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DOE/OR/21555--T3-Suppl.

State of Tennessee

OFFICE OF THE ATTORNEY GENERAL

SUPPLEMENTAL REPORT OF THE ATTORNEY GENERAL

TO THE SAFE GROWTH CABINET COUNCIL

W. J. MICHAEL CODY
Attorney General and Reporter
State of Tennessee

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37219

DOE/OR/21555--T3-Suppl.

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M E M O R A N D U M

TO: W. J. MICHAEL CODY
Attorney General and Reporter

JOHN KNOX WALKUP
Chief Deputy Attorney General

FRANK J. SCANLON
Deputy Attorney General

FROM: R. TIM WURZ
Assistant Attorney General

DATE: January 7, 1986

RE: Inclusion of Public Comments in the MRS Proposal

I. INTRODUCTION

In February of 1986, the Department of Energy (DOE) will present to Congress a proposal to construct a Monitored Retrievable Storage facility (MRS) in Tennessee. DOE has stated its intention to append to that proposal a chronological listing of the comments that the Department has received regarding the MRS plan.

Based upon DOE's stated intention merely to list the comments in the order that they were received, it appears that DOE does not envision responding to or incorporating those suggestions into its proposal. An examination of the NWPA reveals clearly that DOE is under no specific Congressional mandate to respond to comments received from the public about the MRS project. Various NWPA provisions do, however, evidence a Congressional intent to have public comments examined and accorded significant consideration.

Furthermore, the comment procedures utilized by other programs examined in this Memorandum lend credence to

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the argument that more than a listing of comments was envisioned by lawmakers in passing the NWPA. Indeed, most analagous programs use the comment and response period to enhance the decision-making process and assure that the best possible proposal is presented. DOE should, therefore, endeavor to comply with the more standard comment-receiving procedures applicable to the programs and legislation discussed in this Memorandum.

II. RECEIPT OF COMMENTS UNDER THE NWPA

Numerous provisions of the NWPA require periods of comment prior to or in conjunction with DOE actions. Included in those sections are:

1. 42 U.S.C. § 10132(b)(2), which requires the Secretary of DOE, prior to repository site nomination, to "hold public hearings in the vicinity of such site to inform the residents of the area in which such site is located of the proposed nomination of such site and to receive their comments;"

2. 42 U.S.C. § 10133(a), which mandates the Secretary of DOE to "consider fully the comments" received from individuals before a repository site nomination and before site characterization;

3. 42 U.S.C. § 10134(a)(1), under which the Secretary is ordered to hold public hearings to receive comments regarding possible recommendation to the President of a permanent repository site. In addition, that section specifies that the proposal submitted to the President shall include comments received from the Nuclear Regulatory Commission (NRC) as well as "the views and comments of the

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Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views." See subsections (E) and (F);

4. 42 U.S.C. §§ 10136(c)(1)(B)(v) and 10138(b)(2)(A)(v), which permit the Secretary to make grants to states and Indian tribes that contain repository candidate sites in order to enable the governing bodies to make comments and recommendations to the Secretary regarding activities undertaken pursuant to the repository program;

5. 42 U.S.C. §§ 10137(c) and (c)(2), which allow the states to comment on DOE's characterization of the status of consultation and cooperation negotiations and require that any consultation and cooperation agreements specify procedures "by which the Secretary shall consider and respond to comments and recommendations made by such State or governing body of an affected Indian tribe, including the period in which the Secretary shall so respond;"

6. 42 U.S.C. § 10161(b)(3), which directs the Secretary to consult with the NRC and the Administrator of the Environmental Protection Agency (EPA) and submit their comments along with any proposal to Congress for authorization of an MRS;

7. 42 U.S.C. § 10194(b), which requires the Secretary to hold at least one public meeting "to receive [the] views" of residents of an area of a proposed test and evaluation facility;

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8. 42 U.S.C. § 10195(b)(2), which is the analagous provision to 42 U.S.C. § 10137(c)(2) involving the test and evaluation facility; and

9. 42 U.S.C. §§ 10221(b)(2) and (b)(3), which specify that the Secretary must publish notice of the receipt of comments made on the mission plan. After receiving the comments, the Secretary is further directed either to revise the plan to meet the objections or to publish the reason for not so revising the mission plan.

Many of these provisions are not directly applicable to the proposed MRS. Nevertheless, they do evidence the intent of Congress in defining the extent to which public and agency comments are to be incorporated into departmental proposals.

For example, 42 U.S.C. § 10134(a)(1) is not one of the sections of the NWPA explictly incorporated by reference into MRS law pursuant to 42 U.S.C. § 10161(h)[1]. The section does, however, give effect to the Congressional intent to allow the states selected as potential repository sites to have a full and important voice in the siting decision. Morever, the legislative history of the NWPA makes clear that the state chosen as a host for the MRS is to have exactly the same participation rights as the repository states. See Cong. Rec., p. S 15642 (Dec. 20, 1982). If, therefore, DOE intends to compile a list of comments received from Tennessee, meaningful consultation and cooperation would require that those comments be given con-

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[1]42 U.S.C. § 10161(h) provides that an MRS shall be subject to the provisions of 42 U.S.C. §§ 10135, 10136(a), (b), and (d), 10137, and 10138. Any reference in those sections to a repository shall be considered to refer to an MRS.

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sideration and, where appropriate, incorporated into the agency's proposal to Congress.

III. CASE LAW RELATED TO AGENCY RESPONSES TO COMMENTS

The case law construing agency obligations to respond to public comments generally involves the "notice and comment rulemaking" provisions of the Administrative Procedures Act (APA), 5 U.S.C. § 553. In relevant part, the APA provides:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant material presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

Id. at § 553(c).

That provision of § 553(c) was construed in Action on Smoking and Health (ASH) v. Civil Aeronautics Board (CAB), 699 F.2d 1209, 1216 (D.C. Cir. 1983), supplemented in 713 F.2d 795 (D.C. Cir. 1983). In ASH, the D.C. Circuit held that "[a]n agency need not respond to every comment, but it must 'respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. . ..'"

The case of State of South Carolina ex rel. Tindal v. Block, 717 F.2d 874 (4th Cir. 1983), cert denied 104 S.Ct. 1444, also involved an interpretation of the APA. The case is, however, instructive for purposes of this

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Memorandum. In Tindal, the Fourth Circuit stated, "The purpose of allowing comments is to permit an exchange of views, information, and criticism between interested persons and the agency." Id. at 885. Similarly, under the NWPA, states are to be afforded full consultation and cooperation to ensure meaningful participation in the decision-making process. Thus, the Act allows for public comment "to permit an exchange of views, information, and criticism between interested persons and the agencies." Id.

Tindal re-emphasizes the importance of the comment period extended to members of the public. Nevertheless, "[t]here is no requirement for the Secretary to discuss every fact or opinion contained in the public comments. Instead, the Secretary is obligated to identify and comment on only the relevant and significant issues raised during the proceeding." Id. at 885-886 (citations omitted).

Given the clear legislative mandate to involve the states in the siting and construction of facilities authorized pursuant to the NWPA, it seems logical that even greater responsiveness is required of federal officials under the Act than under normal APA rulemaking. Thus, the comments received from the state "partners" of the DOE in the decision process must be accorded at least the status of the general public comments received during "notice and comment rulemaking." Although DOE need not respond to every comment, the Department should "explain how [it] resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." Action on Smoking and Health v. CAB, supra at 1216.

IV. EXAMPLES OF COMMENT RECEIPT IN OTHER PROGRAMS

A. Under APA

Section 553(c) of the APA requires agencies promulgating proposed rules to provide a period for public comment. Furthermore, the agencies are directed to consider those comments and incorporate in the rule a concise general statement of their basis and purpose. A few examples of the

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manner in which agencies comply with this requirement have been collected from recent editions of the Federal Register.

On October 22, 1985, the Internal Revenue Service published its final regulations regarding "Statutory Merger Using Voting Stock of the Corporation Controlling the Merged Corporation." Federal Register Vol. 50, No. 204, pp. 42688-42691 (Tues., Oct. 22, 1985). Preceding the regulations, the IRS responded to comments received by grouping those comments and providing topic-by-topic answers to issues raised therein. In the responses, the IRS addressed concerns raised by some commentors and confirmed results predicted by other individuals who responded to the notice of the proposed regulation promulgation. (A copy of the Federal Register Notice is attached).

The October 23, 1985, Federal Register included the Environmental Protection Agency's (EPA) final rule concerning the "Hazardous Waste Management System; Identification and Listing of Hazardous Waste." Federal Register, Vol. 50, No. 204, pp. 42936-42942 (Wed., Oct. 23, 1985). The final rule also included a topical grouping of the comments received by the agency. The EPA responded to "some of the major comments received on the proposed rule" and addressed the other comments in a "revised listing background document." EPA's responses indicated that the agency did examine the comments offered and that EPA revised the background document in accordance with some of the concerns expressed by commentors. (A copy of the Federal Register Notice is attached).

The Department of Commerce's National Oceanic and Atmospheric Administration issued a final rule which was reported in the October 24, 1985, edition of the Federal Register. Federal Register, Vol. 50, No. 206, pp. 43193-43200 (Thurs., Oct. 24, 1985). As part of the notice, the agency responded to the public comments received. The favorable comments were categorized and counted while the negative comments were addressed seriatim. In the responses, the agency carefully considered the commentors' suggestions and sought to explain or distinguish

potential problems that the commentors envisioned. Justification for agency conclusions was also interwoven into the agency's explanations of its position. (A copy of the Federal Register Notice is attached).

Finally, a different manner of responding to public comments is exemplified in the proposed rulemaking for the program of "State Grants for Strengthening the Skills of Teachers and Instruction in Mathematics, Science, Foreign Languages, and Computer Learning and for Increasing the Access of All Students to That Instruction." Federal Register, Vol. 50, No. 207, pp. 43551-43557 (Fri., Oct 25, 1985). The Secretary of Education listed the various comments received by the Department of Education, and after each comment, responded to the issues raised. The responses also stated explictly whether or not the comments had resulted in the changes suggested. This method of response by the agency clearly indicated the manner in which responses were incorporated into the proposed rule. (A copy of the Federal Register Notice is attached).

The methods in which other federal agencies fulfill their obligations to receive and respond to public comments emphasize that DOE's proposed plan of merely listing public comments is woefully inadequate. While the agencies' responses are mandated under the APA, the NWPA would seem to envision similar response techniques by DOE to its proposal for MRS construction. If the State is to enjoy the consultation and cooperation privileges required by the NWPA, DOE must be willing to devote time to providing reasoned responses to State comments. Moreoever, to raise the level of State participation from one of reaction to one of partnership, DOE must be committed to incorporating into its proposal the meritorious suggestions made by Tennessee officials and citizens.

B. Under Non-Rulemaking Procedures

Citizen input also plays an integral role in projects not governed by APA rulemaking procedures. Because the NWPA does not authorize rulemaking per se, these other

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projects may provide greater insight into standard operating procedures in receipt of public comments.

One area of non-rulemaking decisions that is particularly amenable to public participation is the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C). Under regulations promulgated by the Council on Environmental Quality (CEQ), agencies preparing an EIS are directed to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. Part 1506.6(a). Moreover, 40 C.F.R. Part 1503.4 requires an agency preparing a final EIS to assess, consider, and respond to the comments received. (A copy of 40 C.F.R Part 1503.4 is attached).

The proposed construction of Interstate 440 around part of Nashville generated many comments from affected citizens. Those comments were considered by the United States Department of Transportation and were actually incorporated into the final EIS. In the publication "Community Involvement Shapes a Highway: The Redesign of Nashville's I-440," Environmental Action Plan Report, No. 10, July 1980, a copy of which is attached, the United States Department of Transportation and the Federal Highway Administration recount the public participation aspects of the I-440 project.

The paper concludes:

> After giving due consideration to the hundreds of comments and suggestions that were submitted by the public, Tenn.DOT significantly changed the scope and the design of the I-440 proposal, as well as its approach to developing an EIS. In other words, the effects of these meetings were far more reaching than the development of a single project. Some of the specific changes that were suggested at the workshops and eventually presented in the final EIS are:

A. An alteration in the emphasis given to the subjects to be covered in the EIS. More emphasis was given to the following:

1. An analysis of the current and projected energy impacts.

2. A section on safety.

3. A section on the future of the automobile.

4. Consideration of land use and property values.

5. The transporting of hazardous materials.

B. The consideration of a new alternative: the Boulevard.

C. Major design changes.

1. The addition of a bikeway along part of I-440.

2. Additional crossings of I-440 in order to alleviate the separating of neighborhoods.

3. Elimination of parallel side roads.

4. Elimination of an interchange at Granny White Pike, a highway listed on the National Register of Historic Places.

5. A major reduction in the scope of the facility from six lanes to four lanes.

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6. A major shift in the design of the facility to a below-ground level "parkway".

7. The construction of a plaza structure where the bikeway crosses I-440.

8. Commitment to monitor land use around the historic district.

9. Alteration of access for the First Church of Christ Scientist.

10. More than usual landscaping to enhance the beauty of the I-440 parkway and attention to architectural design of structures and bridges.

Id. at 15-16.

In the I-440 project, therefore, more than a listing of public comments was made. The agency collecting the suggestions seriously considered the citizen input and revised the draft EIS accordingly in order to prepare a better final document.

A second example of comment response under NEPA procedures is collected in the June 1984 Final Environmental Impact Statement Standards and Guidelines for the Southern Regional Guide by the Department of Agriculture's Forest Service Southern Region. (A copy of the report is attached). In the EIS, the Forest Service collected the comments generated by the public concerning the Service's activities. The comments relating to similar issues were grouped together and responses to those suggestions were listed immediately thereafter. In the responses, the Forest Service indicated whether or not the EIS or Regional Guide had been altered to address the commentors' concerns. In some instances, documents were "reformatted," changed, or augmented. The comments were, therefore, accorded significant weight and importance.

Another program that has utilized public participation in the preparation of an EIS is the Drug Enforcement Administration's (DEA) effort to eradicate cannabis on federal lands. In appendices to the July 1985 EIS on the "Eradication of Cannabis on Federal Lands in the Continental United States" (copy attached), DEA reported that the comments that it received "through the scoping process and through letters and oral testimony on the Draft EIS and the Supplement to the Draft EIS have been analyzed and considered in the preparation of the Final EIS." Furthermore, the report stated that the comments "were categorized, analyzed, and responded to. . .. The EIS has been revised as necessary."

DEA listed the comments received in a special Appendix, and after each comment, responded to issues raised. Where appropriate, changes were adopted or new ideas were implemented. In a concrete way, the DEA manifested its compliance with regulations requiring that the agency respond to public comments offered on any draft EIS prepared by the Administration.

The NEPA procedures mandated in 40 C.F.R. Part 1503.4 provide important guidance for DOE in its dealings with the State of Tennessee under the NWPA. If Tennessee is to have the full and unique participatory rights guaranteed under the Act, the NEPA comment and response process would seem to be required in conjunction with the preparation of the environmental assessment that is to accompany the DOE proposal to Congress. This early involvement is essential because preparation of an EIS for the MRS facility does not require an examination of the need for the facility or of any alternative design criteria. Thus, the only time when meaningful State participation in the formulation of the EIS can occur is when the proposal is submitted to Congress. In addition, the proposal and its accompanying environmental assessment should include not only the public comments received by DOE, but also the Department's responses to the comments and the manner in which the meritorious suggestions have been incorporated into the proposal.

RTW:dmm

ACTION ON SMOKING AND HEALTH, Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent.

ACTION ON SMOKING AND HEALTH, Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent.

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v.

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ACTION ON SMOKING AND HEALTH, Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent

Air Transport Association of America, Transamerica Airlines, Inc., Intervenors.

Nos. 79-1044, 79-1095, 79-1754 and 81-2023.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 20, 1982.

Decided Jan. 28, 1983.

Petition was filed for review of order of Civil Aeronautics Board adopting regulation relaxing protections afforded nonsmokers against breathing tobacco smoke of fellow passengers aboard aircraft. The Court of Appeals, Bazelon, Senior Circuit Judge, held that: (1) Board had authority to regulate smoking in interstate, overseas and foreign air transportation; (2) an agency's obligation to explain its actions is not reduced where it rescinds rather than promulgates a regulation; and (3) Board failed to sufficiently state its basis for vacating portion of prior regulation and rejecting several proposed regulations.

Affirmed in part; vacated and remanded in part.

1. Aviation ⇐33

Because Civil Aeronautics Board has broad rulemaking authority under Federal Aviation Act, its regulations are valid so long as they reasonably advance the purposes of the Act. Federal Aviation Act of 1958, § 204(a), as amended, 49 U.S.C.A. § 1324(a).

2. Aviation ⇐101

Statutory responsibility of Civil Aeronautics Board to insure that air carriers provide "adequate service" authorized board regulation of smoking on board domestic air carrier and such regulation did not conflict with provision that Board certificates may not restrict a carrier's right to add to or change accommodations, and Airline Deregulation Act did not diminish Board's authority to regulate smoking. Federal Aviation Act of 1958, §§ 102(c, d), 204(a), 401(e)(4), 404, 404(a), (a)(1), 1601(a)(2)(B), as amended, 49 U.S.C.A. §§ 1302(c, d), 1324(a), 1371(e)(4), 1374, 1374(a), (a)(1), 1551(a)(2)(B).

See publication Words and Phrases for other judicial constructions and definitions.

3. Aviation ⇐101

Requirement of Federal Aviation Act that air carriers in foreign air transportation follow just and reasonable classifications, rules, regulations and practices authorizes Civil Aeronautics Board to regulate smoking on overseas and foreign air carriers. Federal Aviation Act of 1958, § 404(a)(2), as amended, 49 U.S.C.A. § 1374(a)(2).

4. Administrative Law and Procedure ⇐394

In notice and comment rulemaking, an agency need not respond to every comment but it must respond in a reasoned manner to the comments received. 5 U.S.C.A. §§ 551 et seq., 553, 553(c).

5. Administrative Law and Procedure ⇐421, 701

An agency's obligation to explain its actions is not reduced when it rescinds rather than promulgates the regulation and Administrative Procedure Act contemplates judicial review of agency rescission of a regulation. 5 U.S.C.A. §§ 551 et seq., 553, 553(c).

6. Administrative Law and Procedure ⇐421

Agency statement of basis and purpose for rescinding the prior regulation must address, with some precision, the major comments received and explain why the prior regulation is no longer desirable. 5 U.S.C.A. §§ 551 et seq., 553, 553(c).

