procedure

Throughout this provision Indiana is proposing to substitute the word "adopt" in place of "promulgate." This change does not render the section less stringent than section 201 of SMCRA.

Indiana proposes to add a new subsection (c) to provide that a petition must specify the petitioner's proposed adoption, amendment, or repeal of a rule. This is in accordance with section 201(g)(2) of SMCRA, which requires that the petition "shall set forth the facts which it is claimed established that it is necessary to issue, amend, or repeal a rule under this Act."

In addition, Indiana proposes to add a sentence to subsection (d) (formerly subsection (c)) to provide that the Natural Resources Commission (NRC) may not hold a public hearing if the petition is incomplete. This is consistent with 30 CFR 700.12(c), which gives the regulatory authority discretion in granting a hearing (50 FR 14902, 14917; March 13, 1979).

3. IC 13-4.1-3-3(a)(13) Application for Permit; Maps

Indiana proposes to amend IC 13-4.1-3-3(a)(13) which currently requires the applicant to identify on maps all manmade features and significant archaeological and historic sites. The proposed language requires the identification of all manmade features and archaeological and historical sites

known by the Division of Historic Preservation and Archeology (DHPA) of the IDNR. In its submittal of this amendment, Indiana stated that deletion of the term "significant" means that all archaeological and historic sites must be shown on a map, not just those which may be "significant."

The proposed provision limits the information on archeological and historical sites to that known by the DHPA. In a similar vein, several commenters to analogous proposed Federal regulations at 30 CFR 779.12 (52 FR 4258; February 10, 1987) concerning required permit information asserted that permit applicants should be required to obtain information not only from the State Historic Preservation Officer, but also from relevant professional and amateur societies, museums, universities, and other appropriate experts. In response, OSM stated that it is unduly burdensome and unnecessary to place this requirement on permit applicants. State Historic Preservation Officers are the official representatives of historic resources in the States. As such, they can be expected to possess the relevant information concerning such resources. In Indiana, the DHPA can be expected to possess such information.

In the meeting held on September 17, 1992 (Administrative Record Number IND-1155), the IDNR acknowledged that all sources of information must be considered for a permittee to meet the Indiana cultural and historic resources protection requirements. Under the process developed by the IDNR, a permittee would request the comments and evaluation of the IDNR's Division of Historic Preservation and Archeology (DHPA). The DHPA would conduct a search and evaluation to describe and identify the nature of cultural, archeological, and historic resources in or within 1,000 feet of the proposed permit area. If the DHPA has sufficient information to describe and identify the resources, the DHPA will provide its findings to the permittee. If the DHPA determines that it does not have sufficient information to describe and identify the resources, the DHPA will send its findings, in writing, to the IDNR's Division of Reclamation and to the permittee. In Indiana, the director of the IDNR is the State Historic Preservation Officer, and the State Historic Preservation Officer's duties regarding the Indiana program are carried out by the Chief, Division of Historic Preservation and Archeology. The Division of Reclamation will evaluate all the information obtained (from the permittee, the DHPA, and the Division of Reclamation archeologist). If

the Division of Reclamation concludes that additional information is needed, the Division of Reclamation will require the permittee to obtain the information. In addition, the IDNR asserted that protection is also provided to Indiana's cultural and historic resources in that all permit decisions of the IDNR are subject to the Indiana program's public review provisions.

In consideration of the information above, the Director concludes that the IDNR has an established process by which the IDNR can assure that each application will describe and identify the nature of cultural, archeological, and historic resources and that such descriptions and identifications shall be based on information from all available sources.

Therefore, the Director finds that the proposed provision is no less stringent than SMCRA at section 507(b)(13) and no less effective than the Federal regulations at 30 CFR 779.12.

4. IC 13-4.1-3-3.1 Archeological and Historic Sites; Additional Information for Permit

This new section is added to authorize the director of IDNR to require an applicant to submit additional information concerning the identity, location and nature of archeological and historic sites in or within 1,000 feet of the permit area in accordance with rules adopted to implement this provision. The proposed provision requires that the rules developed by the Indiana Natural Resources Commission (NRC) to implement IC 13-4.1-3-3.1 shall provide that the director of IDNR may require a permit applicant to identify and evaluate important archeological and historic sites through searches of the records of research institutions and the DHPA, field investigations, or other appropriate investigations according to standards incorporated in the rules. The provision also requires that the rules developed by the NRC to implement this provision must be consistent with the principles set forth in IC 13-4.1-4-3.1(c).

The proposed provision differs from the Federal regulations at 30 CFR 779.12(b) and 783.12(b) in that the proposed Indiana provision only requires the permit applicant to submit additional information concerning archeological and historical sites for sites that are within 1,000 feet of the permit area. The Federal regulations use the term "adjacent area" rather than limiting the required information to that within 1,000 feet of the permit area. In its April 19, 1991, explanation of the purpose of the proposed rules, Indiana stated that the 1,000-foot criterion is a

reasonable extent beyond the mine permit boundary and that all underground mining shadow areas, plus a 1,000-foot parameter will be considered. In addition, Indiana pointed out that the permit boundaries must encompass all surface effects and that blasting limits are established for each permit to ensure no damage outside the permit area.

In the preamble to the Federal Register notice in which the term "adjacent area" was approved, OSM noted that the language of the definition was written to rely only on adverse impacts on protected resources, rather than on a particular spatial concept. That is, "[t]he area determined to be within the 'adjacent area' must be defined within the context of the particular resource being evaluated and often will depend upon local conditions. A further resolution of the term will be accomplished either on a permit-by-permit basis or as part of a State program" 48 FR 14814, 14819 (April 5, 1983). Indiana has decided to establish "adjacent area" on a programmatic basis in a State program" by using 1,000 feet. 48 FR at 14818. This is no less effective than the Federal regulation because the State is allowing flexibility in its application of the 1,000 feet parameter. Indiana's use of the 1,000-foot criterion is reasonable for the purpose of information to be included in the permit application by the applicant.

Such flexibility was explained in the meeting held on September 17, 1992 (Administrative Record Number IND-1155). The IDNR clarified that the proposed 1,000-foot limit: (1) Does not prohibit the DHPA and the IDNR from reviewing information pertaining to resources which may be beyond the 1,000-foot limit; (2) does not prohibit the DHPA from recommending to the Division of Reclamation that additional information is needed to protect resources which may be beyond the 1,000-foot limit; and (3) does not prevent the IDNR from requiring additional information to identify and protect resources which may be beyond the 1,000-foot limit. In addition, the IDNR stated that the Indiana program contains requirements that a permittee prevent off-site impacts. This would include impacts due to subsidence and blasting. The IDNR asserted that the shadow area of an underground mine is part of the approved permit area. Other known features are identified up to 1,000 feet beyond the permit boundary which would include historic structures. The 1,000-foot distance beyond the permit boundary would contain any subsidence because of

Indiana's geological conditions. The Indiana program's blasting rules protect resources beyond the 1,000-foot limit. Such standards could involve the control of ground vibration, fly rock, and air blast.

The Director finds, therefore, that the proposed provision at IC 13-4.1-3-3.1 is no less effective than the Federal regulations at 30 CFR 779.12(b).

5. IC 13-4.1-4-2 Objections; Informal Conference or Public Hearing

Indiana proposes to amend subsection (a) by adding language which provides that a request for an informal conference under subsection (a) must:

(1) State specifically the objections of the person requesting the conference; and

(2) If the person requesting the conference is not the officer or head of a Federal, State, or local governmental agency or authority, identify the interest of the person who is or may be affected by the proposed operation.

SMCRA at section 513(b) and the implementing regulations at 30 CFR 773.13(c) provide that any person having an interest which is or may be adversely affected shall have the right to file written objections and request an informal conference. Section 773.13(c) goes on to provide that the requestor must summarize the issues. The proposed amendment would add to the counterpart Indiana provisions a requirement that the requestor must specifically identify both their objections and the interest which is or may be affected by the proposed operation. While there are no direct counterparts in SMCRA or the Federal regulations to the proposed requirements that a person identify their objections and interest which may be affected, the Director finds that such a requirement is not inconsistent with SMCRA and the Federal regulations and is, logically, implicit in the Federal provisions. That is, where SMCRA at 513(b) provides that a person may "file written objections," it is a reasonable interpretation that "written objections" include statements which identify the objections and the interest which may be adversely affected.

Indiana is also proposing to amend subsection (b) to add new paragraphs (2) and (3). Paragraph (2) provides that the NRC may not hold a conference if the request fails to comply with the requirements of subsection (a). Paragraph (3) provides that the NRC may not hold a conference if the objections do not concern a matter within the scope of IC 13-4.1 or the rules established by the NRC. There are no direct Federal counterparts to the

proposed language. The Director finds, however, that the proposed language is consistent with the new provisions proposed for subsection (a), and is not inconsistent with SMCRA and the Federal regulations. As stated above, it is a reasonable interpretation that "written objections" include statements which identify the objections and the interest which may be adversely affected. If such objections are not provided or if those objections do not concern matters within the scope of SMCRA, the regulatory authority would have no basis to act.

6. IC 13-4.1-4-3.1 Listing on NRHP or Indiana SRHSS

This new section is added to provide for the consideration of National Register of Historic Places (NRHP) and Indiana State Register of Historic Sites and Structures (SRHSS) resources in permit approvals, rules, and the availability of grants.

Indiana has added subsection (a) to provide that the director of IDNR not approve a permit application unless the director of IDNR states in writing that the director of IDNR has considered the effects of the proposed mining operation on any place listed on or eligible for listing on the NRHP or the Indiana SRHSS. The changes will afford the same protection to State Register sites as is provided to National Register sites. The Director finds these changes to be substantively identical and no less effective than the Federal regulations at 30 CFR 773.15(c)(11) which require such a finding concerning the NRHP.

Indiana proposes to add subsection (b) to provide that the director of the IDNR may impose conditions on a permit for the protection of properties or sites listed on or eligible for listing on the NRHP or the Indiana SRHSS requiring that mining operations not occur in the areas occupied by the properties or sites or that measures be implemented to mitigate the effects of the operation upon those properties or sites before mining.

SMCRA at section 522(e) provides that no surface coal mining operations, except those which exist on the date of enactment of SMCRA or which are subject to valid existing rights, shall be permitted which will adversely affect any publicly-owned park or places included in the NRHP unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the historic site. That is, section 522(e) prohibits mining which will adversely affect NRHP sites.

The implementing Federal regulations at 30 CFR 780.31(b) and 784.17(b) provide that the regulatory authority

may require the applicant to protect historic or archeological properties listed on or eligible for listing on the NRHP through appropriate mitigation and treatment measures. The proposed Indiana language provides the regulatory authority with the authority to require the applicant to take appropriate mitigation or treatment measures. The Indiana language is, therefore, consistent with SMCRA and the Federal regulations.

Subsection (c) of IC 13-4.1-4-3.1 is added to provide a list of general principles which are intended to guide the implementation of section IC 13-4.1-4-3.1. The proposed provision contains the following general principles: (1) The NRC's rules may not prohibit the use of information from any source and shall recognize the responsibilities of the State Historic Preservation Officer (SHPO) under IC 14-3-3.4-3 and IC 14-3-3.4-6. This provision is consistent with SMCRA, and the Federal regulations at 30 CFR 779.12(b)(1) which provide that permit applications shall describe the nature of cultural, historic, and archeological resources using all available information including information from the SHPO and from local archeological, historical, and cultural preservation agencies. See Finding 3, above, for additional information concerning Indiana's proposed process for implementing this provision.

Proposed principle 2: The NRC's rules must provide for participation by professional and amateur archeologists or related experts in any field investigations, studies, or records searches required by the director of IDNR under IC 13-4.1-4-3.1. This provision is consistent with SMCRA and the Federal regulations at 30 CFR 779.12 which requires descriptions of the nature of cultural, historic, and archeological resources be based on all available information. See Finding 3, above, for additional information concerning Indiana's proposed process for implementing this provision.

Proposed principle 3: The NRC's rules must strive to ensure that field investigations and studies are required only where a substantial likelihood exists that important and significant archeological or historic sites are present. The Federal regulations at 30 CFR 779.12(b)(2) and 783.12(b)(2) provide that the regulatory authority may require the applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the NRHP, through the conduct of field investigations. In the preamble to these Federal applications OSM stated that in general,

the regulatory authority should strive to limit survey requirements to situations in which there is a substantial likelihood of important resources being found (52 FR 4257-59; February 10, 1987). OSM also stated that it is appropriate for the regulatory authority to make such decisions on a case-by-case basis. The Director finds, therefore, that the proposed provision is consistent with SMCRA and the Federal regulations.

Proposed principle 4: In considering impacts on a property or site eligible for listing on the NRHP, the director of IDNR shall consider: (A) Based on information available from the DHPA, the relative importance of the property or site compared to others in Indiana listed on or eligible for listing on the NRHP; and (B) The cost of an investigation of the permit area or site as estimated by the applicant. A decision that an investigation is not required may not be based on cost alone.

There is no direct Federal counterpart to this section. However, in the preamble to the Federal rules, commenters were concerned that predictive modeling techniques would be precluded and that all historic resources would "be preserved, undisturbed or mitigated at all costs regardless of the sites' historic value in relation to other similar sites outside the impact area" (52 FR 4244, 4250; February 10, 1987). OSM stated that this was not the case and encouraged "regulatory authorities to make decisions concerning historic resources which balances the interest of the public in such resources against the need to mine coal" (52 FR 4250). OSM cited to the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation which "is based on the concept that decisions about historic properties should take place within the historic context of the area, including what other similar resources occur" (52 FR 4250). Thus, Indiana's approach of balancing the relative importance of a site to other sites and the cost of an investigation is that type of flexible approach contemplated by OSM and is therefore not inconsistent with SMCRA and the Federal regulations.

Proposed principle 5: Section IC 13-4.1-4-3.1 does not authorize rules that impair the ownership of any artifacts or other material found on private land. There is no direct Federal counterpart to this provision. However, an analogous situation exists at section 714(g) of SMCRA. Section 714(g) prohibits the increasing or diminishing of property rights. Thus, the provision is not

inconsistent with SMCRA and the Federal regulations.

Proposed section (d) of IC 13-4.1-4-3.1 provides that the Director of IDNR may investigate the possibility of obtaining Federal or private monies to defer the cost of private individuals of measures required by the Director of IDNR under section IC 13-4.1-4-3.1 and may apply for any such monies so identified. While there is no direct Federal counterpart this provision is not inconsistent with SMCRA or the Federal regulations, because it would reduce the cost to the applicant.

Proposed subsection (e) of IC 13-4.1-4-3.1 provides that in making the finding required by section IC 13-4.1-4-3.1, the Director of IDNR shall take into account the general principles set forth in subsection (C) of IC 13-4.1-4-3.1. While there is no direct Federal counterpart this provision is not inconsistent with SMCRA and the Federal regulations.

7. IC 13-4.1-4-5 Notice of Approval or Disapproval of Application; Hearing

Indiana proposes to amend this provision by adding at subsection (c) a provision that the request for a hearing must include an identification of the person's interest that is or may be affected by the approval or disapproval of the application. This proposed change is consistent with other proposed changes discussed above (see Findings 2 and 5 above) which require that a petitioner specify the proposed adoption, amendment, or repeal of a rule (IC 13-4.1-2-4) and that a request for an informal conference under IC 13-4.1-4-2(a) (concerning any person with an interest which is or may be adversely affected by a proposed application) must specify the person's objections and identify the interest which is or may be affected.

There is no direct Federal counterpart to the proposed language. This language can be logically inferred from section 514(c) of SMCRA. This will prevent frivolous appeals by individuals that do not have an adversely affected interest. The Director finds, however, that the proposed language is not inconsistent with SMCRA at section 514(c) and the Federal regulations at 30 CFR 773.13(c).

8. IC 13-4.1-14-1 Lands Unsuitable; Planning

This section is amended at subsection (a)(3) to add the word "any" so the provision provides that no surface coal mining will exist which will adversely affect any publicly-owned park or "any" place included in the NRHP or the Indiana SRHSS or natural landmarks included in the NRHP unless approved

jointly by the director of IDNR and the Federal, State, or local agency with jurisdiction over the park or the historic site. With this amendment, the protection is applied to privately-owned NRHP and Indiana SRHSS sites as well as those publicly owned. Therefore, the Director finds that the proposed amendment is no less effective than the Federal regulations at 30 CFR 761.11(c).