7. Aviation ⇐101

Civil Aeronautics Board regulation relaxing prior regulation governing smoking on board aircraft could not be upheld merely on basis of statement that although carriers should still be required to provide separate seating for nonsmokers they should be free to decide most other aspects of in-flight smoking policy, notwithstanding that Board considered additional smoking protections as the Board ignored its responsibility to explain its action. 5 U.S.C.A. §§ 551 et seq., 553, 553(c); Federal Aviation Act of 1958, §§ 204(a), 404(a), (a)(1, 2), as amended, 49 U.S.C.A. §§ 1324(a), 1374(a), (a)(1, 2).

8. Aviation ⇐101

Civil Aeronautics Board's minimal discussion of individual proposals concerning smoking on aircraft could not be justified on ground that as long as record contained evidence to support its conclusion the Board was not required to explain its action, as the opposite was true and need for discussion was paramount because evidence was presented in support of, in opposition to, most of the proposals. 5 U.S.C.A. §§ 551 et seq., 553, 553(c); Federal Aviation Act of 1958, §§ 204(a), 404(a), (a)(1, 2), as amended, 49 U.S.C.A. §§ 1324(a), 1374(a), (a)(1, 2).

9. Aviation ⇐101

General desire for bare minimum of regulation of smoking aboard aircraft could not justify Civil Aeronautics Board's rejection of specific proposals, and Board was required to explain why a particular proposal was inconsistent with balance between regulation and competition sought by it and assertion that its decision was necessary to obtain support of majority of Commissioners of Federal Aviation Commission was patently irrelevant. 5 U.S.C.A. §§ 551 et seq., 553, 553(c); Federal Aviation Act of 1958, §§ 204(a), 404(a), (a)(1, 2), as amended, 49 U.S.C.A. §§ 1324(a), 1374(a), (a)(1, 2).

10. Aviation ⇐101

Finding that evidence of link between passive smoking and cancer was slight and controversial did not justify Civil Aeronautics Board's rejection of proposal that airlines provide special accommodations for persons unusually susceptible to physical ill-effects from breathing tobacco smoke. 5 U.S.C.A. §§ 551 et seq., 553, 553(c); Federal Aviation Act of 1958, §§ 204(a), 404(a), (a)(1, 2), as amended, 49 U.S.C.A. §§ 1324(a), 1374(a), (a)(1, 2).

11. Aviation ⇐101

Rejection of proposal to ban all smoking on aircraft with 30 seats or less could not be upheld where Civil Aeronautics Board offered no reason for its rejection but focused on need to resolve unequal application of smoking regulations as between certificated air carriers and commuters. 5 U.S.C.A. §§ 551 et seq., 553, 553(c); Federal Aviation Act of 1958, §§ 204(a), 404(a), (a)(1, 2), as amended, 49 U.S.C.A. §§ 1324(a), 1374(a), (a)(1, 2).

12. Aviation ⇐101

Civil Aeronautics Board's rejection of proposed smoking ban on flights of less than one hour could not be upheld where several health groups commented in favor of the proposal, the industry commented in opposition and proposal received no attention by the agency whatsoever. 5 U.S.C.A. §§ 551 et seq., 553, 553(c); Federal Aviation Act of 1958, §§ 204(a), 404(a), (a)(1, 2), as amended, 49 U.S.C.A. §§ 1324(a), 1374(a), (a)(1, 2).

Petition for Review of an Order of the Civil Aeronautics Board.

John F. Banzhaf, III, Washington, D.C., with whom Paul N. Pfeiffer and Athena Mueller, Washington, D.C., were on the brief, for petitioner in 79-1044, 79-1095, 79-1754 and 81-2023. Peter N. Georgiades, Pittsburgh, Pa., also entered an appearance for petitioner, in 79-1044 and 79-1095.

Kathleen O. Argiropoulos, Washington, D.C., for intervenor, Air Transport Association of America in 81-2083.

Walter D. Hansen, Washington, D.C., for intervenor, Transamerica Airlines, Inc., in 81-2023. Jeffrey A. Manley, Washington, D.C., also entered an appearance for intervenor, Transamerica Airlines, Inc.

Mark Frisbie, Attorney, C.A.B., Washington, D.C., with whom Ivars V. Mellups, Deputy Gen. Counsel, Thomas L. Ray, Acting Associate Gen. Counsel, C.A.B., Barry Grossman and Mark Del Bianco, Attorneys, Dept. of Justice were on the brief, for respondent. Glen M. Bendixsen, Barbara Thorson, Gary J. Edles and Michael Schopf, Attorneys, C.A.B., Margaret G. Halpern, John J. Powers, III, and Robert B. Nicholson, Attorneys, Dept. of Justice, Washington, D.C., also entered appearances for respondents.

Before WRIGHT and MIKVA, Circuit Judges and BAZELON, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge BAZELON.

BAZELON, Senior Circuit Judge:

Petitioner, Action on Smoking and Health (ASH), challenges the promulgation of Regulation ER-1245 by the Civil Aeronautics Board (Board). That regulation relaxes prior protections afforded nonsmokers against breathing the tobacco smoke of fellow passengers aboard aircraft. The Air Transport Association of America and Transamerica Airlines, Inc. have intervened to argue that the Board is altogether lacking in authority to regulate smoking. We find that the Board does have such authority, but the Board's failure to address adequately certain relevant matters requires us to vacate its action in part and remand it in part.

I. Background

The Civil Aeronautics Board has regulated smoking on airlines since 1973.[1] It asserts authority to do so under section 404(a) of the Federal Aviation Act of 1958 (the Act),[2] which requires carriers to "provide safe and adequate service" and "to establish, observe, and enforce just and reasonable classifications, rules, regulations and practices." The Board has primary responsibility for enforcing these requirements.[3] Smoking regulations promulgated by the Board are set forth in 14 C.F.R. Part 252 (1982).

In 1976, ASH petitioned the Board to strengthen its smoking regulations. The Board responded with a notice of proposed rulemaking, ERD-306,[4] which drew thousands of letters from private individuals and comments from various industries, public interest groups, and government agencies. In January 1979, the Board adopted ER-1091, increasing protections for nonsmoking passengers.[5] Five months later, the Board adopted ER-1124, which for the first time applied the smoking regulations to

1. The Board first proposed rules in response to a petition for rulemaking by Ralph Nader. EDR-231, 37 Fed.Reg. 19146 (Sept. 13, 1972). The resulting rule, ER-800, 38 Fed.Reg. 12207 (May 10, 1973), required air carriers to provide a no-smoking section for each class of service.

2. As amended, 49 U.S.C. § 1374(a) (1976).

3. Section 1002(b), (c); 49 U.S.C. § 1482(b).

4. 41 Fed.Reg. 44424 (Oct. 8, 1976).

5. 44 Fed.Reg. 5075 (Jan. 25, 1979). ER-1091 provided nonsmokers three new protections: first, it required special segregation of cigar and pipe smokers; second, it clarified existing regulations to require that no-smoking sections accommodate all passengers desiring a seat in them; and third, it prohibited all smoking when ventilation systems were not functioning fully

commuter airlines with a passenger capacity of more than 30.[6]

ASH sought review of ER-1091 and ER-1124 in this court,[7] arguing that the new regulations still did not provide sufficient protections. We stayed action in that challenge on the Board's assurance that it was proceeding "with dispatch" in its consideration of more stringent smoking regulations proposed in another rulemaking, EDR-377.[8] The Board issued two more proposals, EDR 399 and 420, before taking final action on EDR-377. EDR-399 proposed the so-called "five-minute rule," which would permit airlines to deny seats in the no-smoking section to passengers not present for boarding at least five minutes before scheduled flight departure.[9] EDR-420 further expanded the scope of the rulemaking to include the polar alternatives of banning smoking altogether or revoking the regulations entirely.[10] The Board received voluminous comments from ASH and other groups on each of the proposals.

On June 25, 1981, the Board met in open session under the "Sunshine Act."[11] At the meeting, the Board had only two proposals before it. The first, by the Office of Economic Analysis, recommended that the Board rescind all rules relating to smoking aboard aircraft. The second, by the Bureau of Consumer Protection, recommended keeping the no-smoking section requirement, but only guaranteeing seats in that section to passengers meeting whatever check-in requirement the airline imposed. The second proposal also eliminated protections related to pipe and cigar smoke, drifting tobacco smoke, and adequate ventilation. The Board adopted the second proposal in FR-1245[12] on September 2, 1981.

ASH attacks promulgation of ER-1245, arguing that (1) the Board's statement of the basis and purpose for rescinding several existing protections for non-smokers was inadequate, and (2) the Board did not sufficiently articulate the basis of its failure to adopt several of the proposed protections for non-smokers.[13] An additional challenge, presented by the intervenors, presents the threshold question whether the Board has authority to regulate smoking at all.

II. Board Authority to Regulate Smoking

[1] "Where the empowering provision of a statute states simply that the agency may 'make ... such rules and regulations as may be necessary to carry out the provisions of this Act' ... the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'"[14] Because the Board has broad rulemaking authority under the Act,[15] its regulations are valid so long as they reasonably advance the purposes of the Federal Aviation Act. For authority to regulate smoking, the Board relies on its responsibility to insure that carriers both "provide safe

6. 44 Fed.Reg. 30083 (May 24, 1979).

7. *ASH v. CAB*, Nos. 79-1044, 79-1095, and 79-1754.

8. 44 Fed.Reg. 29486 (May 21, 1979).

9. 45 Fed.Reg. 26976 (Apr. 22, 1980).

10. 46 Fed.Reg. 11827 (Feb. 11, 1981).

11. Government in the Sunshine Act, 5 U.S.C. § 552b (1976).

12. 14 C.F.R. § 252 (1982).

13. The portions of ER-1245 which adopted the late arrival rule (14 C.F.R. § 252.2), rejected a proposed total smoking ban, and rejected a proposed revocation of all smoking regulations are not challenged, and are therefore not in issue here.

14. *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660-1661, 36 L.Ed.2d 318 (1973) (footnote omitted) (quoting *Thorpe v. Housing Auth.*, 393 U.S. 268, 280-81, 89 S.Ct. 518, 525-526, 21 L.Ed.2d 474 (1969)). *See also American Trucking Ass'ns v. United States*, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953).

15. Section 204(a), 49 U.S.C. § 1324(a) (1976). That section gives the Board authority "to make and amend such general or special rules, regulations and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this chapter."

and adequate service" [16] and observe "just and reasonable . . . practices." [17] Because these two requirements differ somewhat in their applicability,[18] we consider them separately.

A. *"Adequate Service"*

[2] While the present case was pending, the Fifth Circuit held that the "adequate service" provision of section 404(a)(1) of the Act provides Board authority to regulate smoking.[19] According to the intervenors, that interpretation of the Act is incorrect because Congress intended to commit only economic regulation to the Board, and to leave details of passenger comfort to the absolute discretion of each airline. We disagree.

The phrase "adequate service" is not defined by statute, nor is there any specific reference to its meaning in the Act's legislative history. The historical context of the Board's creation, however, supports a broad interpretation of the Board's regulatory authority.[20] Congress established the Board in response to chaos in the industry during the 1930's,[21] which had resulted primarily from economic instability and fierce competition.[22] In 1934, Congress established the Federal Aviation Commission to provide "recommendations of a broad policy covering all phases of aviation and the relation of the United States thereto." [23]

The Commission envisioned the creation of an agency with broad power to regulate both the quality and quantity of service provided by carriers.[24] Its report recommended that "[c]ertificates of convenience and necessity should be issued under proper safeguards and specifications. Provision should be made to specify a minimum quality of service and a minimum frequency of schedule on airlines." [25] The Commission recognized, however, that some competition would improve the service offered.[26] Accordingly, it suggested that Congress articulate a general desire for both regulation and competition, and entrust the new agency to strike the proper balance between them.[27]

Congress appears to have followed that suggestion. In instructing the Board to regulate in the public interest, it directed the Board to consider both "[t]he promotion of adequate . . . service" and "[c]ompetition to the extent necessary to assure the sound development of an air-transportation system. . . ." [28] Thus, it appears that Congress gave the Board authority to determine minimum quality standards when balancing the need for regulation against the benefits of competition.

Board authority to regulate quality of service does not conflict with section 401(e)(4) of the Act,[29] which provides that certificates issued by the Board may not "restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business . . . shall re-

16. 49 U.S.C. § 1374(a)(1).

17. 49 U.S.C. § 1374(a)(2).

18. *See infra* p. 1215.

19. *Diefenthal v. CAB*, 681 F.2d 1039 (5th Cir. 1982).

20. Section 1374(a) of the Federal Aviation Act of 1958 was a "reenactment, virtually without substantive change" of the same section in the Civil Aeronautics Act of 1938. *See* H.R.REP. No. 2360, 85th Cong., 2d Sess. 15 (1958), U.S. Code Cong. & Admin.News 1958, p. 3741. Legislative history of the 1938 Act therefore gives primary guidance as to the meaning of the current provision.

21. *See* Note, *Federal Regulation of Aviation*, 60 HARV.L.REV. 1235 (1947).

22. *See* H.R.REP. No. 2254, 75th Cong., 3d Sess. 2 (1938).

23. S.Doc. No. 15, 74th Cong., 1st Sess. 1 (1935).

24. *Id.* at 39.

25. *Id.* at 9.

26. *Id.* at 61-62.

27. *Id.*

28. 49 U.S.C. §§ 1302(c), (d) (1976).

29. 49 U.S.C. § 1371(e)(4) (1976).

quire . . . ." On its face, this provision admittedly seems to preclude regulation of quality of service by the Board. But that interpretation proves too much, for it is clear that the Act authorized the Board to regulate several aspects of airline service that such an interpretation would prohibit.[30] Thus, the section cannot be taken as an "absolute restriction on actions the Board may take to further other statutory goals."[31] Instead, the provision gives guidance in evaluating whether a particular regulation ignores the congressional desire for competition.[32] It makes clear that the Board cannot require agency approval of every change in an airline's service consistent with that already certified. The section does not, however, prohibit Board regulation of quality of service.

Our interpretation of the interplay of sections 401(e)(4) and 404(a) is supported by interpretations of analogous provisions of the Motor Carrier Act of 1935,[33] after which Congress modeled the Federal Aviation Act.[34] The Motor Carrier Act authorizes the Interstate Commerce Commission (ICC) to require carriers to provide adequate service: that authority enables the ICC to specify the "quality of service" that a carrier must provide.[35] The Motor Carrier Act's analogue to section 401(e)(4) of the Act does not, moreover, severely impair that authority. Congress added that section to the Motor Carrier Act to allay fears that certification procedures would thwart the "natural growth of operations."[36] Thus, the provision assured that certified carriers would not have to reapply to the ICC every time they sought to expand or change the details of their business. Given the marked similarities of the Motor Carrier Act and the Federal Aviation Act, we would need specific justification to interpret the two Acts' analogous provisions differently. No such justification exists here.

Finally, the Airline Deregulation Act of 1978, Pub.L. No. 95–504, did not diminish the Board's authority to regulate smoking. To the contrary, although that Act deleted most of section 404, it specifically retained the portion relied upon by the Board to regulate smoking.[37] Legislative history indicates that the desired reform was not aimed at regulation of quality of service, but at the certification procedure that had retarded entry into the industry, expansion

30. A rigid reading of this provision would emasculate the Board's authority to enforce the safe and adequate service requirement of section 404(a). *See Capital Airlines, Inc. v. CAB*, 281 F.2d 48, 52 (D.C.Cir.1960). Thus, the "provision must be read in harmony with the rest of the Act." *Id.*

31. *Continental Air Lines v. CAB*, 522 F.2d 107, 116 (D.C.Cir.1974).

32. *See Diefenthal v. CAB*, 681 F.2d 1039 (5th Cir.1982); *Continental Air Lines v. CAB*, 522 F.2d 107, 116–17 (D.C.Cir.1974).

33. 49 Stat. 543, Pub.L. 255, 74th Cong. (1935) (current version recodified with minor language changes at 49 U.S.C. § 10101 *et seq.*). The Motor Carrier Act's analogue to section 401(e)(4) of the Federal Aviation Act is section 208(a), 49 Stat. 552. The analogue to section 404(a) is section 216(a), 49 Stat. 558. The language of the analogous provisions is virtually identical.

34. Congress's intent with respect to the Motor Carrier Act has previously been recognized as a primary guide for interpreting the Federal Aviation Act. *See Transcontinental Bus Sys. v CAB*, 383 F.2d 466, 480 (5th Cir.1967), *cert. denied*, 390 U.S. 920, 88 S.Ct. 850, 19 L.Ed.2d 979 (1968); *Diefenthal v. CAB*, 681 F.2d 1039 (5th Cir.1982).

35. *Crescent Express Lines v. United States*, 49 F.Supp. 92 (S.D.N.Y.) (3-judge panel), *aff'd*, 320 U.S. 401, 64 S.Ct. 167, 88 L.Ed. 127 (1943).

36. The bill as drafted by the Federal Coordinator of Transportation did not contain the proviso. S.Doc. No 152, 73d Cong., 2d Sess., 47, 357 The addition was explained by Senator Wheeler, the Chairman of the Interstate Commerce Committee, as follows:

> Section 208(a), page 26, as amended, permits the Commission to attach to all certificates, whether granted under the grandfather clause or otherwise, reasonable terms, conditions, and limitations. In order to meet criticisms that the effect of these provisions would be to check the natural growth of operations if every increase in facilities required authorization by the Commission, the committee has amended section 208(a). . . .

79 CONG REC 5654 (April 15, 1935).

37. *See* § 1601(a)(2)(B) (codified at 49 U.S.C. § 1551(a)(2)(B) Supp. IV 1980).

of service, and competition over fares.[38] There is absolutely no indication of congressional intent to remove the Board's authority to regulate smoking. Thus, although the Deregulation Act reflected a congressional desire to rely more heavily on competition, it did not disturb Board authority to regulate quality of service.

B. *Just and Reasonable Classifications, Rules, Regulations and Practices*

[3] The adequate service requirement of 404(a)(1) does not apply to air carriers in foreign air transportation and therefore cannot provide Board authority to regulate smoking on such transportation. For such authority, the Board relies on section 404(a)(2), which requires air carriers in foreign air transportation to follow "just and reasonable classifications, rules, regulations and practices." [39]

This statutory provision is a tenuous source for Board authority to regulate smoking. Congress enacted the provision in 1972 to protect American air carriers from the cut-throat competition of foreign air carriers receiving subsidies from their governments. Legislative history strongly suggests that Congress meant the provision to apply only to regulations affecting fares and other economic matters.[40] Moreover, because the Board was not regulating smoking at all when Congress enacted the section, it is unlikely that Congress intended the section to provide the Board broader authority to do so. Had the Board's authority been challenged when the Board initially regulated smoking, we would have had serious doubts about the Board's authority to regulate smoking on foreign air transportation.

For nine years, however, the Board has interpreted the provision to provide that authority. We assume that Congress was fully aware of Board practices concerning smoking when it passed the Airline Deregulation Act. It would be inappropriate to overturn an interpretation that Congress has acquiesced in for nine years, during which it has closely reviewed the statutory scheme under question. As the Supreme Court has said:

> In addition to the importance of legislative history, a court may accord great weight to the long-standing interpretation placed on a statute by an agency charged with its administration. *This is especially so where Congress has re-enacted the statute without pertinent change.* In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.[41]

It follows that the Board has authority to regulate smoking in interstate, overseas, and foreign air transportation. We turn to consider whether the promulgation of ER-1245 was valid.

III. Regulation ER-1245

A. *Standard of Review*

[4] The Board promulgated ER-1245 pursuant to the notice and comment rulemaking procedure prescribed by § 553 of the Administrative Procedure Act.[42] Accordingly, the Board must furnish a basis and purpose statement that complies with the requirements of § 553(c) as interpreted and applied by the courts. The "purpose of

38. *See* H.R.Rep No 1211, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S.Code Cong. & Ad News 3737, 3738.

39. 49 U.S.C. § 1374(a)(2) (1976). Section 404(a)(1) also has a "just and reasonable ... practices" provision, which applies to interstate and overseas transportation. We need not consider the significance of that provision because the adequate service provision provides sufficient authority for the Board's smoking regulations covering that transportation.

40. *See* H.R.Rep No 92-854, 92d Cong., 2d Sess. 5 (1972) ("This legislation is ... strictly limited in its scope and does not pretend to solve all of the ills and problems of international air transportation.")

41. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-1762, 40 L.Ed.2d 134 (1973) (emphasis added) (footnotes omitted).

42. 5 U.S.C. § 553 (1976).

requiring a statement of the basis and purpose is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's action." [43] An agency need not respond to every comment, but it must "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.... The basis and purpose statement is inextricably intertwined with the receipt of comments." [44] Thus, while the standard for review is whether the agency acted in an arbitrary or capricious manner,[45] the detail required in a statement of basis and purpose depends on the subject of regulation and the nature of the comments received.

B. *Partial Rescission of Part 252*

[5, 6] An agency's obligation to explain its actions is not reduced when it rescinds rather than promulgates a regulation. The APA clearly contemplates judicial review of agency rescission of a regulation.[46] Moreover, rescission typically involves promulgation of a new regulation rescinding the old one. The new regulation changes the legal rights of interested parties and is reviewable in the same manner as earlier regulations on that subject.[47] The statement of basis and purpose must address, with some precision, the major comments received and, of course, explain why the old regulation is no longer desirable. These requirements do not prevent an agency from altering its course when circumstances or attitudes shift: they merely ensure that those changes reflect reasoned consideration of competing objectives and alternatives.

[7] ER-1245 rescinded, *inter alia*, the following three provisions of Part 252: the requirement of special segregation of cigar and pipe smokers, the ban on smoking when ventilation systems are not fully functioning, and the protections given to nonsmokers against the burdens of breathing drifting smoke.[48] The Board's sole explanation of its action consisted of the following short paragraph:

> After considering the outstanding proposals and reviewing the existing provisions, we have decided to replace the current rule with a less detailed regulation. In our view, carriers should still be required to provide separate seating for nonsmokers, but should be free to decide most other aspects of inflight smoking, policy. Decisions regarding the minimum size of the no-smoking section, pipe and cigar smoking, and banning smoking when the air conditioning system is not operating are therefore left to carrier discretion under the new rule. References to the burden of breathing smoke (former § 252.2) and sandwiching (former § 252.2(e)) have also been removed.[49]

43. *American Standard, Inc. v. United States*, 602 F.2d 256, 269 (Ct.Cl.1979). *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971) ("the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment").

44. *Rodway v. U.S. Dep't of Agriculture*, 514 F.2d 809, 817 (D.C.Cir.1975) (citations omitted).

45. 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823–824, 28 L.Ed.2d 136 (1971).

46. 5 U.S.C. § 706 clearly contemplates judicial review of rulemaking, which is defined as "agency process for formulating, amending, or repealing a rule," *id.* § 551(5).

47. The "substantial impact" test determines the applicability of § 553 procedures essentially by asking whether the agency action carries substantial impact on the rights and interests of private parties. *Batterton v. Marshall*, 648 F.2d 694, 709 (D.C.Cir.1980); *see, e.g., Pickus v. United States Bd. of Parole*, 507 F.2d 1107 (D.C.Cir.1974); *Lewis-Mota v. Sec'y of Labor*, 469 F.2d 478 (2d Cir.1972).

48. This third provision was aimed at practices known as "sandwiching", in which a no-smoking section was placed between two smoking sections, or across the aisle from one.

49. 46 Fed.Reg. 45936 (Sept. 16, 1981).

On its face, this explanation is palpably inadequate. The agency offers no reasoning to support its conclusion that the matters covered by the rescinded provisions are better "left to carrier discretion." [50] We are told that the decision was made "[a]fter considering the outstanding proposals," yet no evidence of that consideration is given. To accept the Board's action would render judicial review of informal rules meaningless.

The Board defends the stark absence of explanation by downplaying the status of the rescinded regulation. It characterizes the earlier rule, ER-1091, as "an interim decision in an extended consideration of smoking policy." [51] By describing the decision in that way, the Board claims that it needs to provide only minimal explanation for rescinding the rule. That argument is seriously flawed, however, for it ignores ER-1091's status as final agency action following extensive notice and comment rulemaking. The fact that the Board has considered additional smoking protections is of little consequence. The Board has intolerably ignored its responsibility to explain its action. We therefore vacate that portion of ER-1245 which rescinded protections provided in ER-1091.

C. *Rejection of Proposed Rules*

In addition to rescinding several aspects of part 252, ER-1245 rejected several proposed regulations. Among them was a ban on smoking on small aircraft, a ban on smoking on short flights, and a requirement that airlines provide special protections for persons unusually susceptible to ill effects of breathing smoke. ASH contends that the Board failed to provide an adequate statement of basis and purpose for rejecting the proposals. We agree.

[8] The Board offers several reasons to justify its minimal discussion of individual proposals. First, the Board claims that even though it did not explicitly discuss each proposal, "there can be little doubt that the Board was aware of the pros and cons of each alternative." [52] Thus, the Board suggests that as long as the record contains evidence to support its conclusion, it need not explain its action. Precisely the opposite is true. The APA guarantees the public an opportunity to comment on proposed rules. That opportunity "is meaningless unless the agency responds to significant points raised by the public." [53] The need for discussion is paramount precisely because evidence was presented in support of, and in opposition to, most of the proposals. In order to uphold the agency's action, it must be shown that the Board rationally considered the relevant evidence.

[9] Second, the Board argues that the specific proposals supported by ASH "are not matters of policy, but alternative means of implementing a policy the Board rejected." Because the Board decided "to impose only a bare minimum of government control," it claims it need not discuss more interventionist alternatives. That argument is specious: ER-1245 not only considered whether to regulate smoking, it also determined an appropriate degree of regulation. A general desire for a bare minimum of regulation cannot justify rejecting specific regulatory proposals. The Board must explain why a particular proposal is inconsistent with the balance between regulation and competition sought by the Board.

Finally, the Board's assertion that its decision was necessary to obtain support of a majority of Commissioners is patently irrelevant.

1. *Special protections for persons especially sensitive to smoke*

EDR-377 proposed a requirement that airlines provide special accommodations for

50. The Board's action followed the recommendation of the agency's Bureau of Compliance and Consumer Protection. Memorandum of June 12, 1981 (Joint Appendix 336). That memorandum also gave no reasoning for the recommended action concerning cigar and pipe smoke and inadequate ventilation.

51. Brief at 33.

52. Brief at 32.

53. *Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C.Cir.1979).

persons who are unusually susceptible to physical ill-effects from breathing tobacco smoke. This proposal aimed to protect persons with respiratory, cardiovascular and other health conditions, for whom proximity to smoke is a significant health hazard. Although the Board requested and received practical suggestions from commenters concerning eligibility for such accommodations, it offered no explanation for its rejection of the proposal.

[10] The Board's only consideration of the health effects of smoking related to a proposed total ban on smoking. The Board found that "[t]he evidence of a link between 'passive smoking' and cancer is . . . slight and controversial," [54] and concluded that a total ban on smoking would be inappropriate. That consideration does not, however, justify rejection of the proposed protections for passengers with special health conditions. Health hazards of passive smoking are presumably much greater for people with conditions such as emphysema than for normally healthy persons: [55] The Board recognized that fact when it proposed the special protections. It follows that the Board's failure to address those serious health concerns is arbitrary and capricious.

2. *Ban on smoking on small aircraft*

[11] EDR-377 also proposed a rule to ban all smoking on aircraft with thirty seats or less. The rationale for such a ban is that segregation of smokers on a small plane is not feasible and that small planes are generally used for short flights in which a ban would be less objectionable to smokers. The Board received considerable comments on that proposal, including favorable comments by two airlines that had instituted such a ban on their own initiative.[56]

Nevertheless, the Board offered no reasons for its rejection of the proposal. Instead, its discussion focused on the need to resolve the unequal application of the smoking regulations as between certificated air carriers and commuters. Prior to ER-1245, smoking regulations applied to all certificated air carriers, but only to commuter air carriers in the operation of aircraft of over thirty seats. The Airline Deregulation Act blurred the distinction between those two types of operators, making the disparate treatment seem unfair. To equalize the regulatory burden on commuters and certificated air carriers, the Board exempted all aircraft with fewer than thirty seats from the smoking regulations.

Thus, the Board explained why commuters and certificated air carriers should be regulated similarly. It offered no reasons, however, for why the regulations should not include a total ban on smoking in small aircraft. Such a ban would avoid the difficulties of segregating smokers on a small plane, which were presumably the basis for the original decision not to regulate smoking on commuter flights. It is certainly not obvious on its face, therefore, why such a ban would create the sort of complicated regulatory burden that the Board seeks to eliminate.

54. 46 Fed.Reg. 45936 (Sept. 16, 1981).

55. For example, Secretary of Health and Human Services Richard Schweiker stressed the importance of protecting sensitive individuals from the effects of passive smoking in a letter to the Chairman of the Board dated May 13, 1981. The Secretary summed up his letter by saying that: "In short, involuntary or passive smoking is . . . a health risk to persons with existing respiratory, cardiovascular and other disabilities." The previous Secretary of the Department of Health, Education, and Welfare had expressed similar concerns in letters to the Board. 44 Fed.Reg. 29487 (May 21, 1979). *See also* Hirayama, *Non-Smoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study from Japan*, BRIT.MED.J. (January 17, 1981); Repace & Lowry, *Indoor Air Pollution, Tobacco Smoke, and Public Health*, SCIENCE (May 2, 1980); White and Froeb, *Small-Airways Dysfunction in Nonsmokers Chronically Exposed to Tobacco Smoke*, NEW ENG.J. MEDICINE (March 27, 1980).

56. *See* Memorandum from Richard Dyson, FAA Associate General Counsel, to the Board (May 6, 1981) (Joint Appendix 225, 228-29), summarizing comments on EDR-377.

3. *Ban on smoking on short flights*

[12] EDR-377 also proposed a smoking ban on flights of less than one hour. The rationale for that rule is that it would better protect nonsmokers' interests at little inconvenience to smokers. Several health groups commented in favor of the proposal, and industry commented in opposition to it.[57]

In ER-1245 the proposal received no attention whatsoever. Such treatment plainly disregards the agency's obligation to respond to the major comments received in rulemaking.[58]

CONCLUSION

To summarize, the authority of the Board to regulate smoking on interstate, overseas and foreign transportation is affirmed; the portion of ER-1245 that rescinded the protections of nonsmokers provided by ER-1091 is vacated; and finally, the three proposals in EDR-377 that the Board disposed of without reasons are remanded for further proceedings.

So ordered.

57. *Id.*

ITT WORLD COMMUNICATIONS, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Southern Pacific Communications Company, RCA Global Communications, Inc., Intervenors.

ITT WORLD COMMUNICATIONS, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellant.

ITT WORLD COMMUNICATIONS, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION.

Nos. 80-1721, 80-2324 and 80-2401.

United States Court of Appeals, District of Columbia Circuit.

Argued April 16, 1982.

Decided Feb. 1, 1983.

Telecommunications carrier petitioned for review of an order of the Federal Communications Commission denying its petition for a rule making, and both carrier and the Commission appealed from a judgment of the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., Chief Judge, dismissing the carrier's complaint that the telecommunications committee's alleged negotiations with foreign governments on behalf of the carrier's competitors at consultative process meetings were ultra vires, ordering the Commis-

58. *Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C.Cir.1979).

credibility, we cannot understand why he would not have stated some reason for that conclusion.

[2] Even assuming, however, that the ALJ did conclude that none of the lay witnesses were credible, there remains the problem of the medical evidence. Van Horn's treating physician determined that Van Horn was unable to work. He based this determination in part on conclusions about Van Horn's emotional state—conclusions which were consistent with the consultative psychiatrist's conclusions. The ALJ ignored this evidence in favor of his own conclusion that Van Horn had no emotional problems. In so doing, he acted impermissibly. This court has repeatedly held that "an ALJ is not free to set his own expertise against that of physicians who present competent medical evidence." *Fowler v. Califano*, 596 F.2d 600, 603 (3d Cir.1979). *See also Rossi v. Califano*, 602 F.2d 55 (3d Cir.1979); *Gober v. Matthews*, 574 F.2d 772, 777 (3d Cir.1978). Indeed, we have previously warned that, "[i]n cases of alleged psychological disability, such lay observation [by an administrative judge] is entitled to little or no weight." *Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 494 (3d Cir.1980) (quoting *Lewis v. Weinberger*, 541 F.2d 417, 421 (4th Cir.1976)). The ALJ could only have reached his conclusion by relying solely on his own non-expert observations at the hearing—in other words, by relying on the roundly condemned "sit and squirm" method of deciding disability cases. *See, e.g., Freeman v. Schweiker*, 681 F.2d 727, 731 (11th Cir.1982); *Aubeuf v. Schweiker*, 649 F.2d 107, 113 n. 7 (2d Cir. 1981).[3]

[3] There is simply no competent evidence in this record supporting the ALJ's conclusion that Van Horn was not emotionally disabled and that he was able to engage in substantial gainful employment. Because we conclude that the ALJ's opinion was not supported by substantial evidence in the record, we will remand this case to the district court for transfer to the Secretary for proceedings consistent with this opinion.

cert denied 104 S.Ct. 1414

STATE OF SOUTH CAROLINA ex rel. Leslie E. TINDAL, Commissioner of Agriculture; Steven W. Hamm, as South Carolina Consumer Advocate; South Carolina Farm Bureau; Frank Flowers; W. Charles McGinnis; Lawrence Weathers; Suncoast Milk Producers Cooperative; Independent Dairy Farmers Association, Inc.; Tampa Independent Dairy Farmers' Association, Inc.; Upper Florida Milk Producers Association; Georgia Milk Producers, Inc.; Coble Dairy Products Cooperative, Inc.; Inter-State Milk Producers Cooperative; Dairymen, Inc.; Associated Milk Producers, Inc., Appellees,

v.

John R. BLOCK, Secretary of the United States Department of Agriculture, United States Department of Agriculture and Commodity Credit Corporation, Appellants.

State of Minnesota, Amicus Curiae.

Pennsylvania Farmers Union, Amicus Curiae.

Dairy Farmer Distributors of America and Gustafson, Amicus Curiae.

State of New York and Upstate Milk Cooperatives, Inc., Amicus Curiae.

Nos. 83-1426, 83-1511.

United States Court of Appeals, Fourth Circuit.

Argued July 12, 1983.

Decided Sept. 9, 1983.

Rehearing and Rehearing En Banc Denied Oct. 25, 1983.

Secretary of Agriculture appealed from a judgment of United States District Court

3. "In this approach, an ALJ who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied." *Freeman v. Schweiker*, 681 F.2d at 731.

for the District of South Carolina, Matthew J. Perry, J., which enjoined him from implementing his decision to impose a 50–cent deduction on proceeds of all milk sold commercially. The Court of Appeals, Sprouse, Circuit Judge, held that: (1) Secretary of Agriculture, who not only considered the specific factors Congress legislatively required of him in imposing a 50–cent deduction on proceeds of all milk sold commercially but also considered other general policies underlying the national economy and the price support program, did not act in an arbitrary and capricious manner by failing to consider additional factors contained in other provisions of the Agriculture Act; (2) Secretary of Agriculture did not fail to comply with notice and comment requirements of Administrative Procedure Act; and (3) Secretary's actions did not violate the Constitution.

Vacated and remanded.

1. **Agriculture** ⇐3.5(2)

Secretary of Agriculture, who not only considered the specific factors Congress legislatively required of him in imposing a 50–cent deduction on proceeds of all milk sold commercially but also considered other general policies underlying the national economy and the price support program, did not act in an arbitrary and capricious manner by failing to consider additional factors contained in other provisions of the Agriculture Act. Agricultural Act of 1949, § 201(d)(2), as amended, 7 U.S.C.A. § 1446(d)(2).

2. **Agriculture** ⇐3.5(2)

Secretary of Agriculture's actions in imposing a 50–cent deduction on the proceeds of all milk sold commercially were not arbitrary and capricious for failure to consider general factors nowhere explicitly mentioned in the controlling legislation including the impact on dairy farmers, the impact on the economy dependent on dairy farmers, regional impact on dairy industry and the impact on milk production. Agricultural Act of 1949, § 201(d)(2), as amended, 7 U.S.C.A. § 1446(d)(2); 5 U.S.C.A. § 706(2).

3. **Agriculture** ⇐3.5(2)

Secretary of Agriculture, in imposing a 50–cent deduction on proceeds of all milk sold commercially, did not fail to comply with notice and comment requirements of Administrative Procedure Act. 5 U.S.C.A. § 553.

4. **Administrative Law and Procedure** ⇐395

Notice is sufficient under Administrative Procedure Act if it affords interested parties a reasonable opportunity to participate in the rulemaking process. 5 U.S.C.A. § 553(b)(3).

5. **Administrative Law and Procedure** ⇐405

There is no requirement under Administrative Procedure Act for administrator to discuss every fact or opinion contained in the public comment; purpose of allowing comments is to permit an exchange of views, information, and criticism between interested parties and the agency. 5 U.S.C.A. § 553.