New subsection (b) is added to provide that if valid existing rights exist or joint agency approval is to be obtained under subsection IC 13-4.1-14-1(a)(3), adverse impacts of mining shall be minimized. Subsection (a)(3) provides that no surface coal mining operation may exist which will adversely affect any publicly owned park or any place included in the NRHP or the Indiana SRHSS or natural landmarks included in the NRHP unless approved jointly by the NRC and the Federal, State or local agency with jurisdiction over the park or the historic site. Indiana's rules to implement this provision are provided at 310 IAC 12-2-2(h). The Director finds the proposed language to be substantively identical to the Federal regulations at 30 CFR 780.31(a)(2).

9. Senate Enrolled Act No. 121, Section 8

Indiana has added this non-codified section to Indiana Senate Enrolled Act (SEA) No. 121 to provide that IC 13-4.1-3-3.1 and IC 13-4.1-4-3.1, as added by SEA 121, and the rules adopted under these sections by the NRC may not be enforced if and to the extent that any Federal court holds that SMCRA does not authorize the requirements of records searches, field investigations, or other studies in connection with application for surface coal mining operations. If a Federal court of competent jurisdiction held that such provisions in SMCRA or the Federal regulations are unconstitutional or otherwise invalid, such provisions would be unenforceable by OSM. There is no direct Federal counterpart. This section is similar to another Indiana amendment which OSM approved on July 26, 1982 (see 47 FR 32071). Therefore, the Director finds that the proposed non-codified section will not render the program less effective and is not inconsistent with SMCRA and the Federal regulations.

10. 310 IAC 12-0.5-48 "Fragile Lands" Defined

Indiana proposes to amend this definition by: Changing at subsection 48(3), the term "features" to "formations;" adding a new subsection at 48(4) to read "Paleontological sites;"

and changing at subsection 48(5), "landmark sites" to read "landmarks." The Director finds that these changes are identical to the Federal examples and, therefore, the Indiana definition is no less effective than the Federal definition of "Fragile lands" at 30 CFR 762.5.

11. 310 IAC 12-0.5-59 "Historic Lands" Defined

Indiana proposes to amend this definition by making various changes to the language of the definition so the language is identical to that of the Federal definition at 30 CFR 762.5. The Director finds that the amended definition is substantively identical to the Federal definition.

12. 310 IAC 12-2-1 Areas Where Mining is Prohibited or Limited

a. This provision is amended to add at subsection 1(1) protection for study rivers and study river corridors established in any guidelines pursuant to the Wild and Scenic Rivers Act (16 U.S.C. 1276). This Director finds that the proposed revisions are substantively identical to the Federal regulations at 30 CFR 761.11(a).

b. In subsection 1(3), the words "publicly owned site" are deleted and replaced by the word "place." In the phrase, "publicly owned natural landmarks," the words "publicly owned" are deleted. The words "publicly owned National Register or State Register Site" are deleted and replaced by the word "place." With these changes, the provision extends protection to privately owned places as well as those publicly owned. The Director finds these provisions to be no less stringent than SMCRA at section 522(e)(3) and no less effective than the Federal regulations at 30 CFR 761.11(c).

c. Numerous other nonsubstantive changes are made throughout 310 IAC 12-2-1.

13. 310 IAC 12-2-2 Procedures

a. In subsection 2(c), Indiana proposes to add language to provide that if requested by an agency, the Director of IDNR may extend the 30-day response period by an additional 30 days. The proposed language also provides that if no response is received within the 30-day period, or 60-day extended period, the Director of IDNR may make necessary determinations based upon the information available. The Federal regulations at 30 CFR 761.12(b)(2) also provide that the National Park Service or the U.S. Fish and Wildlife Service shall be notified of any request for a determination of valid existing rights pertaining to areas within the

boundaries of areas under their jurisdiction and shall have 30 days from receipt of the notification in which to respond. In the meeting held on September 17, 1992 (Administrative Record Number IND-1155), the IDNR stated that under 310 IAC 12-3-106(e)(1), the U.S. Fish and Wildlife Service and the National Park Service would be notified of any request for a determination of valid existing rights pertaining to areas within the boundaries of areas under their jurisdiction. The Director finds that the proposed language is substantively identical to the Federal regulations at 30 CFR 761.12(b)(2). In addition, the Director finds that notification of the U.S. Fish and Wildlife Service and the National Park Service under 310 IAC 12-3-106(e)(1) is no less effective than the Federal regulations at 30 CFR 761.12(b)(2) which requires such notice.

b. Subsection 2(h) is amended in two places by deleting the word "site" and adding in its place the word "place." The counterpart Federal regulations at 30 CFR 761.12(f)(1) also use the word "place." Therefore, the Director finds that the proposed changes are no less effective than the Federal regulations.

Subsection 2(h)(2) is amended by adding that the Director of IDNR, upon request by the appropriate agency, may grant an extension to the 30-day period for an additional 30 days. The Director finds that the proposed language is substantively identical to the Federal regulations at 30 CFR 761.12(f)(1) which also authorize granting a 30-day extension to appropriate agencies.

c. Subsection 2(i) is amended to provide that if 310 IAC 12-2-2(h) applies a permit for surface coal mining operations shall not be issued unless jointly approved by all affected agencies. The Director finds that the proposed amendments are substantively identical to and no less effective than the counterpart Federal regulations at 30 CFR 761.12(f)(2).

d. Subsection 2(k) is amended to delete the phrase "the date of enactment" and to add in its place "August 3, 1977." This change precisely, and clearly, places August 3, 1977, as the date of enactment (of SMCRA). The Director finds the change to be consistent with and no less effective than the counterpart Federal language at 30 CFR 761.12(h) which uses the phrase "date of enactment."

Subsection 2(k) is amended by adding that a determination under subsection 2(k) is also subject to the administrative orders and procedures under IC 4-21.5. The Director finds the proposed language is consistent with and no less effective than the Federal regulations at

30 CFR 761.12(h) which provide that such a determination shall be subject to administrative and judicial review under 30 CFR 775.11 and 775.13.

Subsection 2(k) is also amended to change two incorrect references to Federal regulations to the correct citations. The Director finds the proposed changes are no less effective than the counterpart Federal regulations at 30 CFR 761.12(h).

14. 310 IAC 12-3-13 *Exploration of More Than 250 Tons; Special Requirements*

This section is amended to add a requirement at new subsection (a)(1) that an application for exploration operations removing more than 250 tons shall include a statement of why extraction of more than 250 tons of coal is necessary for exploration. The Director finds that this addition is substantively identical to the Federal regulations at 30 CFR 772.12(b)(7).

Subsection (a)(3)(A)(i) is amended by deleting language which specifies that information concerning surface topography, geological, surface water, and other physical features should be included in the required narrative. The Director finds that the deletion of the language does not render the Indiana provision less effective than the counterpart provision at 30 CFR 772.12(b)(3) which also requires a description of an exploration area, but which does not specify the details of its content.

Subsection (a)(3)(A)(iv) is amended to require a narrative description of cultural, archeological, or historic resources listed or eligible for listing on the NRHP or the Indiana SRHSS, and any other information which the director of IDNR may require regarding known or unknown cultural, archeological, or historic resources consistent with 310 IAC 12-3-29 or 310 IAC 12-3-67. The Director finds these changes to be substantively identical to the counterpart Federal regulations at 30 CFR 772.12(b)(8).

Subsection (a)(3)(C) is amended to require that the exploration and reclamation plan include the estimated amounts of coal to be removed and a description of the methods used to determine these amounts. The Director finds this proposed language to be substantively identical to the Federal regulations at 30 CFR 772.12(b)(6).

Subsection (a)(4) is amended to add language which provides that each application for approval of exploration operations shall include, if the surface is owned by a person other than the applicant, a description of the basis upon which the applicant claims the

right to enter that land for the purpose of conducting exploration and reclamation. The Director finds the proposed language to be substantively identical to the counterpart Federal language at 30 CFR 772.12(b)(13).