6. **Administrative Law and Procedure** ⇐405

Administrative Procedure Act does not require an exhaustive explanation of an administrator's reasoning for adopting a rule and there is no obligation to make references in agency explanation to all the specific issues raised in the comments; required is a concise general statement of the regulation's basis and purpose and the explanation must simply enable a reviewing court to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them in the way it did. 5 U.S.C.A. § 553(c).

7. **Agriculture** ⇐3.5(2)

Deduction on proceeds of all milk sold commercially, which was imposed by Secretary of Agriculture, was not a tax and therefore the deduction did not violate constitutional provisions governing the taxing power. Agricultural Act of 1949, § 201(d)(2), as amended, 7 U.S.C.A.

§ 1446(d)(2); U.S.C.A. Const. Art. 1, §§ 7, cl. 1, 8, cl. 1.

8. Taxation ⇐1

Mere fact that a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised; if regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax. U.S.C.A. Const. Art. 1, §§ 7, cl. 1, 8, cl. 1.

9. Agriculture ⇐3.5(2)
Commerce ⇐62.5
Constitutional Law ⇐62(6)

Statute under which Secretary of Agriculture imposed a 50–cent deduction on proceeds of all milk sold commercially, did not unconstitutionally delegate legislative power to Secretary and did not violate commerce clause. Agricultural Act of 1949, § 201(d)(2), as amended, 7 U.S.C.A. § 1446(d)(2); U.S.C.A. Const. Art. 1, § 8, cl. 3.

Douglas Letter, Washington, D.C. (Leonard Schaitman, Nicholas Zeppos, Sarah Greenberg, Appellate Staff, Civ. Div., Dept. of Justice, J. Paul McGrath, Asst. Atty. Gen., Washington, D.C., Henry Dargan McMaster, U.S. Atty., Columbia, S.C., on brief), for appellants.

Morton Hollander, Washington, D.C., (D. Paul Alagia, Jr., Richard A. Gladstone, Sydney J. Butler, Paul S. Davidson, Barnett & Alagia, Washington, D.C., Donald M. Barnes, Salvatore A. Romano, Joyce L. Bartoo, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., T. Travis Medlock, Atty. Gen., Clifford O. Koon, Jr., Asst. Atty. Gen., Columbia, S.C., Russell H. Putnam, Jr., Charleston, S.C., Russell W. Templeton, Columbia, S.C., Hubert E. Long, Long, Bouknight, Nicholson & Davis, Lexington, S.C., Venable Vermont, Columbia, S.C., on brief), for appellees.

Hubert H. Humphrey, III, Atty. Gen., Jon K. Murphy, Catharine F. Haukedahl, Sp. Asst. Attys. Gen., St. Paul, Minn., on brief, for amicus curiae.

Before PHILLIPS, SPROUSE and ERVIN, Circuit Judges.

SPROUSE, Circuit Judge:

John R. Block, the Secretary of the United States Department of Agriculture (the Secretary), appeals from the judgment of the district court enjoining him from implementing his decision to impose a 50-cent deduction on the proceeds of all milk sold commercially. The Secretary officially announced his decision by issuing a "notice of determination," which incorporated, among other things, regulations for implementing the decision.[1] This action was taken pursuant to a recent congressional amendment to section 201 of the Agriculture Act of 1949,[2] which generally established the present structure of the milk price support program. The purposes of the deduction, as described by both Congress and the Secretary, are to encourage dairy farmers to reduce milk production and to offset a portion of the cost of the milk price support program.[3] The Secretary is not required by law to impose the deduction, but is authorized by Congress to take that action in his discretion if he believes it will encourage a reduction in milk production. It is conced-

1. 48 Fed.Reg. 11,253 (March 17, 1983). The deduction applies to the proceeds of milk sold during the period April 16, 1983, through September 30, 1983. *Id.* Collection procedures are set forth in the "final rule" published on November 30, 1983. 7 C.F.R. § 1430.291 *et seq.* (1983). The party responsible for collecting the deduction may be the milk producer or purchaser, depending on the circumstances. To the extent a producer markets his own milk directly to consumers, he is responsible to remit to the Commodity Credit Corporation (CCC) 50 cents per hundredweight of milk sold. To the extent a producer sells his milk to nonconsumers, the purchaser is responsible to deduct 50 cents per hundredweight of milk bought from the producer proceeds and remit the collections to the CCC. 7 U.S.C. § 1446(d)(4); 7 C.F.R. § 1430.295 (1983).

2. Pub.L. No. 97-253, § 101, 96 Stat. 763 (Sept. 8, 1982) (amending 7 U.S.C. § 1446).

3. *See* 7 U.S.C. § 1446(d)(2); 48 Fed.Reg. 3764, 3766 (Jan. 27, 1983); *see also* note 9 *infra*.

ed that the deduction will reduce the gross income of farmers by approximately 4 percent.[4]

The State of South Carolina, several dairy farmers and a number of intervening agricultural groups (hereinafter collectively referred to as "dairy parties") filed this suit in district court alleging administrative law and constitutional violations, and seeking injunctive relief preventing implementation of the deduction program. Following an evidentiary hearing, the court found that the Secretary had violated the Administrative Procedure Act (APA) in its rulemaking proceedings.[5] It then issued a preliminary injunction on June 3, 1983, enjoining further collections of the deduction and ordering the return of all monies collected pursuant to the regulation.[6] We hold that the Secretary complied with the APA and that the legislation granting him discretion to act does not violate any provision of the Constitution, and vacate the district court's order.

I.

Congress, in section 201 of the Agriculture Act, authorizes and directs the Secretary to support the price of milk. 7 U.S.C. § 1446. The express purposes of the dairy price support legislation are "to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs." *Id.* § 1446(c). The Secretary is not authorized to pay direct subsidies to producers, but supports the price of milk by standing ready to purchase unlimited quantities of milk products at announced prices. *Id.*; 48 Fed.Reg. 11,253. The Commodity Credit Corporation (CCC), a federal corporate entity within the United States Department of Agriculture,[7] removes excess milk from the market through purchases of surplus butter, cheese, and nonfat dry milk. This program effectively creates a floor for the prices of the products purchased and, indirectly, a floor for the price of all milk and milk products.

In recent years, milk production has greatly exceeded consumer demand. In each of the past two dairy marketing years, the CCC purchased the equivalent of 10 percent of all milk produced in the United States. *See* 48 Fed.Reg. at 3766. This has created massive inventories of hundreds of millions of pounds each of butter, cheese, and dry milk, with current annual storage costs of around $50 million. In 1982, the federal government spent approximately

4. 7 U.S.C. § 1446(d)(2). Congress first provided in the amendment that the Secretary shall support the price of milk at not less than $13.10 per hundredweight, allowing the Secretary to increase that level in his discretion. *Id.* § 1446(d)(1). The Secretary has set the price support level for the fiscal year October 1, 1982, through September 30, 1983, at the statutory minimum. 47 Fed.Reg. 42,128 (Sept. 24, 1982). The amendment further gave the Secretary discretion to impose two 50-cent deductions if CCC purchases of surplus milk products were projected to exceed certain levels. 7 U.S.C. § 1446(d)(2), (3). The Secretary estimated that a 50-cent per hundredweight deduction represented about 4 percent of a farmer's gross income. 48 Fed.Reg. 3764, 3765 (Jan. 27, 1983). By imposing both deductions, the Secretary would reduce a farmer's income by about 8 percent. *Id.* The Secretary to date has imposed only one of the 50-cent deductions, which is the deduction challenged in this litigation.

5. *South Carolina v. Block*, C/A No. 82-3172-0 (D.S.C. June 3, 1983) (Block II). The court, having found administrative law violations, did not address the constitutional claims.

District courts in several other circuits recently considered some of the same issues before the district court, and all refused to issue injunctions. *Pennsylvania Farmers Union, Inc. v. Block*, C/A No. 83-0476 (M.D.Pa. April 28, 1983); *National Farmers' Organization, Inc. v. Block*, 561 F.Supp. 1201 (E.D.Wis. 1983); *Mulroy v. Block*, 569 F.Supp. 256 (N.D. N.Y.1983); *Larsen v. Block*, C/A No. NC-82-0222W (D.Utah March 28, 1983); *Haworth v. Block*, C/A No. 82-4187 (D.Idaho March 5, 1983).

6. The order was stayed by this court on June 13, 1983, pending appeal, and Chief Justice Burger, on June 27, 1983, denied a motion to dissolve the stay.

7. This corporation is created in 15 U.S.C. § 714.

$2.3 billion on the milk price support program.[8] *Id.* at 3785.

Congress, responding to the problems of milk overproduction and the increasing cost of the dairy support program,[9] enacted the amendment in issue as part of the Omnibus Budget Reconciliation Act of 1982[10] (the 1982 amendment). The amendment modifies the price support statute in three respects. First, it established the price at which milk shall be supported at not less than $13.10 per hundredweight during the period October 1, 1982, until September 30, 1984, and mandated that this price level be maintained at a comparable percentage of parity[11] for the fiscal year 1984.[12] Second, Congress authorized the 50-cent deduction challenged in this suit. That portion of the amendment provides:

> Effective for the period beginning October 1, 1982, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Commodity Credit Corporation to offset a portion of the cost of the milk price support program. Authority for requiring such deductions shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 5 billion pounds milk equivalent.

7 U.S.C. § 1446(d)(2). Third, Congress authorized the Secretary to impose an additional 50-cent deduction effective April 1, 1983, that would be refundable to producers who reduce their commercial marketings.[13]

The Secretary, on September 22, 1982, projected that for the fiscal year beginning October 1, 1982, the net price support purchases of milk products would be 12.6 billion pounds. The Secretary then published a "notice of determination" in the Federal register establishing the price support level at $13.10 for fiscal year October 1, 1982, and imposing the first 50-cent deduction beginning on December 1, 1982. He also published a proposed procedure for implementing the deduction program, and invited public comments on "whether the dairy collection plan should be implemented in the manner set forth in this proposed rule...." 47 Fed.Reg. 42,112 (Sept. 24, 1982). The final rule detailing the collection plan was published on November 30, 1982, and was essentially the same as the proposed rule.

The plaintiffs in the district court challenged the Secretary's imposition of the deduction on two grounds: that the legislation was unconstitutional and that the Secretary did not comply with the Administrative Procedure Act in issuing the determination. The district court entered its first preliminary injunction against the deduction on January 11, 1983. The court, con-

8. In 1982, the CCC purchased approximately 68 percent of all nonfat dry milk, 30 percent of all butter and 22 percent of all American cheese produced in this country. As of November 12, 1982, the CCC had inventories of over 400 million pounds of butter, 790 million pounds of cheese, and 1.2 billion pounds of nonfat dry milk. *See National Farmers' Organization Inc. v. Block*, 561 F.Supp. at 1203.

9. *See* 7 U.S.C. § 1446(d)(2) ("the Secretary may provide a deduction of 50 cents ... to offset a portion of the cost of the price support program."); H.R.Rep. No. 97-687, 97th Cong., 2d Sess. at 8 (1982) (the House Committee on Agriculture reported favorably on a program designed "to achieve supply adjustments by alleviating surpluses which, in the case of the dairy program, have resulted in excessive government costs"); S.Rep. No. 97-504, 97th Cong., 2d Sess. at 83-84, U.S.Code Cong. & Admin.News 1982, p. 1641.

10. Pub.L. No. 97-253, § 101, 96 Stat. 763. The Omnibus Budget Reconciliation Act of 1982 sought "to achieve ... dramatic reductions in Federal spending ... to wage an effective battle against Federal deficits." S.Rep. No. 97-504, 97th Cong., 2d Sess. at 4, U.S.Code Cong. & Admin.News 1982, p. 1643.

11. *See* 7 U.S.C. §§ 602, 608c(18), 1301(a).

12. 7 U.S.C. § 1446(d)(1).

13. *Id.* § 1446(d)(3). This second deduction can be imposed only if estimated CCC purchases of milk products exceeds 7.5 billion pounds. While the Secretary has projected that CCC purchases will exceed that amount for fiscal year 1983, he has not yet imposed that deduction. This appeal concerns only the exercise by the Secretary of his discretion to impose the first deduction.

sidering only the administrative law challenges, found that the Secretary failed to comply with the Administrative Procedure Act, and that his action imposing the deduction was therefore illegal. *State of South Carolina v. Block*, 558 F.Supp. 1004 (D.S.C. 1983) (*Block I*). The court specifically found, among other things, that: (1) the appellants' determination of September 24, 1982, constituted substantive rulemaking under the Administrative Procedure Act, 5 U.S.C. § 551(4); (2) the 1982 amendment vested in the appellants the discretion to impose the 50-cent deduction, but did not require the imposition of the assessment; (3) the Secretary had acted to impose the assessment without complying with the notice and comment provisions of the Administrative Procedure Act; (4) dairy farmers would be irreparably harmed by the Secretary's action, while the government would not suffer undue harm due to issuance of an injunction; and (5) that issuance of a preliminary injunction was in the public interest. *Id.*

The Secretary did not appeal the January 11 district court order. Instead, he published another notice designed to remedy the notice and comment defects found by the district court.[14] 48 Fed.Reg. 3764 (Jan. 27, 1983). The notice included a "Summary of Preliminary Regulatory Impact Analysis" and an "Initial Regulatory Flexibility Impact Analysis." *Id.* at 3765–66. The notice further invited the submission of comments, and stated that the comments submitted in response to the September 24 "notice of determination"[15] would be considered in determining whether to impose the new deduction requirement. *Id.* at 3764. The Secretary allowed a 30-day period to receive comments,[16] and then published a final rule imposing the first 50-cents per hundredweight deduction, beginning on April 16, 1983, and extending through September, 1983. 48 Fed.Reg. 11,253 (March 17, 1983).[17] In its final determination, the Secretary responded to the public comments and provided a "Summary of Final Regulatory Impact Analysis." *Id.* at 1254–55.

The plaintiffs again challenged the program contending that the statutory amendment was unconstitutional, and contending that the Secretary's second attempt to implement the deduction also violated the Administrative Procedure Act. The district court again did not address the constitutional claims, stating that "the problems concerning administrative law are so grave that these alone resolve the case against defendants." *Block II*, slip op. at 13. The court essentially found that the Secretary's second action in promulgating the rule for the deduction was arbitrary and capricious in three critical respects: (1) the Secretary did not comply with his statutory responsibility under the Agricultural Act by failing to consider such factors as: the cost of production, returns to producers and the support prices of other commodities; (2) the Secretary had failed to consider important and relevant factors prerequisite to a reasoned decision such as: the impact on dairy farmers, the impact on the economy dependent on dairy farmers, and the regional impact of the program on dairy production; and (3) the Secretary violated the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553, by failing to fairly apprise interested parties of the issues involved in the proposed program, by failing meaningfully to consider important and substantive comments on the proposed action, and by failing to explain his decision adequately. The district court

14. The Secretary at this time estimated CCC purchases for fiscal year 1983 at 14.2 billion pounds.

15. Some 25,000 comments were submitted, and a number of petitions were received containing 23,000 signatures. Virtually all comments were against the deduction.

16. Approximately 5000 comments and petitions containing in excess of 500 signatures were received with regard to the second proposed determination.

17. The final rule states that the deduction "is to be collected in accordance with the regulations published on November 30, 1982 (47 Fed.Reg. 53,831) [7 C.F.R. § 1430.291 *et seq.* (1983)]." 48 Fed.Reg. at 11,254.

issued the preliminary injunction [18] against the Secretary involved in this appeal, but declined to grant permanent injunctive relief stating that "the matter is not yet ripe for final resolution." *Block II*, slip op. at 13.

The Secretary on appeal insists that he complied with the APA. The dairy parties, however, relying on the same three objections successfully raised below, argue that: he failed to consider factors required by the Agricultural Act,[19] that he failed to consider other factors which, although not specified by the Agricultural Act, were critically relevant to his decision, and third, that he violated the notice and comment requirements of the Administrative Procedure Act.

The dairy parties' contentions, however, are misplaced. Congress, in passing the controlling legislation, narrowly defined the factors which the Secretary must consider in exercising his discretion, and the record shows that the Secretary considered those factors. The record also reveals that he complied with the notice and comment requirements. His published notice clearly delineates the proposed rule and we feel he sufficiently considered the comments submitted in response to the notice.

Normally, we would not consider the constitutional arguments raised but not considered in the district court. The government contends, however, and we agree, that the record is fully developed and the constitutional questions are ripe for review. Since we feel that the answers to the constitutional questions are obvious, a remand for initial determination by the district court would be a needless burden on judicial resources. It would also impose needless delays in the final resolution of this matter, which is of crucial and immediate importance to dairy farmers and others in the industry, as well as the government.[20] We therefore hold that the legislation in issue [21] and the Secretary's action pursuant to it [22] are not violative of any provision of the constitution. We thus remand with instructions that the complaint be dismissed.

II.

The critical provision of the Agriculture Act in this litigation is section 1446, which defines the price support level for several commodities, including milk. The basic price support scheme contained in that section has been in place since 1949. Prior to the 1982 amendments, section 1446, with regard to dairy products, merely authorized the Secretary to support the price of milk through purchases of milk and milk products at announced prices. The price support level, which has been periodically adjusted by Congress, generally has been expressed as a price above a specified minimum level or as falling within a certain range based on the parity price. The Secretary determines the precise support level for a particular year. One of the dairy parties' attacks is that the Secretary, in determining to impose the deduction *vel non*, must act upon the same economic considerations that he is required to consider in fixing the milk price support level. The factors which the Secretary must consider in fixing the support level are specifically

18. In support of its preliminary injunction, the district court further found that:
(1) the plaintiffs have established a strong showing that, unless they are allowed injunctive relief by this court, they will suffer injuries of a sort which cannot be adequately compensated by a later return of the monies in question;
(2) the defendants have failed to show that an injunction will cause them hardship of a level comparable to the harm that the plaintiffs will suffer if no injunction is issued;
(3) the public interest strongly favors an injunction to prohibit the collection of this deduction.
Block II, slip op. at 118. *See Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir.1977).

19. *See* 7 U.S.C. §§ 1421(b), 1446(c), 1446b.

20. *See Allstate Ins. Co. v. McNeill*, 382 F.2d 84 (4th Cir.1967); *Hurwitz v. Directors Guild*, 364 F.2d 67 (2d Cir.), *cert. denied*, 385 U.S. 971, 87 S.Ct. 508, 17 L.Ed.2d 435 (1966).

21. 7 U.S.C. § 1446(d)(2).

22. 48 Fed.Reg. 11,253.

contained in section 1446 and other provisions of the Agricultural Act. *See, e.g.*, 7 U.S.C. §§ 1421(b), 1446b.