Numerous other nonsubstantive changes are proposed for 310 IAC 12-3-13 which the Director finds to be no less effective than the Federal regulations at 30 CFR 772.12.

15. 310 IAC 12-3-29 (Surface) and 310 IAC 12-3-67 (Underground) *Permit Applications; Cultural and Historic Resources*

Subsections (a) are amended to require that each application describe and identify the nature of cultural, archeological, and historic resources in or within 1,000 feet of the proposed permit area. The description shall be based on information obtained from the DHPA. In its submittal of these amendments, Indiana stated that the 1,000-foot criterion was added to more specifically define the term "adjacent areas," as used at 30 CFR 779.12(b)(1).

The Federal regulations at 30 CFR 701.5 define "adjacent area" as the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed mining operations, including probable impacts from underground workings. In a preamble discussion of the definition of "adjacent area," OSM stated that the size of the adjacent area could vary on a case-by-case basis depending upon whether impacts on water, fish and wildlife, cultural resources, or others are being considered (48 FR 14818, April 5, 1993). OSM also stated that, alternatively, the size of the adjacent area could also be established on a programmatic basis in a State program. Indiana has chosen to establish the size of the adjacent area concerning cultural resources on a programmatic basis. That is, Indiana has concluded that 1,000 feet is the area within which cultural resources in Indiana could be adversely impacted by mining operations. In its April 19, 1991, explanation of the 1,000-foot criterion, Indiana asserted that the criterion is justified because: (1) Permit boundaries must encompass all surface effects; (2) Blasting limits are established for each permit to ensure no damage; (3) All underground mining shadow areas, plus the 1,000-foot perimeter are considered; and (4) the 1,000-foot limit is a reasonable extent beyond a mine permit boundary. For additional information concerning the 1,000-foot limit, see Finding 4, above.

As discussed above in Finding 4, the Director finds that Indiana's use of the 1,000-foot criterion is reasonable. Therefore, the Director finds that the proposed 1,000-foot criterion at 310 IAC 12-3-29/67(a) is no less effective than the Federal regulations at 30 CFR 779.12(b) and 783.12(b).

Subsections (a) also provide that the description of the nature of cultural, archeological, and historic resources shall be based on information obtained from the Indiana DHPA. As discussed above in Finding 3, OSM has concluded that SHPO's are the official representatives of the historic resources in the States. As such, they can be expected to possess the relevant information concerning such resources. In Indiana, the DHPA can be expected to possess such information. Where the DHPA determines that it does not possess the relevant information, the IDNR has established procedures to follow:

(1) The DHPA will provide its findings to the Division of Reclamation, in writing; and

(2) The Division of Reclamation would then determine, based on all the available information from the permittee, the DHPA, and the Division of Reclamation's archeologist, if the permittee would be required to provide additional information.

Under Indiana's proposed system, all sources of information would be considered. Therefore, the Director finds that the proposed language which provides that such descriptions shall be based on information obtained from the DHPA is no less effective than 30 CFR 779.12.

Subsections (b) have been added to provide that the Director of IDNR shall require the permit applicant to submit additional information to describe and identify the nature of cultural, archeological, and historic resources when the Director of IDNR determines that sufficient information is not available from the DHPA to identify the nature of such resources. The proposed language also identifies commonly known information sources but does not exclude any sources of information. See Finding 3, above, for additional information concerning this process, the IDNR, and the DHPA.

The Federal regulations at 30 CFR 779.12(b) require the applicant to identify the nature of cultural, historical, and archeological resources within the proposed permit and adjacent areas, and that such description shall be based on all available information. The Director finds (also see Finding 3, above) that the

proposed language at subsections (b) will assure that all information is considered and, therefore, the proposed subsections are no less effective than 30 CFR 779/783.12(b).

Subsections (c) are added to provide that if, based upon the written comments of the DHPA and other sources, the director of IDNR determines there is a substantial likelihood that there are undiscovered archeological or historic sites that may be eligible for listing on the NRHP or the Indiana SRHSS that would be adversely affected by surface coal mining operations, the director of IDNR may require the applicant to identify and evaluate the nature of such resources through any of the following: (1) Collection of additional information; (2) conduct of field investigations; and (3) other appropriate analyses. The counterpart Federal regulations at 30 CFR 779/783.12(b)(2) provide that the regulatory authority may require the applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the NRHP, through: (1) Collection of additional information, (2) conduct of field investigations; or (3) other appropriate analyses. In the preamble to these Federal regulations, OSM stated that it is appropriate for the regulatory authority to make such decisions on a case-by-case basis. The Director finds, therefore, that the proposed Indiana language at 310 IAC 12-3-29/67(c) is substantively identical to the Federal regulations at 30 CFR 779/783.12(b)(2).

Subsections (d) are added to provide that the Director of IDNR may require an applicant to evaluate the significance of important archeological and historic sites identified under section 310 IAC 12-3-29/67 through any of the following: (1) Evaluation of records of research institutions and the DHPA; (2) evaluation of written reports; (3) field investigations; and (4) other appropriate investigations. In its submittal of this provision, Indiana asserted that subsections (d) provide for adequate evaluation of the eligibility of resources identified under section 310 IAC 12-3-29/67 to meet NRHP or Indiana SRHSS criteria. As previously discussed above, the Director finds that the proposed language is consistent with and no less effective than the Federal regulations at 30 CFR 779/783.12(b)(2) which provide that the regulatory authority may require an applicant to evaluate important historic and archeological resources that may be eligible for listing on the NRHP.

Subsections (e) as added to provide that projects to identify or evaluate cultural resources required by

subsections 310 IAC 12-3-29(b), (c), or (d) and 12-3-67(b), (c), or (d) shall be conducted in accordance with the standards established under 310 IAC 19-3. 310 IAC 19-3 provides standards for investigation that will be required whenever projects to identify or evaluate cultural or historic resources are necessary. There is not direct Federal counterpart to this section. However, the Federal rules contemplate flexibility such as this. Thus, the Director finds that the proposed rules are consistent with and no less effective than the Federal regulations at 30 CFR 779.12(b).

16. 310 IAC 12-3-38 (Surface) and 310 IAC 12-3-75 (Underground) Permit Applications; Environmental Resources; Maps

In addition to numerous nonsubstantive changes, these sections include the following substantive changes. Subsections 310 IAC 12-3-38/75(9) (A) and (B) (formerly subsections (i)) have been amended to provide that the permit application shall include maps showing any cultural, archeological, or historic resources listed, or eligible for listing, in the NRHP or the Indiana SRHSS. Prior to these amendments, the provisions did not require information concerning resources eligible for such listing. The Director finds that the amended language is substantively identical to the counterpart Federal regulations at 30 CFR 779/783.24(i).

Indiana has also amended 310 IAC 12-3-38/75(9)(C) to provide that the required maps shall also show all archeological and historic sites known by the DHPA within the permit and adjacent area. Prior to this amendment, these provisions required information concerning all known archeological sites within the permit and adjacent area.

As discussed above in Finding 3, the DHPA is the State's official clearinghouse of the historic resources in Indiana. As such, the DHPA can be expected to possess much of the relevant information concerning such resources. Also, as discussed in Finding 3 above, where the DHPA does not possess the relevant information, the IDNR has established procedures which should assure that all relevant information is obtained and considered by the IDNR. Under the proposed amendments at 310 IAC 12-3-29/67 (c) and (d), the director of IDNR may require the applicant to provide additional information from other sources if the DHPA determines that it has insufficient information. Therefore, the Director finds that the proposed

amendments are no less effective than the Federal regulations at 30 CFR 779/783.24(i).

17. 310 IAC 12-3-52 (Surface) and 310 IAC 12-3-84 (Underground) Permit Applications; Reclamation Plan; Protection of Public Parks and Historic Lands

Subsections (a) are amended to provide that for any public parks or any historic lands listed on the NRHP or the Indiana SRHSS that may be adversely affected by the proposed operations the submitted plan shall describe the measures to be used: (1) To prevent adverse impacts; or (2) If valid existing rights exist or joint agency approval is to be obtained under 310 IAC 12-2-1(3) to minimize adverse impacts.