Section 1446, as amended by the Omnibus Budget Reconciliation Act of 1982, provides in pertinent part:

> The Secretary is authorized and directed to make available ... price support to producers for ... milk ... as follows:
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> ....
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> (c) The price of milk shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs. Such price support shall be provided through the purchase of milk and products of milk.
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> (d) Notwithstanding any other provision of law—
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> (1)(A) Effective for the period beginning October 1, 1982, and ending September 30, 1984, the price of milk shall be supported at not less than $13.10 per hundredweight of milk containing 3.67 per centum milkfat.
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> ....
>
> (C) The price of milk shall be supported through the purchase of milk and the products of milk.
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> (2) Effective for the period beginning October 1, 1982, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Commodity Credit Corporation to offset a portion of the cost of the milk price support program. Authority for requiring such deductions shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should estimate that such net price support purchases during that fiscal year would be less than 5 billion pounds, the authority for requiring such deduction shall not apply for the balance of the year.
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> (3)(A) Effective for the period beginning April 1, 1983, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight, in addition to the deduction referred to in paragraph (2), from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Corporation. The deduction authorized by this subparagraph shall be implemented only if the Secretary establishes a program whereby the funds resulting from such deductions would be refunded in the manner provided in this paragraph to producers who reduce their commercial marketings from such marketings during the base period.

To reiterate, Congress again, in this 1982 Omnibus amendment, adjusted the price support level, providing for a minimum level of $13.10 through September 30, 1984. Significantly, Congress departed from the historical approach it had pursued in this area of agricultural legislation. In the past, congressional action simply concerned fixing the price level at which milk products would be supported. In the 1982 amendment, the Secretary was given authority to require dairy farmers to deduct and remit to the Secretary fifty cents from the price they received for each hundredweight of milk. It is this discretion given the Secretary which is central to the issues in this appeal. That discretion to impose the 50-cent deduction is contingent on the Secretary's projection of milk purchases by the CCC exceeding a specified amount. 7 U.S.C. § 1446(d)(2). Such authority was given to the Secretary for the period October 1, 1982, through September 30, 1985. *Id.* Congress never before under the dairy support program had authorized the Secretary to reduce the income of dairy farmers or to affect the price of milk except by fixing the price support level.

A.

[1] The dairy parties concede that Congress, by granting the Secretary authority to impose the 50-cent deduction, departed from the historical structure of the Agriculture Act. They nevertheless insist that all of the historical provisions of the Act apply to and control the Secretary's discretion in imposing the deduction. Specifically, they contend, and the district court held, that sections 1421(a), 1446(c), and 1446b describe "factors" which the Secretary must consider in exercising his discretion to impose the deduction *vel non*.[23] Section 1446(c) is quoted above. Section 1421(b) describes factors which the Secretary must consider in determining price support. It provides in part:

> (b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried, shall be determined or approved by the Secretary. The following factors shall be taken into consideration in determining, . . . in the case of any commodity for which price support is mandatory [such as milk], the level of support in excess of the minimum level prescribed for such commodity: (1) the supply of the commodity in relation to the demand therefor, (2) the price levels at which other commodities are being supported, . . . (3) the availability of funds, (4) the perishability of the commodity, (5) the importance of the commodity to agriculture and the national economy, (6) the ability to dispose of stocks acquired through a price-support operation, (7) the need for offsetting temporary losses of export markets, (8) the ability and willingness of producers to keep supplies in line with demand. . . .

Section 1446b provides:

> The production and use of abundant supplies of high quality milk and dairy products are essential to the health and general welfare of the Nation; a dependable domestic source of supply of these foods in the form of high grade dairy herds and modern, sanitary dairy equipment is important to the national defense; and an economically sound dairy industry affects beneficially the economy of the country as a whole. It is the policy of Congress to assume a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and butterfat by encouraging dairy farmers to develop efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy.

Contrary to the dairy parties' contentions, however, it seems clear that what Congress intended in enacting section 1446(d)(2) was a self-contained, temporary change in the dairy support program in response to the immediate problems of increasing overproduction and the burgeoning cost of the price support program. Congress prefaced section 1446(d) with the phrase "[n]otwithstanding any other provision of law." It then articulated in section 1446(d)(2) specific factors the Secretary must consider in deciding to impose the first 50-cent deduction: the overproduction of milk; the cost of the milk price support program; the expected amount of CCC purchases; and the relevant time periods. The legislative history shows that Congress considered the effects on the economy of imposing the 50-cent deduction, the government budgetary problems and the individualized hardships it would impose on dairy farmers. After considering these factors in hearings and debates, it provided the Secretary with a narrowly-defined discretionary authority to implement the deduction. The statutory parameters of his discretion were set forth in section 1446(d)(2), which provides that

23. The district court also held that 7 U.S.C. § 1441a applied to the Secretary's determination to impose the deduction. That section, however, merely gives the Secretary the general duty to conduct ongoing studies on the cost of production of certain commodities. *Id.*

the Secretary has such authority for only three fiscal years, October 1, 1982 through September 30, 1985, that such authority applies only if the Secretary estimates that the CCC will purchase in excess of 5 billion pounds of milk products, and the proceeds must be "remitted to the CCC to offset a portion of the cost of the milk price support program." There is no indication that Congress intended for the Secretary to consider factors contained in other provisions of the Agriculture Act.

The substance of all the statutory provisions which the dairy parties would have the Secretary apply in exercising his discretion to impose the deduction was in place long before the 1982 amendment became law. Section 1421(b) specifically states that it applies to the Secretary's actions under the milk program only for purposes of "determining . . . the level of support in excess of the minimum level prescribed for [milk]." Section 1446(c), in listing the factors to be considered by the Secretary, specifically states that they are to be considered in setting the price support level for milk. Section 1446b is entitled "Promotion of increased use of dairy products," a concern of little relevance to the purposes of section 1446(d)(2).[24] Indeed, most, if not all, of the factors listed in the above provisions were considered by Congress in enacting the deduction portion of the 1982 amendment. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 50 n. 22, 101 S.Ct. 2633, 2643 n. 22, 69 L.Ed.2d 460 (1981).

We conclude that the statutory factors reflecting congressional policy contained in 7 U.S.C. §§ 1421(b), 1446(c) and 1446b apply only to the Secretary's responsibility in fixing the price support level, not to his responsibility in determining whether to impose the deduction. On the contrary, Congress narrowly defined the factors he should consider in exercising this latter discretion: whether surplus milk production would exceed five billion pounds and whether this deduction program would lower the government milk support costs. The record reflects that the Secretary considered the statutory requirements imposed upon him by Congress. If statutory requirements are satisfied, a court cannot set aside an administrative decision simply because it "is unhappy with the result reached." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1978).

The Secretary projected milk production and CCC purchases with and without imposition of the 50-cent deduction for fiscal year 1983 as shown in his "Summary of Final Regulatory Impact Analysis" as follows:

> With price support at $13.10 per hundredweight, production is projected to be 138.6 billion pounds for fiscal year 1983 if there is no deduction program, up 3.6 billion pounds from fiscal year 1982. Relatively low feed prices, resulting from record crop production, will keep milk-feed price relationships favorable for increased production. Commercial consumption is projected to increase 1.9 billion pounds to 124.0 billion pounds, milk equivalent, because of relatively stable retail prices and increased population. It is estimated that CCC removals in fiscal year 1983 will be 14.7 billion pounds, up about 0.9 billion pounds or about 8.5 percent more than a year earlier. Despite the upward trend in consumption, purchases would continue to exceed dispositions and CCC stocks would continue to build—a condition that has existed since October 1979.
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> Even with implementation of a 50 cents per hundredweight deduction on April 16, 1983, milk production in fiscal year 1983 is likely to increase from the fiscal year 1982 level by 3.2 billion pounds. Implementation of a $1.00 per hundredweight deduction would result in production increasing by 2.8 billion pounds. Neither of the two deduction programs would have a great downward effect upon milk production this fiscal year because they would not become ef-

24. In deciding to exercise his discretion, however, the Secretary did consider many of the factors listed in section 1446b. *See* 48 Fed.Reg. at 11,255

fective until the season of highest milk production has begun.

Net price support purchases during fiscal year 1983 are projected to be 14.3 billion pounds, at a cost of $2,375 million if a 50-cent per hundredweight deduction is imposed on April 16, 1983 and 13.9 billion pounds, at a cost of $2,314 million if the deduction is $1.00 per hundredweight. Net outlays before deductions, are projected to be $2,433 million with a 50-cent per hundredweight deduction and $2,372 million with a $1.00 per hundredweight deduction. During the period April 16, 1983, through September 30, 1983, a 50-cent per hundredweight deduction will likely total $324 million and $1.00 per hundredweight deduction will total $646 million. Therefore, net CCC outlays for the fiscal year, after deductions, are projected to be $2,109 million assuming a 50-cent deduction and $1,726 million assuming a $1.00 deduction. These figures compare with an estimated purchase cost of $2,282 million and a net outlay of $2,438 million for fiscal year 1982, and an estimated purchase cost of $2,438 and a net outlay of $2,496 million for fiscal year 1983 if there is no deduction.

48 Fed.Reg. at 11,254–55. The Secretary also determined that the 50-cent deduction would help to reduce the overproduction of milk, as shown in his "Initial Regulatory Flexibility Impact Analysis" as follows:

Failure to implement any deduction would fail to accomplish CCC's stated objectives and would result in a continuation of the present situation where milk production exceeds commercial consumption and Commodity Credit Corporation purchases large amounts of dairy products under the milk price support program at great expense.

Neither of the two deduction programs will have a great downward effect upon milk production during this fiscal year because they would not become effective until the season of highest milk productions (the flush) has begun. The effect upon milk production will begin to be felt after the flush in the summer months as pastures begin to deteriorate, and later in the fall when cows are taken off pasture and moved into barns.

48 Fed.Reg. at 3766.

Moreover, although the Secretary was required to consider only the three statutory factors, he in fact ranged over a broader spectrum of considerations in deciding to exercise his discretion to impose the 50-cent deduction. The Secretary's impact analysis is illustrative where he states:

The proposal will assure an adequate supply of milk and dairy products and will encourage efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment. It also will assure dairy farmers as a whole of a fair return for their labor and investment while assuring an adequate supply of pure and wholesome milk to meet current needs. The proposal will assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs. The proposal also reflects the recent reduction in the cost of feed and increased efficiency in production. Some marginal operators may not be able to profit under the proposal but the statute does not guarantee each and every dairy farmer a profit while requiring the accumulation of huge CCC stocks of surplus dairy products.

48 Fed.Reg. at 3765–66. *See* 7 U.S.C. § 1446b.

We conclude, therefore, that the Secretary did not act in an arbitrary and capricious manner by failing to consider additional factors contained in other provisions of the Agriculture Act in implementing the 50-cent deduction. He not only considered the specific factors Congress legislatively required of him, but also considered other general policies underlying the national economy and the price support program.

B.

[2] The district court held that the Secretary was required by the Administrative Procedure Act not only to consider the legislative factors previously listed, but other

general factors nowhere explicitly mentioned in the controlling legislation. 5 U.S.C. § 706(2). It specifically found, among other things, that the Secretary improperly failed to consider in determining to impose the deduction: (1) the impact on dairy farmers; (2) the impact on the economy dependent on dairy farmers; (3) the regional impact on the dairy industry; and (4) the impact on milk production.

The district court fell into the same error in making these findings as it did in concluding that additional sections of the Agriculture Act must be considered. Again, Congress specifically, and we think emphatically, granted the Secretary discretion to decide whether to impose the deduction. It directed him to project whether CCC purchases would exceed 5 billion pounds and whether the deduction program would lower the cost to the government of the support program.[25] As already noted, the Secretary properly considered these factors. Courts are not free to add substantive or procedural hurdles for agencies to overcome if Congress has not established such requirements. *See Baltimore Gas & Elec. Co. v. NRDC*, —— U.S. ——, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). Having met those requirements, it cannot be said that the Secretary's actions were arbitrary and capricious for failure to consider the factors which a court might feel are appropriate but which were either considered and rejected by Congress, or simply not included by Congress as factors which the administrative agency must consider.

C.

[3] The finding that the Secretary failed to comply with the notice and comment requirements of the APA, 5 U.S.C. § 553, was also in error. The district court held first that the information made available to the public was critically deficient in that it did not reveal the information animating the defendant's proposal to a sufficient degree to allow effective public comment; second, that the Secretary did not adequately respond to comments; and third, that he failed adequately to explain his decision. We consider these district court findings in that sequential order.

[4] First, section 553(b)(3) provides that a "notice" shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The notice requirement is to fairly appraise interested parties of the issues involved in the rulemaking proceedings. *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321–22 (4th Cir.1980); *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 248 (4th Cir.1979). Notice is sufficient if it affords interested parties a reasonable opportunity to participate in the rulemaking process. *Forester v. Consumer Product Safety Comm'n*, 559 F.2d 774, 787–88 (D.C.Cir.1977).

We believe the dairy parties and the interested public were fairly apprised of the "subjects and issues involved" regarding the Secretary's proposal to implement the 50-cent deduction. 5 U.S.C. § 553(b)(3). The proposal explained the background of the proposed rule, described the milk price support program, and provided a summary of the proposed rule. It further discussed the expected effect of the regulation, the reasons for the action, the objectives and legal basis for the proposed rule, and a number of other considerations. The deduction program was designed by Congress itself following hearings and debate. Leaders in the dairy industry followed those congressional proceedings closely. As to them, the notice did not newly introduce the problem.

[5] Second, the Secretary adequately responded to comments he had received after publishing the notice. The purpose of allowing comments is to permit an exchange of views, information, and criticism between interested persons and the agency. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C.Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977). There is no requirement for the Secretary to discuss every fact or opinion contained in the public comments. *General Telephone Co. v. Unit-*

25. 7 U.S.C. § 1446(d)(2).

ed States, 449 F.2d 846, 862 (5th Cir.1971); *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F.Supp. 457, 484 (D.Kan.1978), *aff'd*, 602 F.2d 929 (10th Cir.1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980). Instead, the Secretary is obligated to identify and comment on only the relevant and significant issues raised during the proceeding. *Home Box Office*, 567 F.2d at 35 n. 58; *Community Nutrition Institute v. Bergland*, 493 F.Supp. 488, 492-93 (D.C. 1980).

The Secretary enumerated all of the comments he had received with regard to the proposed deduction rules, and stated that "all comments bearing on the determination have been considered." 48 Fed.Reg. at 11,254. He responded specifically to a number of comments, such as ones stating that the deduction would not reduce milk production, that it would not balance supply and demand, that large numbers of small farmers would be put out of business, and other comments suggesting increased donations of dairy products, a reduction in the support price, termination of the milk price support program, and an exemption from the deduction for producer-handlers. *Id.* Most of the comments concerned alternatives to the deduction program outside the scope of the Secretary's authority, or concerned factors and issues irrelevant to implementation of the deduction or which had already been considered by Congress in enacting the deduction amendment. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 50 n. 22, 101 S.Ct. 2633, 2643 n. 22, 69 L.Ed.2d 460 (1981). Having responded to the comments concerning the major factors relevant to a decision to implement the deduction and a number of others, the Secretary did not violate the comment requirement contained in 5 U.S.C. § 553(c).

Third, the district court ruled that the Secretary's explanation of the final rule did not enable the court to discern the agency's reasoning, and thus frustrated judicial review. 5 U.S.C. § 553(c). We feel that the Secretary adequately explained his decision to impose the first 50-cent deduction.

[6] The APA does not require an exhaustive explanation of an administrator's reasoning for adopting a rule. Required is "a concise general statement [of the regulation's] basis and purpose." *Appalachian Power Co. v. EPA*, 579 F.2d 846, 854 (4th Cir.1978), *quoting United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758, 92 S.Ct. 1941, 1951, 32 L.Ed.2d 453 (1972). There is no obligation to make references in the agency explanation "to all the specific issues raised in comments." *Appalachian Power Co.*, 579 F.2d at 854, *quoting Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C.Cir.1972); *Consumers Union of U.S., Inc. v. Consumer Product Safety Comm'n*, 491 F.2d 810, 812 (2d Cir.1974). The agency's explanation must simply enable a reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did." *General Telephone Co. v. United States*, 449 F.2d 846, 862 (5th Cir.1971), *quoting Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C.Cir.1968). *See also Amoco Oil Co. v. EPA*, 501 F.2d 722, 739 (D.C.Cir.1974).

The facts and policy concerns relied on by the Secretary are clearly set forth in the statement of basis and purpose in the final rule. In his "Summary of Final Regulatory Impact Analysis," the Secretary demonstrates that milk production is expected to increase; that CCC purchases will continue to increase despite a deduction program; and that without a deduction program, the CCC will have to spend accelerating amounts to support the price of dairy products. The Secretary also projected that CCC purchases would greatly exceed 5 billion pounds in fiscal year 1983, and that imposing the 50-cent deduction would reduce the amount the government would have to spend in that fiscal year. The Secretary thus articulated an adequate factual basis for his decision to impose a 50-cent deduction and clearly explained that decision.

III.

The constitutional contentions merit little discussion. As we previously indicated, we

normally would not entertain these issues since they were not considered by the district court and the resolution of the constitutional questions are not necessary to support our decision to reverse the action of the district court issuing the preliminary injunction. If we ruled solely on the district court's holding relating to violation of the APA, however, the constitutional issues surely would be raised again on remand with attendant delays of hearing and appeal. Since we have decided the administrative law issues adversely to the dairy parties, only their constitutional claims remain. No factual issues inhibit our full understanding of those claims, and the asserted constitutional principles are well settled. The development of those issues in district court would provide us with little assistance in disposing of the constitutional arguments. Therefore, with some hesitancy in departing from our well-established and trusted rule that we not meet constitutional problems unless necessary to the resolution of the appeal, we briefly consider the fully developed facts under well established principles of constitutional law.

[7] The dairy parties first argue that the deduction, which is to be imposed by the Secretary, violates the constitutional provisions governing the taxing power. They specifically argue that it violates Art. I, § 7, cl. 1, in that it is a tax not originating in the House of Representatives. They further argue that the deduction violates Art. I, § 8, cl. 1, because Congress cannot delegate the "power to lay and collect taxes," and because the funds generated by the deduction do not go to the United States Treasury for the "general welfare."

[8] The deduction, however, is not a tax. The mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised. *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884). The imposition of assessments have long been held to be a legitimate means of regulating commerce. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942). If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax. *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir.1957); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir.1943).