The proposed language is nearly identical to the counterpart Federal regulations at 30 CFR 780.31(a) and 784.17(a) with one exception. Where the proposed language reads "or any historic lands" listed on the NRHP, the counterpart Federal regulations read "or any places" listed on the NRHP. That is, the proposed language reads "historic lands" where the Federal language reads "places."

Indiana defines "historic lands" at 310 IAC 12-0.5-59, and that definition is substantively identical to the Federal definition of "historic lands" at 30 CFR 762.5 (see Finding 11 above). Indiana defines "historic lands" to mean, for the purposes of 310 IAC 12, areas containing historic, cultural, or scientific resources. The phrase "historic, cultural, or scientific resources" would include structures, artifacts, and objects in addition to actual land.

The Director finds, therefore, that the proposed language at 310 IAC 12-3-52/84(a) is no less effective than the Federal regulations at 30 CFR 780.31(a) and 784.17(a).

Subsection (b) is added to provide that the Director of IDNR may impose conditions that require the applicant to protect historic or archeological properties listed on or eligible for listing on the NRHP or the Indiana SRHSS through appropriate mitigation and treatment measures consistent with the standards established under 310 IAC 19-3. Mitigation and treatment measures must be approved by the Director of IDNR after consideration of the comments of the DHPA. Subsection (b) further provides that required measures that avoid impacts must remain in place throughout all mining and reclamation operations. Required measures that involve the mitigation of impacts through excavation or documentation may be taken after

permit issuance provided that they are completed before the property is affected by any mining operation.

The Indiana rule differs from the Federal rule in several ways. Indiana provides for mitigation and treatment measures consistent with the standards established under 310 IAC 19-3. Throughout the cultural and historic resources rules, there is a constant theme of flexibility. The State regulatory authority is free to choose its method that will fulfill the minimum requirements set forth by SMCRA and its implementing regulations. The Director concludes that Indiana has adopted a reasonable approach that fulfills the minimum Federal requirements.

The Indiana rule also is different than the Federal rules in that mitigation and treatment measures must be approved by the Director after consideration of the comments of the DHPA. This difference is superficial. The Federal rules require that the SHPO be "notified of each permit application and given an opportunity to comment." 52 FR at 4249. While the DHPA is not the SHPO, it is the Indiana agency which houses the archeological, cultural and historic resources information. Thus, Indiana is explicitly stating what the Federal rule impliedly states.

The Indiana rules also require that all measures must remain in place throughout the mining and reclamation operations. Again, the Indiana rule is explicitly stating what the Federal rule implies. It would not be logical to remove protective measures until mining was completed. Otherwise, such protection may be ineffective since damage could occur at any point in the mining operation.

Finally, Indiana requires that excavation or documentation must be completed before the property is affected by any mining operation. The Federal rule is more general in its language. It states that appropriate mitigation and treatment measures must be completed before the property is affected. OSM has determined that Indiana's measures are appropriate and will protect the properties. Therefore, the Director finds the proposed language is no less effective than the Federal regulations at 30 CFR 780.31(b) and 784.17(b).

18. 310 IAC 12-3-112 Permit Approval or Denial

In addition to several nonsubstantive changes, Indiana proposes to add new subsection (p) concerning a required written finding for permit approval. Under subsection (p) the Director of the IDNR must make a written finding that

the effect of the proposed mining operation on properties or sites eligible for listing on the NRHP or the Indiana SRHSS has been taken into account. Indiana also provides that this finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan to protect these properties or sites, or by a documented decision that no additional protection measures are necessary. The proposed language is substantively identical to the counterpart Federal regulations at 30 CFR 773.15(b)(1) except that where the Federal regulation provides for properties "listed on and eligible for listing on" the NRHP, Indiana provides for properties "eligible for listing on" the NRHP or Indiana SRHSS. However, the governing Indiana statute at IC 13-4.1-4-3.1(a) provides that the Director of the IDNR may not approve a permit application unless the Director of the IDNR states in writing that the Director has considered the effects of the proposed mining operation or any place "listed on or eligible for listing on" the NRHP or the Indiana SRHSS. Therefore, the Director finds that the proposed rule language in concert with the governing statute is no less effective than the Federal regulations.

Indiana also proposes to add to subsection (p) that the Director of the IDNR in making the finding required by subsection (p) must take into account: (1) The relative importance of the property or site to other properties or sites based upon information available from the DHPA; and (2) the estimated cost of any treatment or mitigation measures required by the Director of the IDNR. The estimate shall be provided by the applicant and shall be prepared by a person qualified as a principal investigator at 310 IAC 19-3-4. The estimate shall be accompanied by the scope of work and any other documents that provide the basis for the estimate. Indiana further provides that a decision that treatment or mitigation measures are not required shall not be based on cost alone. As discussed above at Finding 6, above, concerning the proposed statutes which govern these rules, Indiana's approach of balancing the relative importance of a site to other sites and the cost of an investigation is that type of flexible approach contemplated by OSM. The Director finds, therefore, that the proposed rules are not inconsistent with SMCRA and no less effective than the Federal regulations.

19. 310 IAC 12-3-121

Permit Revisions

In addition to numerous nonsubstantive changes throughout this section, Indiana proposes to add new subsection (d)(7).

Proposed subsection (d)(7) provides that the Director of IDNR may require an applicant for an incidental boundary revision to protect, within the expanded boundaries, any historic or archeological properties listed or eligible for listing on the NRHP or the Indiana SRHSS to prevent or minimize adverse impacts through appropriate mitigation and treatment measures. In the meeting held on September 17, 1992 (Administrative Record Number IND-1155), Indiana clarified that the IDNR can require the identification of properties listed or eligible for listing on the NRHP or the Indiana SRHSS within the expanded boundaries of an incidental boundary revision under 310 IAC 12-3-121(d)(4) (B) and (C). There is no direct Federal counterpart to the proposed language. Neither section 511(a) of SMCRA nor 30 CFR 774.13(d) define incidental boundary revision. However, the Director finds that the proposed language is not inconsistent with SMCRA or the Federal regulations.

IV. Summary and Disposition of Comments

Agency Comments

Pursuant to section 503(b) of SMCRA and 30 CFR 732.17(h)(11)(i), comments were solicited from various interested Federal agencies.

1. *Rules proposed under amendment #91-8.* The U.S. Environmental Protection Agency (EPA) responded and concurred without comment. The U.S. Fish and Wildlife Service and the Bureau of Mines also responded and had no comments. The Advisory Council on Historic Preservation (ACHP) expressed objections to 310 IAC 12-3-29 and 12-3-38 which leave decisions about the need for identification and evaluation of archeological properties to the discretion of the Director of IDNR. This, ACHP asserts, places the burden of identification on the State Historic Preservation Officer (SHPO). It is appropriate and consistent with the Federal regulations that the decisionmaking is discretionary. The Federal historic rules are "designed to allow regulatory authorities maximum flexibility in adopting procedures which are suitable for conditions existing in the individual States. The rules emphasize reasonable decisionmaking about historic resources without

specifying all the means by which State regulatory authorities choose to achieve the specified results" (52 FR 4244, 4246; Feb. 10, 1987). "[T]his will require regulatory authorities to use judgment in determining what is an appropriate action in a specific case, this approach will allow each regulatory authority to develop procedures best suited to the individual circumstances of its State" (52 FR at 4249). In addition, the Director notes that in Indiana, the Director of IDNR is the SHPO, but it is the DHPA which houses the archeological, cultural and historic resources information. The DHPA is responsible for providing written recommendations to the SHPO concerning archeological, cultural, and historical resources. Rather than being a burden, it is a primary function of the DHPA.

The ACHP commented that none of the regulations set forth by Indiana require other than "consideration" of any comments from the DHPA. That is, there are no provisions for formal consultation with the DHPA to ensure that historic properties are fully considered in the permitting process. A similar comment was raised in the Federal rules. Commenters wanted OSM to include a formal role by the SHPO in the permitting process. OSM responded by stating the role of the SHPO is important but that the SHPO and state regulatory authority are both State agencies and "it is appropriate to leave the details of the consultation processes between them to the individual States" (52 FR at 4249). Thus, the SHPO is only an advisor and not the ultimate decisionmaker (51 at 3805). The ultimate decisionmaker is the State regulatory authority. The Director notes that the proposed rules allow sufficient opportunity for DHPA comment during the permit review process (see Finding 3, above), and that the DHPA can interpose objections to all permit decisions.

ACHP also commented that as for religious or cultural properties significant to Native Americans, not all may be "historic," and thus subject to the proposed Indiana regulations as "historic lands." However, ACHP notes the provisions of the American Indian Religious Freedom Act (Pub. L. 95-341) may apply in some situations.

2. *Statutes proposed.* The EPA concurred without comment, the U.S. Soil Conservation Service and the U.S. Fish and Wildlife Service responded with no comments.

The ACHP expressed concern over Indiana's choice of the word "known" at proposed IC 13-4.1-3-3(a)(13). The ACHP argues that the showing of known sites on maps is "of very little assistance

in making decisions about the impact of surface mining operations on archaeological and historic properties. The vast majority * * * have not been discovered." SMCRA at 507(b)(13) requires the permit applicant to show on a map all "significant known archeological sites existing on the date of application." (Emphasis added.) The regulations at both the Federal and State level are what define and clarify what is meant by their statutes (see 30 CFR 779.12(b) and 310 IAC 12-3-29).

The National Park Service (NPS) commented on IC 13-4.1-1-3 and asserted that the definition of "substantial legal and financial commitments in a surface coal mining operation" is too broad and conflicts with the Federal definition.

According to the NPS, the definition is too broad because Indiana extends the definition to "capital-intensive activities beyond those significant investments related to long-term coal contracts as specified in 30 CFR 762.5." The Director disagrees. As noted in Finding 1(b), above, Indiana has two examples of "capital-intensive activities" that are not listed in the Federal definition. These examples are consistent with Congressional intent. In the preamble to the Federal rule, the Director quoted language from a Senate Report that said: "[i]n order to preclude designation [as unsuitable for mining], it must be established that specific plans and specific contracts for sale of coal and purchase of necessary equipment * * * were in existence on the date of enactment." (Emphasis added) 48 FR 41312, 41327 (September 14, 1983). The Indiana acquisition of capital equipment example, which OSM previously approved in Kentucky, is just that type of necessary equipment purchase that Congress was contemplating. The other example, that of improvement or modification of coal lands, is also a significant investment that is not solely based on the cost of acquiring the coal in place or the right to mine such coal.

Two commenters addressed the term "nature" at IC 13-4.1-3-3.1(a). The ACHP commented that the term "nature of" is misleading since section 106 of the National Historic Preservation Act requires that only "significant" properties that are on or eligible for the NRHP be considered. The Council for the Conservation of Indiana Archaeology, Inc. (CCIA) noted that the term "nature" is not defined and is inappropriate. In response, the Director notes that the term "nature" is used in the Federal regulations at 30 CFR 779.12 concerning permit applications. Also, under the proposed Indiana provision, all cultural and historic sites will be

identified including significant properties on or eligible for listing on the NRHP.

The NPS commented that IC 13-4.1-4-3(a) does not state how the chief of IDNR will consider the effects of the proposed mining operation on historic properties. In response, the Director notes that under the process to be instituted by Indiana under the proposed provisions the Indiana DHPA will provide a written evaluation of the identity and nature of cultural and historic resources. If additional information is needed, the DHPA will so state in writing to the Chief, Division of Reclamation and to the permittee. The Chief, Division of Reclamation will make a final decision, with reliance on the information provided by the DHPA, on a case-by-case basis.

The NPS commented on IC 13-4.1-4-3.1. NPS commented that IC 13-4.1-4-3.1(b) implies that compliance with Federal historic preservation law is optional. The Director disagrees. The proposed language authorizes the imposition of permit conditions to prevent or mitigate adverse effects on places listed or eligible for listing on the NRHP or the Indiana SHRSS. In the proposed rules at 310 IAC 12-3-52(a), Indiana requires that proposed reclamation and operation plans include a description of the measures to be used to prevent or minimize adverse impacts of any historic lands listed on the NRHP or the Indiana SHRSS that may be adversely affected by the proposed operations.

NPS commented that under IC 13-4.1-4-3.1(c)(2) which authorizes the use of amateurs in any field investigation, studies, or records researcher, although it is legitimate to include both amateurs and professionals, such participation should be guided by 36 CFR 61.4 as a means of establishing minimum qualification standards for cultural resource professionals. This issue was raised in a Kentucky amendment and OSM rejected requiring such standards. See 54 FR 51391, 51393 (December 15, 1989). A similar issue was also raised when the Federal rules were proposed. In the Federal rule, a commenter wanted State regulatory authorities to hire qualified professional personnel to conduct any historic resources activities (52 FR 4244, 4251; February 10, 1987). OSM did not agree that such activity needed to be carried out by professionals. "The regulatory authorities are responsible for making reasonable decisions about historic resources and for ensuring that they have been considered in the permitting process. Issuance of a permit requires a finding that they have fulfilled this

responsibility" (52 FR at 4251) (emphasis added). This flexibility in the Federal rules is a constant theme throughout the cultural and historic resources rules. "The rules emphasize reasonable decisionmaking about historic resources without specifying all the means by which State regulatory authorities choose to achieve the specified results" (52 FR 4246). Thus, if Indiana does not want to adopt the standards of 36 CFR 61.4, the State is free to do so as long as there is reasonable decisionmaking that fulfills the minimum requirements set forth by SMCRA and its implementing regulations. The Director concludes that Indiana has adopted a reasonable approach that fulfills the minimum Federal requirements.

ACHP commented that in IC 13-4.1-4-3.1(c)(3) the term "substantial likelihood" is undefined and open to varying interpretations. The Director notes that as discussed in Finding 6, OSM has stated (56 FR 4257; February 10, 1987) that in general, the regulatory authority should strive to limit survey requirements to situations in which there is a substantial likelihood of important resources being found. It is appropriate for the regulatory authority to make such decisions on a case-by-case basis. In addition, the proposed implementing rules at 310 IAC 12-3-29(c) provide that such decisions be based on written comments of the Indiana DHPA. Therefore, Indiana's interpretation of "substantial likelihood" should be consistent with the standards commonly applied in the archeological and historic preservation communities.

The NPS commented that IC 13-4.1-4-3.1(c)(3) should be rewritten to provide that field studies are required where a likelihood exists that archeological or historic sites are present. The Director disagrees. As written, the provision merely strives to limit studies where there is not substantial likelihood that such sites exist. As discussed in Finding 6, above, in the preamble to the counterpart Federal regulations at 30 CFR 779.12(b)(2) and 783.12(b)(2), OSM stated that in general, the regulatory authority should strive to limit survey requirements to situations in which there is a substantial likelihood of important resources being found.

NPS commented that IC 13-4.1-4-3.1(c)(4)(B) should be amended to define factors other than cost, which should also be considered when deciding whether to proceed with field investigations. As discussed in Finding 6, above, there is no direct Federal counterpart to this proposed provision.

However, the Director noted that OSM encourages regulatory authorities to make decisions concerning historic resources which balance the interest of the public in such resources against the need to mine coal. Cost is but one factor a regulatory authority would consider. Although each relevant factor is not proposed for inclusion in the Indiana provisions, such factors will be considered as a consequence of Indiana's proposed provisions which provide for the participation of professional and amateur archeologists, anthropologists, historians or related experts as well as the DHPA.

The U.S. Forest Service (USFS) commented that it is inappropriate at IC 13-4.1-4-3.1(a) to lump language concerning sites "listed on" and "eligible for" listing on the NRHP into one category. The Director notes that IC 13-4.1-14-1(a)(3) and the proposed implementing rules at 310 IAC 12-3-52/84(a) clearly separate the rules for "listed" and "eligible for" sites, and provide clear intent to prevent adverse impacts to NRHP listed sites as do the Federal regulations at 30 CFR 780.31 and 784.17.

The USFS commented that IC 13-4.1-4-3.1(c)(2) which provides for participation by amateurs in archeological investigations seems unnecessarily burdensome for coal companies. In response, the Director notes that the provision merely requires that implementing rules cannot restrict amateurs from participating in any needed archeological investigations.