The clear language and structure of the 1982 amendment indicates that its primary purpose is regulation. The statute's regulatory purpose is to reduce overproduction of milk and shift some of the financial burden of the price support program. Accordingly, the dairy amendment bears the indelible imprimatur of the commerce power and is not an unconstitutional exercise of the taxing power.

[9] There likewise is no merit to the contention that the involved statute unconstitutionally delegates legislative power to the Secretary. The legislative history of section 1446(d)(2) reveals that Congress clearly delineated the policy objectives of reducing milk production and reducing the increasing cost of the milk price support program. The statute clearly describes the effective dates during which the deduction may be implemented, the specific amount of the deduction, and requires a minimum level of expected government purchases before the deduction can be imposed. Congress thus clearly delineated "the general policy, the public agency which will apply it, and the boundaries of the delegated authority." *Electric Power & Light Corp. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946).

The dairy parties finally contend that section 1446(d)(2) is not a valid exercise under the commerce clause, Art. 1, § 8, cl. 3. The test of this issue is simply stated by the Supreme Court ruling in *Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981): "A court may invalidate legislation under the commerce clause only if it is clear that there is no rational basis ... between the regulatory means selected and the asserted ends." *Id.* at 323–24, 101 S.Ct. at 2383. The dairy parties themselves are reaching for the irrational, contending that there exists no rational basis between the means—lowering the financial rate on milk—and the ends sought by Congress—a

decrease in milk production and a contribution by milk suppliers to the cost of the support program. Indeed, the milk support program, which has been in effect for many years without challenge, is premised on the link between profitability and production.[26]

IV.

We may well consider the tool given the Secretary to be blunt, and its use by the Secretary to effectively drive some producers "out-of-business" to be harsh as it applies to small dairy operations. It is clear, however, that Congress was aware of the possibility of harsh results to some small farmers. The Secretary, on appeal, admits that reduction to gross income by 4 percent will force some dairy families to cease their farming operations. The current unprecedented high expense of farming, the inherent cost inefficiency of operating a family farm, and the resulting small percentage of gross income ultimately realized as a profit, makes this sometimes cruel prospect a stark reality. Were we the Secretary, we might well have searched long for a more humane alternative, but our judicial task is not to substitute our judgment for that of the administrative agency. We are limited in our review to determining whether the Secretary acted constitutionally under a constitutional statute, followed the mandate of Congress, and in accordance with the APA.

The Secretary's actions implementing the 50-cent deduction authorized in section 1446(d)(2) were not, under our standard of review, arbitrary or capricious, nor in excess of statutory authority or limitations. 5 U.S.C. § 706(2). We further hold that section 1446(d)(2) and its application withstand constitutional scrutiny. The order of the district court, therefore, is vacated and remanded for dismissal of the complaint.

VACATED AND REMANDED.

26. The dairy industry also alleged that section 1446(d)(2) as imposed violates the equal protection and due process requirements of the fifth amendment. These claims are clearly without merit. *See Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-254, 30 L.Ed.2d 225 (1971); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Larsen v. Block*, C.A. No. NC-82-0222W (D.Utah March 28, 1983).

Rudolph LEE, Jr., Appellee,

v.

Andrew J. WINSTON, Sheriff; Aubrey M. Davis, Jr., Appellants,

and

Gerald Baliles; Circuit Court, City of Richmond, Division I, Defendants.

No. 82-6762.

United States Court of Appeals, Fourth Circuit.

Argued March 9, 1983.

Decided Sept. 14, 1983.

State court defendant brought civil rights and habeas corpus action to preclude state from forcing him to undergo surgery to remove a bullet from his chest. The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., J., 551 F.Supp. 247, granted relief and state appealed. The Court of Appeals, James Dickson Phillips, Circuit Judge, held that: (1) defendant had been denied due process in state court proceedings when he was not given adequate time to prepare his case; (2) case would properly be treated as one for injunction under federal civil rights statute and not as one for habeas corpus; (3) state court proceedings were not entitled to full faith and credit in federal court because of the denial of due process; and (4) it would violate Fourth Amendment to require defendant to undergo surgery while under general anesthesia for removal of bullet from his chest.

Affirmed in part and vacated in part.

Widener, Circuit Judge, filed a dissenting opinion.

for his or her daily activities. This type of property includes real property such as land which is used to produce vegetables or livestock only for personal consumption in the individual's household (for example, corn, tomatoes, chicken, cattle). This type of property also includes personal property necessary to perform daily functions exclusive of passenger cars, trucks, boats, or other special vehicles. (See § 416.1218 for a discussion on how automobiles are counted.) Property used to produce goods or services or property necessary to perform daily functions is excluded if the individual's equity in the property does not exceed $6,000. Personal property which is required by the individual's employer for work is not counted, regardless of value, while the individual is employed. Examples of this type of personal property include tools, safety equipment, uniforms and similar items.

Example. Bill owns a small unimproved lot several blocks from his home. He uses the lot, which is valued at $4,800, to grow vegetables and fruit only for his own consumption. Since his equity in the property is less than $6,000, the property is excluded as necessary to self-support.

7. Section 416.1225 is added to read as follows:

§ 416.1225 An approved plan for self-support; general.

If the individual is blind or disabled, resources will not be counted that are identified as necessary to fulfill a plan for achieving self-support which is in writing, has been approved by the Social Security Administration and is being pursued by the individual.

8. Section 416.1226 is revised to read as follows:

§ 416.1226 What a plan to achieve self-support is.

A plan to achieve self-support must—

(a) Be designed especially for the individual;

(b) Be in writing;

(c) Be approved by the Social Security Administration (a change of plan must also be approved);

(d) Be designed for an initial period of not more than 18 months. The period may be extended for up to another 18 months if the individual cannot complete the plan in the first 18-month period. A total of up to 48 months may be allowed to fulfill a plan for a lengthy education or training program designed to make the individual self-supporting;

(e) Show the individual's specific occupational goal;

(f) Show what resources the individual has or will receive for purposes of the plan and how he or she will use them to attain his or her occupational goal; and

(g) Show how the resources the individual set aside under the plan will be kept identifiable from his or her other funds.

9. Section 416.1227 is added to read as follows:

§ 416.1227 When the resources excluded under a plan to achieve self-support begin to count.

The resources that were excluded under the individual's plan will begin to be counted as of the first day of the month following the month in which any of these circumstances occur:

(a) Failing to follow the conditions of the plan;

(b) Abandoning the plan;

(c) Completing the time schedule outlined in the plan; or

(d) Reaching the goal as outlined in the plan.

[FR Doc. 85-25156 Filed 10-21-85; 8:45 am]
BILLING CODE 4190-11-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8059]

Statutory Merger Using Voting Stock of the Corporation Controlling the Merged Corporation

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the statutory merger of a controlled corporation into an acquiring corporation using the voting stock of the corporation controlling the merged corporation (reverse triangular merger). Changes to the applicable tax law were made by Public Law 91-693. These regulations affect corporations involved in reverse triangular mergers, and the shareholders and security holders of those corporations, and provide guidance needed to comply with the law.

DATES: These regulations are effective October 22, 1985. These regulations apply to statutory mergers occurring after December 31, 1970.

FOR FURTHER INFORMATION CONTACT: Andrew B. Pullman of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224, Attention: CC:LR:T, (202-566-3458, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

On January 2, 1981, the **Federal Register** published proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 368 of the Internal Revenue Code of 1954 (the "Code") (46 FR 114). The amendments were proposed to conform the regulations to Public Law 91-693, which added section 368(a)(2)(E) to the Code. Because a public hearing was not requested, no public hearing was held. After consideration of all comments regarding the proposed amendments, those amendments are adopted as revised by this Treasury decision.

Summary of Public Comments and Changes To Proposed Regulations

Control Requirement

Section 368(a)(2)(E)(ii) of the Code requires that, in the transaction, former shareholders of the surviving corporation (hereinafter "T") exchange, for voting stock of the controlling corporation (hereinafter "P"), an amount of stock which constitutes control of T (as defined in section 368(c) of the Code). Section 1.368-2(j)(3)(i) of the proposed regulations provides that the amount of T stock surrendered in the transaction by T shareholders in exchange for P voting stock must itself constitute control. Accordingly, if P owns more than 20 percent of T, the transaction does not qualify under section 368(a)(2)(E). Example (3) of proposed § 1.368-2(j)(7) illustrates that result. Numerous commenters suggested that, instead, the regulations provide that the requirement of section 368(a)(2)(E)(ii) is satisfied if, in the transaction, T shareholders surrender in exchange for P voting stock an amount of T stock which, when added to P's prior stock ownership in T, constitutes control.

After careful consideration, it is concluded that the statute does not permit the interpretation advanced by the commenters. Section 1.368-2(j)(3)(i) and example (4) of § 1.368-2(j)(7) of the final regulations retain the rule set forth in the proposed regulations. Examples (6) and (7) of § 1.368-2(j)(7) of the final regulations clarify, however, that the control requirement of section 368(a)(2)(E)(ii) may be satisfied despite the fact that, in the transaction, P contributes money or other property to T in exchange for additional T stock, or P receives T stock in exchange for its prior interest in the merged corporation (hereinafter "S"). However, as

illustrated in example (9) of § 1.368–2(j)(7) of the final regulations, the receipt of such T stock will not contribute to satisfaction of that control requirement.

Section 1.368–2(j)(3)(i) of the proposed regulations also provides that, for purposes of the control requirement, T's outstanding stock is measured immediately before the transaction. Further, as illustrated in examples (2) and (4) of proposed § 1.368–2(j)(7), payments to T's shareholders other than P voting stock (such as cash payments to dissenters or payments in redemption of T stock), as part of the transaction, could prevent satisfaction of that requirement. Several commenters suggested that, similar to reorganizations under section 368(a)(1)(B), payments to T's shareholders could be disregarded for purposes of the control requirement, provided the consideration was furnished by T and not by P. In response, § 1.368–2(j)(3)(i) of the final regulations, reflecting an interpretation of the statute which looks to the consideration furnished by P rather than that received by the T shareholders, provides that such payments by T and not by P may be disregarded for purposes of section 368(a)(2)(E)(ii). As with reorganizations under section 368(a)(1)(B), the facts and circumstances of each case will determine whether the payments came from T or P. Examples (2) and (3) of § 1.368–2(j)(7) of the final regulations illustrate that result. However, § 1.368–2(j)(3)(i) and (iii) also clarify that those payments are treated as a reduction of T's properties for purposes of section 368(a)(2)(E)(i), which requires that, after the transaction, T hold substantially all of its properties. In addition, receipt of consideration other than P stock by T shareholders in the transaction could prevent satisfaction of the continuity of interest requirement.

Section 1.368–2(j)(3)(i) of the proposed regulations defines control under section 368(c). Since current law is sufficiently clear as to the definition of control under section 368(c), the final regulations do not contain such a definition.

Section 1.368–2(j)(3)(ii) of the proposed regulations provides that P must acquire control of T in the transaction. Section 1.368–2(j)(3)(ii) of the final regulations clarifies this rule to provide that P must be in control of T immediately after the transaction. Thus, any disposition by P of the T stock acquired (other than a transfer described in section 368(a)(2)(C)), or any new issuance of stock by T to persons other than P, as part of the transaction, which causes P not to be in control of T will prevent the transaction from qualifying under section 368(a)(2)(E). Example (8) of § 1.368–2(j)(7) of the final regulations illustrates this rule.

"Substantially All" Requirement

Section 368(a)(2)(E)(i) of the Code requires generally that, after the transaction, T hold substantially all of its properties and substantially all of the properties of S. Section 1.368–2(j)(4) of the proposed regulations indicates that this requirement will not be satisfied where, as part of the transaction, T transfers assets to a corporation controlled by T, notwithstanding section 368(a)(2)(C) of the Code. Several commenters suggested that section 368(a)(2)(C) permits assets to T to be transferred to a controlled corporation without violating the "substantially all" requirement. In response, § 1.368–2(j)(4) of the final regulations provides that such transfers do not violate the "substantially all" requirement.

Section 1.368–2(j)(3)(iii)(E) of the final regulations clarifies that money transferred from P to S to satisfy minimum state capitalization requirements, which eventually is returned to P as part of the transaction, is not taken into account in applying the "substantially all" test to the assets of S.

Assumption of Liabilities; Exchange of Securities

Section 1.368–2(j)(5) of the proposed regulations provides that P may assume liabilities of T without disqualifying the transaction under section 368(a)(2)(E). Commenters requested that the regulations clarify the treatment of such liability assumption by P. Accordingly, § 1.368–2(j)(5) of the final regulations clarifies that liability assumption is a continuation to the capital of T by its shareholder P. In addition, § 1.368–2(j)(5) of the final regulations clarifies that where, pursuant to the plan of reorganization, securities of T are exchanged for securities of P, or for other securities of T which, for example, are convertible into P stock, that exchange is subject to the otherwise applicable provisions of section 354 and 356.

Relation to Section 368(a)(1)(B)

A few commenters suggested that the regulations confirm that a transaction which fails to qualify under section 368(a)(2)(E) may, under appropriate circumstances, qualify as a reorganization described in section 368(a)(1)(B), as in Rev. Rul. 67–448, 1967–2 C.B. 144. Examples (4) and (5) of § 1.368–2(j)(7) of the final regulations confirm this result.

Merged Corporation

Finally, in response to comments, § 1.368–2(j)(6) of the final regulations clarifies that S can be an existing corporation as well as a corporation formed for purposes of the section 368(a)(2)(E) transaction.

Regulatory Flexibility Act and Executive Order 12291

The Commissioner of Internal Revenue has determined that this final rule is not a major rule as defined in Executive Order 12291 and that a Regulatory Impact Analysis is therefore not required. Because the notice of proposed rulemaking for these regulations was filed with the Federal Register on December 29, 1980, no regulatory flexibility analysis is required.

Drafting Information

The principal author of these regulations is Andrew B. Pullman of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing these regulations, both on matters of substance and style.

List of Subjects in 26 CFR 1.301–1 through 1.383–3

Income taxes, Corporations, Corporate distributions, Corporate adjustments, Reorganizations.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 1 is amended as follows:

Paragraph 1. The authority for Part 1 continues to read in part:

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

Par. 2. Section 1.368–2 is amended by adding paragraphs (b)(3), (i), and (j). These added provisions read as follows:

§ 1.368–2 Definition of terms.

* * * * *

(b) * * *

(3) For regulations under section 368(a)(2)(E), see paragraph (j) of this section.

* * * * *

(i) [Reserved]

(j)(1) This paragraph (j) prescribes rules relating to the application of section 368 (a) (2) (E). Section 368(a)(2)(E) applies to statutory mergers occurring after December 31, 1970.

(2) Section 368(a)(2)(E) does not apply to a consolidation.

(3) A transaction otherwise qualifying under section 368(a)(1)(A) is not disqualified by reason of the fact that stock of a corporation (the controlling corporation) which before the merger was in control of the merged corporation is used in the transaction, if the conditions of section 368(a)(2)(E) are satisfied. Those conditions are as follows:

(i) In the transaction, shareholders of the surviving corporation must surrender stock in exchange for voting stock of the controlling corporation. Further, the stock so surrendered must constitute control of the surviving corporation. Control is defined in section 368(c). The amount of stock constituting control is measured immediately before the transaction. For purposes of this subdivision (i), stock in the surviving corporation which is surrendered in the transaction (by any shareholder except the controlling corporation) in exchange for consideration furnished by the surviving corporation (and not by the controlling corporation of the merged corporation) is considered not to be outstanding immediately before the transaction. For effect on "substantially all" test of consideration furnished by the surviving corporation, see paragraph (j)(3)(iii) of this section.

(ii) Except as provided in paragraph (j)(4) of this section, the controlling corporation must control the surviving corporation immedately after the transaction.

(iii) After the transaction, except as provided in paragraph (j)(4) of this section, the surviving corporation must hold substantially all of its own properties and substantially all of the properties of the merged corporation (other than stock of the controlling corporation distributed in the transaction). The term "substantially all" has the same meaning as in section 368(a)(1)(C). The "substantially all" test applies separately to the merged corporation and to the surviving corporation. In applying the "substantially all" test to the surviving corporation, consideration furnished in the transaction by the surviving corporation in exchange for its stock is property of the surviving corporation which it does not hold after the transaction. In applying the "substantially all" test to the merged corporation, assets transferred from the controlling corporation to the merged corporation in pursuance of the plan of reorganization are not taken into account. Thus, for example, money transferred from the controlling corporation to the merged corporation to be used for the following purposes is not taken into account for purposes of the "substantially all" test:

(A) To pay additional consideration to shareholders of the surviving corporation;

(B) To pay dissenting shareholders of the surviving corporation;

(C) To pay creditors of the surviving corporation;

(D) To pay reorganization expenses; or

(E) To enable the merged corporation to satisfy state minimum capitalization requirements (where the money is returned to the controlling corporation as part of the transaction).

(4) A transaction qualifying under section 368(a)(1)(A) by reason of the application of section 368(a)(2)(E) is not disqualified merely because part or all of the stock of the surviving corporation is transferred to a corporation controlled by the controlling corporation, or because part or all of the assets of the surviving corporation or the merged corporation are transferred to a corporation controlled by the controlling corporation. See section 368(a)(2)(C).

(5) The controlling corporation may assume liabilities of the surviving corporation without disqualifying the transaction under section 366(a)(2)(E). An assumption of liabilities of the surviving corporation by the controlling corporation is a contribution to capital by the controlling corporation to the surviving corporation. If, in pursuance of the plan of reorganization, securities of the surviving corporation are exchanged for securities of the controlling corporation, or for other securities of the surviving corporation, see sections 354 and 356.

(6) In applying section 368(a)(2)(E), it makes no difference if the merged corporation is an existing corporation, or is formed immediately before the merger, in anticipation of the merger, or after preliminary steps have been taken to otherwise acquire control of the surviving corporation.

(7) The following examples illustrate the application of this paragraph (j). In each of the examples, Corporation P owns all of the stock of Corporation S and, except as otherwise stated, Corporation T has outstanding 1,000 shares of common stock and no shares of any other class. In each of the examples, it is also assumed that the transaction qualifies under section 368(a)(1)(A) if the conditions of section 368(a)(2)(E) are satisfied.

Example (1). P owns no T stock. On January 1, 1981, S merges into T. In the merger, T's shareholders surrender 950 shares of common stock in exchange for P voting stock. The holders of the other 50 shares (who dissent from the merger) are paid in cash with funds supplied by P. After the transaction, T holds all of its own assets and all of S's assets. Based on these facts, the transaction qualifies under section 368(a)(1)(A) by reason of the application of section 368(a)(2)(E). In the transaction, former shareholders of T surrender, in exchange for P voting stock, an amount of T stock (950/1,000 shares or 95 percent) which constitutes control of T.