The USFS commented that in IC 13-4.1-4-3.1(c)(2) the words "substantial likelihood" implies a predictable level of success which is not yet attainable in the Midwest. In response, and as noted above in Finding 6, the regulatory authority should strive to limit survey requirements to situations in which there is a substantial likelihood of important resources being found. To help accomplish this, the regulatory authority should make such decisions on a case-by-case basis.

The USFS commented that at IC 13-4.1-4-3.1(c)(4)(A), the required comparison of the relative importance of a site eligible for listing on the NRHP would be lengthy if indeed they could be made at all. In response, the Director notes that Indiana's requirement that such a comparison be made is not inconsistent with SMCRA and the Federal regulations and that the exact method for implementation is left to the States to decide.

The ACHP commented that proposed IC 13-4.1-4-3.1(c)(5) should be clarified by providing that under this provision, artifacts can be retained by an

appropriate laboratory long enough to complete analysis and reporting, before being returned to their owners. In response, the Director notes that although the provision does not contain such language, the proposed language does not prohibit artifacts being retained for study before being returned to their owners.

The ACHP commented that at IC 13-4.1-14-1, all exclusions based on "valid existing rights" should be deleted. As discussed in Finding 8, above, the proposed language is substantively identical to the Federal regulations at 30 CFR 780.31(a)(2).

Public Comments

The public comment periods and opportunities to request a public hearing were announced as follows: (1) For the proposed statutes in SEA 121, which are provided in Public Law 108-1988, in the May 10, 1988, *Federal Register* (53 FR 16560); (2) For the proposed statutes in amendment 91-1, which are provided in Public Law 104-1990, in the March 21, 1991, *Federal Register* (56 FR 11980); (3) For the proposed rules in amendment 91-8, in the August 9, 1991, *Federal Register* (56 FR 37868), in the August 19, 1991, *Federal Register* (57 FR 37498); and (4) For the proposed rules in amendment 91-7C in the July 9, 1992, *Federal Register* (56 FR 31093). The public comment periods ended on June 9, 1988, April 22, 1991, September 9, 1991, September 3, 1992, and August 8, 1991, respectively. A public hearing was held on June 6, 1988 (Administrative Record Number IND-0579), concerning the proposed statutes in SEA 121. No other public hearing was requested so none was held.

Several commenters believed that proposed IC 13-4.1-3-3 is inconsistent with 36 CFR 800.4 and OSM's regulations because it restricts information to that known by the DHPA, while the Federal regulations require information from all available sources. The purpose of the Federal rules on historic resources was:

[T]o ensure that as part of those [state] programs regulatory authorities have regulations and procedures which enable them to make reasonable and informed decisions about the disposition of important historic resources. The rules are designed to allow regulatory authorities maximum flexibility in adopting procedures which are suitable for conditions existing in the individual States. The rules emphasize reasonable decisionmaking about historic resources without specifying all the means by which State regulatory authorities choose to achieve the specified results. (Emphasis added) 52 FR 4244, 4246; (February 10, 1987).

As discussed in Finding 3, above, the Indiana amendment is no less effective than the Federal regulation. An analogous condition exists at 30 CFR 779.12(b). The Federal regulation at 30 CFR 779.12(b) requires the applicant to describe and identify all cultural, historic and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites. The description is to be based on all available information. Typically, the SHPO "searches" all available sources and not the applicant (51 FR 3802, 3805; January 30, 1986). SHPO's "are the official representatives of historic resources in the States. As such, they can be expected to possess the relevant data concerning such resources. Regulatory authorities can make other provisions in their own programs in those States where this is not the case" (52 FR 4244, 4258-59; February 10, 1987). Indiana has decided to make the DHPA the only source. It is the only source in the sense that the applicant need only go to the DHPA. In reality, the DHPA is collective of all available sources. This choice is what was contemplated by OSM in allowing the State regulatory authorities the flexibility of choosing the means that will achieve the desired result of a well-informed decisionmaker.

Several commenters also contended that the DHPA does not have complete site records. As noted in Finding 3, above, if the DHPA does not have adequate information, it will report such to the Division of Reclamation of the IDNR. The Chief, Division of Reclamation then will decide if it needs additional information. This is not a departure from the Federal regulations (see 30 CFR 779.12(b)(2)). The SHPO or in this case the DHPA is an advisor and not the ultimate decisionmaker (51 FR at 3805). The ultimate decisionmaker is the State regulatory authority. If it determines additional information is needed it will require the applicant to submit additional information through field investigations and the like (also see Finding 15 above).

The Council for the Conservation of Indiana Archeology, Inc. (CCIA) commented that the amended law in IC 13-4.1-3-3.1(a) and IC 13-4.1-4-3.1(b), by using phrases as "may require" and "may impose" allow too great discretion in decisions that are critical to the identification, evaluation, and treatment of archeological resources. In response, the Director notes that Federal regulations at 30 CFR 779.12(b)(2) and 783.12(b)(2) also use such phrases as "may require" in the regulations concerning the identification and

protection of such resources. As contemplated by the Federal rules, this discretion allows the regulatory authority to require additional information or to require the protection of resources if the evidence indicates that such additional information or protection is warranted. The language does not authorize the regulatory authority to disregard the facts and to not require additional information or to not protect when the evidence indicates that such additional information or protection is warranted.

The CCIA commented that under IC 13-4.1-3-3.1(b) it will be difficult to conduct additional investigations or that such investigations will be done in an acceptable manner. In response, the Director notes that in Findings 3 and 15 above, the proposed statutes and rules incorporate a clear process which Indiana will use to meet its obligations concerning the identification and protection of cultural and historic resources. Included within that process is a clear path from the permittee through the DHPA and to the Chief, Division of Reclamation of the IDNR through which decisions can be made concerning cultural and historic resources, including the decision that additional information is needed. The quality of additional investigations can be monitored by the DHPA through review of data and for field investigations is maintained by standards established at 310 IAC 19 concerning archeological investigations.

The CCIA commented that IC 13-4.1-3-3.1(b) uses the undefined phrase "important" and that this term could preclude the identification of unknown archeological sites or evaluation of poorly known sites. CCIA also questioned who will determine what important means. In response, the Director notes that the Federal rule at 30 CFR 779.12(b)(2) also uses the term, "important." The rules implementing this statutory section require that if the director determines that there is a substantial likelihood that there are undiscovered archeological or historic sites that may be eligible for listing on the NRHP or the State Register, then the director may require the applicant to identify and evaluate such resources. See 310 IAC 12-3-29(c). Thus, unknown or poorly known sites will not go unnoticed.

The CCIA stated that SEA 121 severely limits the regulatory authority to require additional information through the imposition of the principles at IC 13-4.1-4-3.1(c). Specifically, the CCIA commented that IC 13-4.1-4-3.1(c)(1) contains circuitous language and should more directly encourage the

use of a broad range of information and that the Indiana program does not have an affirmative provision that the sources listed in the Federal regulations shall be consulted for information. In response, the Director notes this language is enabling in nature, and the regulations, especially 310 IAC 12-3-29, assist in implementing such language.

The CCIA commented that IC 13-4.1-4-3.1(c)(3) uses undefined phrases such as "substantial likelihood," "important" and "significant." The Director notes that the term "important" is also not defined in the Federal regulations. The terms cannot be defined because the Federal regulations contemplate flexibility by the states. The States must make such decisions on a case-by-case basis (52 FR 4258).

The CCIA commented on IC 13-4.1-4-3.1(c)(4)(A), which concerns the relative importance of property or sites listed on or eligible to be listed on the NRHP. The CCIA stated that the proposed language is ambiguous because the NRC must judge the "relative importance" of a site in making decisions. Again, the Federal historic rules contemplate flexibility by the states in achieving the minimum Federal standards. To define the term "relative importance" would not advance any goal because such importance must be decided on a case-by-case basis since resources may be unique in nature. The Director notes that the purpose of the proposed language is to require that the NRC, in drafting rules to implement IC 13-4.1-4-3.1, draft such rules to be consistent with the guidelines at IC 13-4.1-4-3.1(c).