Example (2). The facts are the same as in example (1) except that holders of 100 shares in corporation T, who dissented from the merger, are paid in cash with funds supplied by T (and not by P or S) and in the merger, T's remaining shareholders surrender 720 shares of common stock in exchange for P voting stock and 180 shares of common stock for cash supplied by P. The requirements of section 368(a)(2)(E)(ii) are satisfied since, in the transaction, former shareholders of T surrender, in exchange for P voting stock, an amount of T stock (720/900 shares or 80 percent) which constitutes control of T. The T stock surrendered in exchange for consideration furnished by T is not considered outstanding for purposes of determining whether the amount of T stock surrendered by T shareholders for P stock constitutes control of T.

Example (3). T has outstanding 1,000 shares of common stock, 100 shares of nonvoting preferred stock, and no shares of any other class. On January 1, 1981, S merges into T. Prior to the merger, as part of the transaction, T distributes its own cash in redemption of the 100 shares of preferred stock. In the transaction, T's remaining shareholders surrender their 1,000 shares of common stock in exchange for P voting stock. The requirements of section 368(a)(2)(E)(ii) are satisfied since, in the transaction, former shareholders of T surrender, in exchange for P voting stock, an amount of T stock (1,000/1,000 shares or 100 percent) which constitutes control of T. The preferred stock surrendered in exchange for consideration furnished by T is not considered outstanding for purposes of determining whether the amount of T stock surrendered by T shareholders for P stock constitutes control of T. However, the consideration furnished by T for its stock is property of T which T does not hold after the transaction for purposes of the substantially all test in paragraph (j)(3)(iii) of this section.

Example (4). On January 1, 1971, P purchased 201 shares of T's stock. On January 1, 1981, S merges into T. In the merger, T's shareholders (other than P) surrender 799 shares of T stock in exchange for P voting stock. Based on these facts, in the transaction, former shareholders of T do not surrender, in exchange for P voting stock, an amount of T stock which constitutes control of T (799/1,000 shares being less than 80 percent). Therefore, the transaction does not qualify under section 368(a)(1)(A). However, if S is a transitory corporation, formed solely for purposes of effectuating the transaction, the transaction may qualify as a reorganization described in section 368(a)(1)(B) provided all of the applicable requirements are satisfied.

Example (5). On January 1, 1971, P purchased 200 shares of T's stock. On January 1, 1981, S merges into T. Prior to the merger, as part of the transaction, T distributes its own cash in redemption of 1 share of T stock from a T shareholder other than P. In the merger, T's remaining shareholders (other than P) surrender 799 shares of T stock in exchange for P voting stock. Based on these facts, in the transaction, former shareholders of T do not surrender, in exchange for P voting stock, an amount of T stock which constitutes control of T (799/999 shares being less than 80 percent). Therefore, the transaction does not qualify under section 368(a)(1)(A). However, if S is a transitory corporation, formed for purposes of effectuating the transaction, the transaction may qualify as a reorganization described in section 368(a)(1)(B) provided all of the applicable requirements are satisfied.

Example (6). The stock of S has a value of $25,000. The stock of T has a value of $75,000. On January 1, 1984, S merges into T. In the merger, T's shareholders surrender all of their T stock in exchange for P voting stock. After the transaction, T holds all of its own assets and all of S's assets. Based on these facts, the transaction qualifies under section 368(a)(1)(A) by reason of the application of section 368(a)(2)(E). In the transaction, former shareholders of T surrender, in exchange for P voting stock, an amount of T stock (1,000/1,000 shares or 100 percent) which constitutes control of T. The stock of T received by P in exchange for P's prior interest in S is not taken into account for purposes of section 368(a)(2)(E)(ii) since the amount of T stock constituting control of T is measured before the transaction.

Example (7). The stock of T has a value of $75,000. On January 1, 1984, S merges into T. In the merger, T's shareholders surrender all of their T stock in exchange for P voting stock. As part of the transaction, P contributes $25,000 to T in exchange for new shares of T stock. None of the cash received by T is distributed or otherwise paid out to former T shareholders. After the transaction, T holds all of its own assets and all of S's assets. Based on these facts, the transaction qualifies under section 368(a)(1)(A) by reason of the application of section 368(a)(2)(E). In the transaction, former shareholders of T surrender, in exchange for P voting stock, an amount of T stock (1,000/1,000 shares or 100 percent) which constitutes control of T. The T stock received by P in exchange for its contribution to T is not taken into account for purposes of section 368(a)(2)(E)(ii) since the amount of T stock constituting control of T is measured before the transaction.

Example (8). The facts are the same as in example (7) except that, as part of the transaction, corporation R, instead of P, contributes $25,000 to T in exchange for T stock. Based on these facts, the transaction does not qualify under section 368(a)(1)(A) by reason of section 368(a)(2)(E) since P does not control T immediately after the transaction.

Example (9). T stock has a value of $75,000. P owns 500 shares (½) of that stock with a value of $37,500. The stock of S has a value of $125,000. On January 1, 1984, S merges into T. In the merger, T's shareholders (other than P) surrender their T stock in exchange for P voting stock. Based on these facts, in the transaction, former shareholders of T do not surrender, in exchange for P voting stock, an amount of T stock which constitutes control of T (500/1,000 shares being less than 80 percent). Therefore, the transaction does not qualify under section 368(a)(1)(A). The stock of T received by P in exchange for P's prior interest in S does not contribute to satisfaction of the requirement of section 368(a)(2)(E)(ii).

Approved: September 24, 1985.

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

Ronald A. Pearlman,

Assistant Secretary of the Treasury.

[FR Doc. 85-25174 Filed 10-21-85; 8:45 am]

BILLING CODE 4830-01-M

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26 CFR Part 1

[T.D. 8042]

Income Tax—Taxable Years Beginning After December 31, 1953; Property Transferred in Connection With the Performance of Services; Correction

Correction

In FR Doc. 85-23287 appearing on page 39664, in the issue of Monday, September 30, 1985, in the second column, eighteenth line, the word "first" is corrected to read, "third".

BILLING CODE 1505-01-M

Office of the Secretary

31 CFR Part 103

Amendments to Implementing Regulations, Currency and Foreign Transactions Reporting Act

AGENCY: Department of the Treasury, Office of the Secretary.

ACTION: Final rule.

SUMMARY: These regulatory amendments make a number of clarifying or procedural, nonsubstantive changes to the implementing regulations for the Currency and Foreign Transactions Reporting Act. Experience with enforcing the regulations over the years has shown that these changes will be helpful to persons required to comply with the regulations. These amendments accomplish the following: update the authority citation for Part 103; correct an inconsistency in language used to describe brokers or dealers in securities; add paragraph markings to § 103.11; clarify the definition of "bank"; clarify the definition of "currency"; clarify the scope of the currency transportation reporting requirement; change the procedures governing the filing of reports; make explicit that reports filed under this Part are available to other Federal, state, local and foreign law enforcement agencies for criminal, tax and regulatory proceedings, and to certain other Federal agencies for national security purposes; and clarify the compliance assurance responsibilities of bank supervisory agencies.

EFFECTIVE DATE: November 21, 1985.

FOR FURTHER INFORMATION CONTACT: Robert J. Stankey, Jr., Financial Crimes & Frauds Advisor, Office of the Assistant Secretary (Enforcement & Operations), Department of the Treasury, Room 1458, 1500 Pennsylvania Avenue NW., Washington, D.C. 20220, (202) 566-8022.

SUPPLEMENTARY INFORMATION:

Background

The Currency and Foreign Transactions Reporting Act, Title II of Public Law No. 91-508 (permanently codified at 31 U.S.C. 5311 *et seq.*), empowers the Secretary of the Treasury to require financial institutions to keep records and file reports that the Secretary determines have a high degree of usefulness in criminal, tax and regulatory matters. In general, a variety of financial institutions, including banks, savings and loans, credit unions, currency exchanges, and brokers or dealers in securities are required by Treasury regulations implementing the Act to file reports of large currency transactions. Financial institutions also are required to maintain records necessary to trace transactions through the nation's banking system. The Department's experience in enforcing the Act in recent years has indicated that the following clarifying and procedural, nonsubstantive regulatory changes are desirable and appropriate.

Update the authority citation for Part 103: This amendment updates the Title 31 citation for the Bank Secrecy Act to reflect the addition of a new reward section enacted by the Comprehensive Crime Control Act of 1984.

Correct an inconsistency in the language used to describe brokers or dealers in securities: The table of contents and heading for § 103.35, as well as several places in the text of Part 103, refer to "brokers *and* dealers in securities" (emphasis added). However, § 103.11 defines the term "brokers *or* dealers in securities" (emphasis added). This change eliminates any possible confusion that might arise from this inconsistency by changing the term wherever it appears to read "brokers or dealers in securities."

National Center for Missing and Exploited Children.

PART 664—MERCHANDISE SAMPLES

4. Revise 664.24 to read as follows:

664.2 Address Cards.

24a. The address card must be made of paper or cardboard stock.

b. The address card must NOT:

(1) be folded, perforated, or creased.

(2) measure less than 3½ by 5 inches.

(3) measure more than 5 by 9 inches.

(4) measure less than 0.007 of an inch thick.

PART 767—PREPARATION OF BOUND PRINTED MATTER

5. In 767.7, redesignate 767.7g as 767.7i and revise and redesignate the introductory paragraph and 767.7a through f to read as follows:

767.7 Optional Handling of Bulk Mailings.

At the option of the mailer, address cards and unaddressed pieces mailed at bound printed matter rates, which are addressed for delivery only in the mailer's local parcel post zones, may be mailed separately for local delivery at the office of mailing, subject to all of the following conditions:

a. The address card must be made of paper or cardboard stock.

b. The address card must NOT:

(1) be folded, perforated, or creased.

(2) measure less than 3½ by 5 inches.

(3) measure more than 5 by 9 inches.

(4) measure less than 0.007 of an inch thick.

c. The address cards must show the full name, address, and either the ZIP +4 or the 5-digit ZIP Code of the sender and addressee and must be sorted by the mailer to the fourth and fifth digit of the ZIP Code.

d. Postage must be paid by permit imprints for each card including cards returned as undeliverable. The imprint may be placed on the pieces or on the cards (see 145).

e. The mailer must submit a completed Form 3605, *Statement of Mailing-Bulk Zone Rates*, with each mailing.

f. The total weight of pieces placed in a sack, carton, crate, or any other type of container must not exceed 70 pounds.

g. The mailer must send the address cards to the postmaster at the delivery office. It is recommended that the mailer include with the cards separate documentation specifying the number of pieces sent for each 5-digit ZIP Code delivery unit.

h. Address cards bearing incorrect, nonexistent, or otherwise undeliverable addresses are corrected or endorsed to show why they are undeliverable and returned to the mailer. Each envelope is rated with postage due at the address correction fee (see 712.2) for each address label contained in the envelope. At the request of the mailer, the postmaster will notify the mailer (at the mailer's expense and by any reasonable means specified by the mailer and approved by the postmaster) of the number of address labels being returned. The request for notification must accompany the labels. Correctly addressed labels will be held awaiting arrival of the pieces.

i. • • •

A transmittal letter making these changes in the pages of the Domestic Mail Manual will be published and will be transmitted to subscribers automatically. Notice of issuance of the transmittal letter will be published in the Federal Register as provided by 39 CFR 111.3.

W. Allen Sanders,

Associate General Counsel, Office of General Law and Administration.

[FR Doc. 85-25217 Filed 10-22-85; 8:45 am]

BILLING CODE 7710-12-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261 and 271

[SW-FRL-2912-8]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today is amending the regulations on hazardous waste management under the Resource Conservation and Recovery Act (RCRA) by listing as hazardous six wastes generated during the production of dinitrotoluene (DNT), toluenediamine (TDA), and toluene diisocyanate (TDI). In addition, the Agency is amending 40 CFR 261.33(f) by adding two compounds to the list of commercial chemical products which are hazardous wastes when discarded, and is adding several toxicants to Appendix VIII of Part 261. The effect of this regulation is that all of these wastes will be subject to regulation as hazardous wastes under 40 CFR Parts 262-266, and Parts 270, 271, and 124.

DATES: Effective Date: This regulation becomes effective on April 23, 1986.

Compliance dates:

Notification—The Agency has decided not to require persons who generate, transport, treat, store, or dispose of these hazardous wastes to notify the Agency within 90 days of promulgation that they are managing these wastes. The Agency views the notification requirement to be unnecessary in this case since we believe that most, if not all, persons who manage these wastes have already notified EPA and received an EPA identification number. In the event that any person who generates, transports, treats, stores, or disposes of these wastes has not previously notified and received an identification number, he must get an identification number pursuant to 40 CFR 262.12 before he can generate, transport, treat, store, or dispose of these wastes.

Interim Status—All existing hazardous waste management facilities (as defined in 40 CFR 270.2) which treat, store, or dispose of hazardous wastes covered by today's rule, and which qualify to manage these wastes under interim status under section 3005(e) of RCRA, must file with EPA an amended Part A permit application by April 23, 1986 and meet the criteria in 40 CFR 270.72. Under the Hazardous and Solid Waste Amendments of 1984, a facility also is eligible for interim status if it was in existence on the effective date of any statutory or regulatory change under RCRA that requires it to obtain a section 3005 permit. See RCRA (amended) section 3005(e)(1)(A)(ii). Facilities which have qualified for interim status under section 3005(e)(1)(A)(ii) will not be allowed to manage the wastes covered by today's rule after April 23, 1985, unless they have an EPA identification number and they submit an amended Part A permit application with EPA by April 23, 1985.

If the facility has received a permit pursuant to section 3005, however, it will not be allowed to treat, store, or dispose of the wastes covered by today's rule until it submits an amended permit application pursuant to 40 CFR 124.5, and the permit has been modified pursuant to 40 CFR 270.41 to allow it to treat, store, or dispose of these wastes.

ADDRESSES: The official public docket for this rulemaking is located in Room S-212, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460, and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays.

FOR FURTHER INFORMATION CONTACT: The RCRA Hotline at (800) 424-9346 or at (202) 382-3000. For technical

information contact Wanda LeBleu-Biswas, Office of Solid Waste (WH-562B), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460 (202) 475-6728.

SUPPLEMENTARY INFORMATION:

I. Background

On May 8, 1984, EPA proposed to amend the regulations for hazardous waste management under RCRA by listing as hazardous six wastes generated during the production of dinitrotoluene (DNT), toluenediamine (TDA), and toluene diisocyanate (TDI). (See 49 FR 19608-19611.) The hazardous constituents in these wastes include carcinogenic, mutagenic, teratogenic, or otherwise chronically and acutely toxic compounds.[1] One or more of these constituents are typically present in each waste at significant levels (although each waste does not contain all of the individual toxic constituents of concern); in addition, the hazardous constituents are mobile and persistent, and can reach environmental receptors in harmful concentrations if these wastes are mismanaged. Furthermore, waste K111 is corrosive. (See the preamble to the proposed rule at 49 FR 19608 for a more detailed explanation of our basis for listing these wastes.) After evaluating these wastes against the criteria for listing hazardous wastes (40 CFR 261.11(a)(3)), EPA had determined that these wastes are hazardous because they are capable of posing a substantial present or potential threat to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. In addition, the Agency proposed to add two compounds to the list of commercial chemical products which are hazardous wastes when discarded, as well as adding a number of toxic constituents to Appendix VIII, the list of contaminants identified by the Agency as exhibiting toxic, carcinogenic, mutagenic or teratogenic effects on humans or other life forms. (See 49 FR 19608-19611.)

The Agency received a number of comments on the proposed waste listings. We have evaluated these comments carefully, and have modified the regulations as well as the supporting documentation. Accordingly, this notice finalizes the regulation proposed on May 8, 1984, and outlines EPA's response to many of the comments received on that proposal. EPA also received comments on the following issues: (a) Production processes and chemistry; (b) management of the wastes; (c) damage incidents; (d) fate and transport; and (e) toxicity of the hazardous constituents. The Agency's response to these other comments is set forth in the revised listing background document available in the public docket for this rulemaking at EPA Headquarters—see "ADDRESSES" section—and in the EPA regional libraries.)

[1] The constituents of concern for these wastes are: 2,4-dinitrotoluene, 2,6-dinitrotoluene, nitrobenzene, aniline, carbon tetrachloride, hexachlorobenzene, chloroform, and phosgene.

II. Response to Comments

This section presents some of the major comments received on the proposed rule, as well as the Agency's response. (As stated above, the other comments are addressed in the revised listing background document.)

A. Clarification of the Scope of Waste K111—Product Washwaters From the Production of Dinitrotoluene Via Nitration of Toluene

One commenter felt that, because of the heavy emphasis on the TDI relationship, it was unclear if DNT produced as an intermediate to TNT (trinitrotoluene) production is included in the proposed listing. If it is, and if this proposal included the munitions industry, it should say so.

The commenter was correct that there was heavy emphasis on the production of toluene diisocyanate in the proposal; however, this is because these wastes are generated mostly in relation to the production of TDI. It also was stated in the preamble, however, that the listing was not limited to TDI production; we clearly indicated that any wastes which meet the listing description and are generated by the processes described in the background document are included in this rulemaking, regardless of the end-product or industry in which it takes place (see 49 FR 19608). Accordingly, product washwaters from the production of DNT by nitration of toluene, as an intermediate to TNT production, also are covered by this listing. To clarify this point, the background document has been revised accordingly.

B. Clarification of the Scope of Waste K113-Light Ends From the Purification of Toluenediamine in the Production of Toluenediamine Via Hydrogenation of Dinitrotoluene

Several commenters stated that they concur with the Agency's implied decision not to include gaseous emissions as part of waste K113, but request this interpretation be explicitly stated in the definition of "light ends." In addition, one commenter indicated that they are aware of EPA's concern that some operators may be tempted to heat liquid light ends in order to escape regulation (see 49 FR 5314, February 10, 1984). The commenter stated, however, that heating wastes so as to cause them to change to gaseous state would be a form of hazardous waste treatment and, therefore, subject to regulation (see 40 CFR 260.10).

As the commenters have correctly noted the Agency has not made a decision yet concerning the regulatory staus of condensible process emissions. In a previous proposal to list certain wastes from chlorinated aliphatics production (see 49 FR 5313-5315, February 10, 1984), the Agency claimed authority and proposed to list light ends which may be emitted in the gaseous phase, but condense to liquids at ambient temperature and pressure. The comment period for that rulemaking has ended, and the Agency is currently evaluating these comments. Until EPA reaches a decision in that rulemaking, the Agency has decided not to include the uncondensed light ends as part of the listing. Thus, as stated in the propoal, the waste stream being regulated as EPA Hazardous Waste No. K113 is light ends after condensation to liquid. (See 49 FR 19608.) To avoid any confusion, the Agency has modified EPA Hazardous Waste No. K113 to "Condensed liquid light ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene" to clarify this intent. This change has been made throughout the listing background document as well.