The CCIA commented that IC 13-4.1-4-3.1(c)(4)(B), has two faults: (1) The proposed language allows costs to be estimated by the applicant, and (2) The use of "may not," does not mean the same as "shall not." In response, the Director notes that although the cost of an investigation must be estimated by the applicant, a significant portion of such an estimate would, logically, consist of fee-services information provided to the applicant by professionally qualified and experienced sources. In addition, the DHPA is the agency charged with deciding whether or not estimates provided by an applicant are reasonable. The DHPA, with its duty to the public, could not blindly accept an estimate without first determining if the estimate was reasonable. Regarding the use of the term "may not," the Director notes that there is no direct Federal counterpart to the proposed provision. However, as noted in Finding 6, above, the proposed

language is not inconsistent with SMCRA and the Federal regulations.

The CCIA commented that the proposed statutes don't provide a logical process in protecting and preserving archaeological resources. In response, the Director notes that part of the confusion expressed by CCIA may be resolved by the knowledge that under Indiana's recently passed "sunset law" (Pub. L. 28-1990), the director of IDNR is responsible for approving permits and the NRC adopts the rules. The NRC writes the Indian a SMCRA-implementing rules and the director of IDNR and the DHPA function in accordance with those rules using the process outlined in Finding 3 above.

The Indiana Coal Council, Inc. (ICC) submitted comments and stated that it fully supports Public Law 108-1988 and Public Law 104-1990 and urged OSM to approve them as an amendment to the Indiana program. ICC did not provide comments concerning the rules submitted under amendment 91-8. ICC stated in its letter dated September 6, 1991 (Administrative Record Number IND-0943), that it is inappropriate to submit comments since the proposed rules had not been officially adopted by the State. In response, the Director notes that Indiana submitted the proposed rules as a formal amendment and following established procedures OSM announced the submittal in the Federal Register (56 FR 37868), and requested public comment. In its submittal of the proposed rules, Indiana stated that if in its final rule promulgation process any changes are made to the rules, Indiana would forward the changes to OSM for review and approval. Any such submittals to OSM would be announced in the Federal Register and a comment period would be opened to allow public comment on those changes.

The National Coal Association (NCA) noted that definition of "substantial legal and financial commitments in a surface coal mining operation" at IC 13-4.1-1-3 closely resembles the Federal definition except for the example of an existing but non-producing coal mine. However, the Federal definition also excludes this example. OSM deleted such an example after the court remanded the definition (see 53 FR 26582; July 13, 1988).

V. Director's Decision

Based on the above findings, the Director is approving proposed amendments submitted by Indiana on March 18, 1988, February 15, 1991, by undated letter which was received by OSM on July 10, 1991, by letter dated June 15, 1992, and transferred from amendment 91-7C and as clarified by

Indiana in a meeting with OSM dated September 17, 1992. The Federal regulations at 30 CFR part 914 codifying decisions concerning the Indiana program are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage the states to conform their programs with the Federal standards without delay. Consistency of State and Federal standards is required by SMCRA.

EPA Concurrence

Under 30 CFR 732.17(h)(11)(ii), the Director is required to obtain the written concurrence of the Administrator of the Environmental Protection Agency (EPA) with respect to any provisions of a State program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). The Director has determined that this amendment contains no provisions in these categories and that EPA's concurrence is not required. However, EPA responded to the Director's request for comments and stated that EPA had no comments and that it concurred on the proposed amendments (Administrative Record No. IND-0858 and IND-1034).

VI. Procedural Determinations

Executive Order 12291

On July 12, 1984, the Office of Management and Budget (OMB) granted the Office of Surface Mining Reclamation and Enforcement (OSM) an exemption from sections 3, 4, 7 and 8 of Executive Order 12291 for actions related to approval or conditional approval of State regulatory programs, actions and program amendments. Therefore, preparation of a regulatory impact analysis is not necessary and OMB regulatory review is not required.

Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of the Surface Mining Control and Reclamation Act (SMCRA) (30 U.S.C. 1253 and 1255) and 30 CFR 730.11,

732.13 and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3507 *et seq.*

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal Regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Hence, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 914

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 12, 1992.

Ronald C. Recker,

Acting Assistant Director, Eastern Support Center.

For the reasons set out in the preamble, title 30, chapter VII, subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 914—INDIANA

1. The authority citation for part 914 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 914.15 is amended by adding a new paragraph (pp) to read as follows:

§ 914.15 Approval of regulatory program amendments.

(pp) The following amendments (amendments submitted under Senate Enrolled Act (SEA) 121, Program Amendment Number 91-1 and 91-8, and two proposed amendments transferred from proposed amendment #91-7, (SEA 154) to the Indiana program as submitted to OSM on March 18, 1988, February 15, 1991, and by undated letter received by OSM on July 10, 1991, and amended by letter dated June 15, 1992, respectively and transferred on June 23, 1992 (57 FR 27928), and as clarified by Indiana in a meeting with OSM dated September 17, 1992, are approved, effective December 30, 1992.

Changes to IC 13-4.1-1-3 concerning the definitions of "higher or better uses" and "substantial legal and financial commitments in a surface coal mining operation;" IC 13-4.1-2-4 concerning petition procedures to promulgate, amend, or repeal rules; IC 13-4.1-3-3 concerning map requirements in permit applications; IC 13-4.1-3-3.1 concerning additional permit information for archeological and historical sites; IC 13-4.1-4-2 concerning additional information required to request an informal conference or public hearing; IC 13-4.1-4-3.1 concerning listing on NRHP or Indiana SRHSS; IC 13-4.1-4-5 concerning request for a hearing concerning approval or disapproval of a permit; IC 13-4.1-14-1 concerning lands unsuitable; SEA 121, section 8 concerning the enforcement of sections IC 13-4.1-3-3.1 and IC 13-4.1-4-3.1; 310 IAC 12-0-5-48 concerning the definition of "Fragile lands;" 310 IAC 12 0.5-59 concerning the definition of "Historic lands;" 310 IAC 12-2-1 concerning areas where mining is prohibited or limited; 310 IAC 12-2-2 concerning areas unsuitable; 310 IAC 12-3-13 concerning exploration of more than 250 tons; 310 IAC 12-3-29 and 12-3-67 concerning cultural and historic resources; 310 IAC 12-3-38 and 12-3-75 concerning map information for permit applications; 310 IAC 12-3-52 and 12-3-84 concerning protection of public parks and historic lands; 310 IAC 12-3-112 concerning permit approval

or denial and 310 IAC 12-3-121 concerning permit revisions.

[FR Doc. 92-31372 Filed 12-29-92; 8:45 am]

BILLING CODE 4310-05-M

30 CFR Part 920

Maryland Regulatory Program; Excess Spoil

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is announcing the approval of a proposed amendment to the Maryland regulatory program (hereinafter referred to as the Maryland program) approved under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment provides the statutory authority to allow excess spoil from active mining operations to be placed on abandoned mine land sites to aid reclamation.

EFFECTIVE DATE: December 30, 1992.

FOR FURTHER INFORMATION CONTACT: Robert Biggi, Director, Harrisburg Field Office, Harrisburg Transportation Center, 4th and Market Streets, suite 3C, Harrisburg, PA 17101; Telephone: (717) 782-4036.

SUPPLEMENTARY INFORMATION:

- I. Background on the Maryland Program.
- II. Submission of Amendment.
- III. Director's Findings.
- IV. Summary and Disposition of Comments.
- V. Director's Decision.
- VI. Procedural Determinations.

I. Background on the Maryland Program

On February 18, 1982, the Secretary of the Interior approved the Maryland program. Information regarding the general background on the Maryland program, including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Maryland program can be found in the February 18, 1982, *Federal Register* (47 FR 7214). Actions taken subsequent to the approval of the Maryland program are identified at 30 CFR 920.12, 30 CFR 920.15, and 30 CFR 920.16.

II. Submission of Amendments

By letter dated June 23, 1992, the Maryland Bureau of Mines (Maryland) submitted a program amendment to OSM (Administrative Record No. MD-555.00). The proposed amendment, House Bill Number 1234, revises section 7-508 of the Natural Resources Article of the Annotated Code of Maryland (the