With respect to the comment regarding the heating of liquid light ends in order to escape regulation, we agree with the commenter that this would constitute treatment and would be subject to the appropriate regulations. We are explicitly stating this point in the background document to clarify this interpretation.

C. Total Organic Load and Waste Volume

Two commenters stated that the Agency has overstated the exposure and risk data by considering as hazardous the entire volume of wastes generated annually, instead of the actual amount of hazardous organic constituents.

The commenters are partially correct when they indicate that by looking at the total volume of waste, one may overstate exposure (i.e., if the waste contains 99% water, one should not count this in considering one's exposure to the toxic compounds). Our analysis, however, did not look simply at the total volume of waste that is generated, but rather how this value relates to the

concentration in the waste, and the potential for these constituents to escape into the environment. In particular, the volume of waste that is generated has a direct relationship to the total amount of the hazardous constituents that may escape into the environment (*i.e.*, the larger the volume of waste that is generated, the greater the potential for more toxicants to escape into the environment and cause a problem). In reviewing the data for those wastes, we see that the total mass loading for the specific hazardous constituent are:

Constituent	Total annual generation rate (MKG)
2,4-dinitrotoluene	342
2,4-toluenediamine	6513
o-toluidine	242
p-toluidine	162
Aniline	0.24
Carbon tetrachloride	113
Tetrachloroethylene	22
Chloroform	11
Phosgene	45

These quantities, in general, are quite high when considering the toxicity of the constituents, and the levels at which those constituents may cause a substantial hazard to human health and the environment. See the preamble to the proposal for more detailed discussion (49 FR 19606, May 8, 1984). In considering these quantities, EPA believes that the risk to those persons who may come into contact with these wastes may be substantial. We, therefore, believe that our analysis is sound, and that these wastes may pose a substantial hazard to human health and the environment.

One commenter stated that the total of 647,000 kg of wastes produced annually is an improbability when compared with the total of 313,000 kg production capacity for TDI.

The total of 647,000 kg of waste generated annually is correct. This volume of waste is large compared to the production capacity because there is generally a large volume of water used in washing or purifying.

D. Concentrations of Hazardous Constituents

One commenter felt that to designate zero as the lower end of the concentration range for some hazardous constituents in the wastes is, at least a partial basis for listing. The Agency precludes potential future delisting based on data which demonstrates that none of the specified hazardous constituents (or any other Appendix VIII constituents) are present in the wastes. They object to using a zero concentration level as the lower end of the range, and request the Agency to reconsider and designate a more appropriate lower concentration threshold as a listing justification.

The range of concentrations of hazardous constituents reported in the preamble to the proposed rule is an aggregation of analytical results and data submitted by different facilities under RCRA section 3007, both of which are confidential business information (CBI). The data were presented in this way to protect CBI. In addition, due to process-specific variations, not all hazardous constituents may be present at a given facility. The zero, which was used in the background document, indicates either this, or that the particular hazardous constituent was not detected in an analysis, or was not reported in the RCRA section 3007 questionnaries. The designation "NR" was used in the preamble to the proposal for purposes of simplification. In order to clarify this point, the zeros in the background document have been changed to "t," with a footnote explanation of the term.

It should be noted, however, that the use of zero as a lower end of a range would not have precluded delisting. Facilities wishing to have their wastes delisted would have to demonstrate, among other things, that none of the hazardous constituents cited as the basis for listing the waste are present, or are present at concentrations which would not present a substantial hazard to human health or the environment, or although present in the waste in high concentrations, would not migrate from the waste into the environment (see 40 CFR 260.22(d)). Also, based on the Hazardous and Solid Waste Amendments of 1984, petitioners would have to provide sufficient information for the Agency to determine whether other factors (including if additional constituents are reasonably present in the wastes) cause the waste still to be hazardous.

E. Toxicity

One commenter provided a number of citations pertaining to toxicity of the hazardous constituents. The Agency has carefully reviewed them, and has decided that although additional data were available, the Agency's conclusions on toxicity should not change. None of these more recent data, unavailable at the time the Health and Environmental Effects Profiles (HEEPs) were developed, indicate that initial concerns on toxicity of the hazardous constituents were unfounded. See the listing background document for specific responses to these comments.

One commenter stated that the Agency should test the toxicity of the dilute waste stream proposed to be listed, rather than the pure hazardous constituents.

The commenter raises a good point. The Agency, however, has not yet developed a test to determine the toxicity of waste streams (*i.e.*, bioassay testing). Although the Agency is conducting research in this area, we don't expect to have a validated bioassay for several years. Until such a test is developed and put out for comment, the Agency will continue to use the criteria for listing wastes cited in 40 CFR 261.11. In particular, a waste will be listed as hazardous if it contains any of the substances listed in 40 CFR Part 261, Appendix VIII, unless, after considering a number of factors (see 40 CFR 261.11(a)(3)), the Administrator concludes that the waste is not capable of posing a substantial present or potential threat to human health or the environment if improperly managed.[1] (Substances are listed on Appendix VIII if they have been shown in scientific studies to have toxic, carcinogenic, mutagenic, or teratogenic effects on humans or other life forms.) The Agency has evaluated the wastes using these criteria and determined that they are hazardous. (See the preamble to the proposed regulation for a more detailed discussion of our basis for listing.)

Since the public comments on the proposal to list wastes generated during the production of DNT, TDA, and TDI have not changed the Agency's initial basis for listing these wastes, we are listing them in 40 CFR 261.32 in today's action.

(There are additional public comments and Agency response in the sections on CERCLA impacts, the regulatory status of hazardous wastewaters, and the regulatory impact analysis.)

F. Deletion of These Hazardous Constituents

In the proposal to list these wastes as hazardous, we included 2,6-dinitrotoluene as a constituent of concern in EPA Hazardous Waste No. K111, and 2,6- and 3,4-toluenediamine as constituents of concern in EPA Hazardous Waste Nos. K112, K113, K114, and K115 (see 49 FR 19606-19611;

[1] Wastes will also be listed if they exhibit any of the characteristics of hazardous wastes (*i.e.*, ignitability, corrosivity, reactivity, and extraction procedure (EP) toxicity), or if they are defined as acutely hazardous.

As a result of comments received and a re-evaluation of these contaminants, we now believe that they should not be identified in Appendix VII as constituents of concern. In particular, both 2,6-dinitrotoluene and 2,6-toluenediamine, although toxic, are not present in the waste at significant levels (i.e., if these contaminants were to migrate from the waste into the environment, the concentration expected at a nearby receptor well is expected to be below the health-based standard). See Table 5 of the revised listing background document. With respect to 3,4-toluenediamine, not enough data is available to calculate a health-based standard; as a result, we are not able to determine whether the concentration found in the waste is significant. Consequently, these compounds are not being included in the final rule as Appendix VII hazardous constituents.[3]

It should be noted that by removing these compounds as constituents of concern, we are not deleting any of the listings from the rule since all the listings still contain at least one specified hazardous constituent. In addition, it also should be clear that the Agency still believes that these contaminants are toxic. (See section V.C. on the health effects in the revised background document.) Therefore, 2,6-dinitrotoluene will remain on Appendix VIII of Part 261, while 2,6- and 3,4-toluenediamine are being added to Appendix VIII in today's rule (see section IV. below).

III. Substances Added to 40 CFR 261.33(f)

The Agency also proposed to add *o*- and *p*-toluidine to § 261.33(f). There were no comments received on this proposed action. The Agency, therefore, is finalizing their addition to § 261.33(f), the list of commercial chemical products or manufacturing chemical intermediates which are identified as hazardous wastes when discarded.

IV. Toxicants Added to 40 CFR Part 261, Appendix VIII

In addition, the Agency proposed to add *o*- and *p*-toluidine to Appendix VIII, as well as identify the specific isomers 2,4-, 2,6-, and 3,4-toluenediamine, which are already listed in Appendix VIII as toluenediamine. There were no comments received on this part of the proposal, either. Thus, the Agency also is finalizing this action.

V. Test Methods for New Appendices VII and VII Compounds

EPA is today adding nine compounds to Appendix VII (the basis for listing), some of which have not been identified before as constituents of concern. These are *o*- and *p*-toluidine and phosgene.

In addition, three compounds, 2,4-dinitrotoluene, 2,6-toluenediamine and 3,4-toluenediamine, which we proposed to add to Appendix VII, are not being listed as hazardous constituents (see section II.F., above). However, as stated above, since they are toxic, 2,6- and 3,4-toluenediamine are being added to Appendix VIII; 2,6-dinitrotoluene is already on Appendix VIII.

Persons wishing to submit delisting petitions are to use the methods listed in Appendix III to demonstrate the concentration of these toxicants in the waste.[4] See, *e.g.*, 40 CFR 260.20(d)(1). Among other things, petitioners should submit quality control data demonstrating that the methods they have used yield acceptable recovery (*i.e.*, > 50% recovery at concentrations above 1 ug/g) on spiked aliquots of their waste.

Accordingly, the Agency is designating test methods in Appendix III for all those compounds for which appropriate methods exist. Method Number 8250 is to be used for aniline, *o*- and *p*-toluidine, and 2,4-, 2,6-, and 3,4-toluenediamine. Method Numbers 8060 and 8250 are to be used for 2,6-dinitrotoluene.

The above methods are in "Test Methods for Evaluating Solid Waste: Physical/Chemical Methods," SW-846, 2nd ed., July 1982, as amended; available from: Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 (202) 783-3238, Document Number: 055-002-81001-2.

VI. CERCLA Impacts

All hazardous wastes designated by today's rule will, upon the effective date, automatically become hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). (See CERCLA section 101(14).) CERCLA requires that persons in charge of vessels or facilities from which hazardous substances have been released in quantities that are equal to or greater than the reportable quantities (RQs) immediately notify the National Response Center (at (800) 424-8802 or (202) 426-2675) of the release. (See CERCLA section 103 and 50 FR 13456-13522, April 4, 1985.)

In the May 8, 1984 proposal, the Agency stated that RQs of one pound would be imposed pursuant to CERCLA section 102(b) for the listed wastes (K111, K112, K113, K114, K115, and K116), as well as for the commercial chemical products, *o*- and *p*-toluidine, which were proposed to be added to 40 CFR 261.33(f). Although this rule is not changing Table 302.4 of 40 CFR 302.4, the RQs as stated here are effective upon the effective date of today's action, pursuant to the statutory requirements of CERCLA section 102(b). These listed wastes, as well as *o*- and *p*-toluidine, and their RQs, will be added to Table 302.4 at its next update.

Several comments were received on this provision. Two commenters stated that RQs of one pound for the listed wastes are unreasonable because the one-pound RQ category was intended to represent the pure substance, and not a dilute mixture. The commenters stated that the RQ for aqueous substances should be calculated by dividing the RQ for the pure constituent by that constituent's concentration in the waste.

The Agency's policy in this area is that the RQ for a hazardous waste is the lowest RQ of those established for each of the hazardous constituents in the waste. See 50 FR 13463, April 4, 1985. If a person completely analyzes the wastes, however, and determines that the amount of each constituent in the waste spilled is below the RQ established for that constituent, no notification is required. The commenters are correct about calculating the RQ for the listed wastes, as long as they can demonstrate this point. Since the composition of the wastes may vary, the burden is placed on the regulated community to determine the quantity of each constituent that is spilled. It should be noted, however, that CERCLA does not impose any testing requirements. Therefore, the releaser should use the RQ of the listed waste stream if the concentrations of the hazardous substances in the waste are not known.

One commenter felt that CERCLA section 101 is time-specific, that section 102 does not mandate one pound RQs, and that section 102 should be used in this instance. At the time of CERCLA passage, Congress defined CERCLA hazardous substances pursuant to section 101(14). This definition has nothing to do with being "time-specific," as suggested by the commenter. Rather, the statute states that when the Agency

[3] Although these contaminants are not being identified as Appendix VII hazardous constituents, petitioners who submit delisting petitions will need to address these compounds as part of their petition.

[4] Test methods are currently cited in 40 CFR Part 261 Appendix III for the following compounds: Method Numbers 8010 and 8240 are to be used for analyzing for carbon tetrachloride, chloroform, and tetrachloroethylene; Method Numbers 8090 and 8250 are to be used for analyzing for 2,4-dinitrotoluene.

adds new listings, as is the case with section 101(14)(C) of CERCLA for newly promulgated RCRA section 3001 hazardous waste listings, they automatically become CERCLA hazardous substances. In addition, section 102(b) of CERCLA mandates a one-pound RQ for any newly listed CERCLA hazardous substance until such time as the Administrator adjusts the RQ by regulation.

One commenter also stated that the Agency has not contemplated the cost of the retroactive application of CERCLA to the industry. The commenter is correct that our cost analysis did not contemplate the retroactive cost of application of CERCLA notification to the industry. However, there is no retroactive application involved. Notification pursuant to CERCLA section 103(a) need only occur when a hazardous substance, as defined in CERCLA section 101(14), has been released in an amount that equals or exceeds its RQ. Since the hazardous wastes described in this rulemaking action do not become CERCLA hazardous substances until the effective date of this final rule, there is no requirement to notify the National Response Center of past releases, and no retroactive application of CERCLA notification requirements to the industry.

Although it was not explicitly stated, the commenter may have been referring to all CERCLA costs, including clean-up costs. However, CERCLA clean-up costs are not a direct consequence of this listing decision and, thus, should not be included in the regulatory impact cost estimate.

VII. State Authority

A. *Applicability of Rules in Authorized States*

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 7003, and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA) amending RCRA, a State with final authorization administered its hazardous waste program entirely in lieu of the Federal program. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State which the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obligated to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under newly enacted section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA applies in authorized States in the interim.

Today's rule is being added to Table 1 in § 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA. The Agency believes that it is extremely important to clearly specify which EPA regulations implement HSWA, since these requirements are immediately effective in authorized States. States may apply for either interim or final authorization for the HSWA provisions identified in Table 1 as discussed in the following section of this preamble.

B. *Effect on State Authorizations*

Today's announcement promulgates regulations that are effective in all States, since the requirements are imposed pursuant to section 222 of the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. 6921(e)(2). Section 222 of those amendments states, "the Administrator shall make a determination of whether or not to list . . . the following wastes: . . . TDI (toluene diisocyanate) . . . ." This requirement is not limited to toluene diisocyanate or the wastes directly resulting from its production. The HSWA provision encompasses the entire TDI production process, including intermediates. In a June 9, 1982, letter following the RCRA Reauthorization hearings, Senator Chafee asked the Agency a number of questions, including which wastes EPA intended to list within two to five years. In his response, Lee Thomas, then Acting Assistant Administrator for Solid Waste and Emergency Response, answered that, among others, wastes from toluene diisocyanate production would be considered for listing. The Agency thus was considering a particular project which included DNT, TDA, and TDI wastes. This position is supported by the fact that DNT and TDA are often generated as intermediates in TDI production and so the wastes generated from their production can be ascribed to that process. In addition, the TDI proposal had been published on May 8, 1984, before the HSWA. The Agency often referred to this listing as "TDI," and we believe Congress did likewise in the HSWA. Accordingly, all wastes listed today are requirements under HSWA. This includes product washwaters from the production of DNT via nitration of toluene when the DNT is produced as an intermediate in the production of trinitrotoluene (TNT). These wastes are part of the TDI listing, which is a requirement of HSWA. Thus, EPA will implement the standards in nonauthorized States and in authorized States until they revise their programs to adopt these rules, and the revision is approved by EPA.

A State may apply to receive either interim or final authorization under section 3006(g)(2) or 3006(b), respectively, on the basis of requirements that are substantially equivalent or equivalent to EPA's. The procedures and schedule for State program revisions under section 3006(b) are described in 40 CFR 271.21. The same procedures should be followed for section 3006(g)(2).

Applying § 271.21(e)(2), States that have final authorization must revise their programs within a year of promulgation of EPA's regulations if only regulatory changes are necessary, or within two years of promulgation if statutory changes are necessary. These deadlines can be extended in exceptional cases (40 CFR 271.21(e)(3)).

States with authorized RCRA programs may have listings similar to those in today's rule. These State regulations have not been assessed against the Federal regulations being promulgated today to determine whether they meet the tests for authorization. Thus, a State is not authorized to implement these listings in lieu of EPA until the State program revision is approved. As a result, the regulations promulgated in today's rule apply in all States, including States with listings similar to those in today's rule. States with existing listings may continue to administer and enforce their standards as a matter of State law. In implementing the Federal program, EPA will work with States under cooperative agreements to minimize duplication of efforts. In many cases, EPA will be able to defer to the States in their efforts to implement their programs, rather than

take separate actions under Federal authority.

States that submit official applications for final authorization less than 12 months after promulgation of EPA's regulations may be approved without including standards equivalent to those promulgated. However, once authorized, a State must revise its program to include standards substantially equivalent or equivalent to EPA's within the time periods discussed above.

VIII. Regulatory Status of Hazardous Wastewaters

Under the existing hazardous waste regulations, tanks that are treating or storing hazardous wastewaters are exempt from the Parts 264 and 265 management standards when the treatment unit is part of a wastewater treatment facility that is subject to regulation under either section 402 or section 307(b) of the Clean Water Act (CWA). (See 40 CFR 260.10 for definition of "tank.")

When wastewaters, including those covered by the listings promulgated today, are stored or treated in tanks, they are presently exempt from the Parts 264 and 265 management standards, whereas wastewaters that are stored or treated in surface impoundments are subject to regulation.

One commenter stated that treatment and disposal of the wastewaters listed in the proposal (K111 and K112) are currently controlled adequately by the NPDES regulations under sections 301, 302, 303, 304, 305, 306, 307, and 402 of the CWA; additional regulation will be burdensome, wasteful, and unnecessary. They also argue that if the proposed wastewater streams are listed as hazardous, then the wastewater treatment facilities receiving them will become subject to RCRA provisions.

The commenter is correct that when these wastewaters are listed, they will be subject to RCRA control. As indicated above, however, and as explained in the preamble to the proposed rule, when treated in tanks they will be exempt from regulation, but when treated in surface impoundments they will be subject to regulation. The commenter also believes that the CWA already adequately controls wastewater. We disagree. The CWA only controls the actual discharge point; any storage or treatment of these wastewaters before discharge is not controlled under the CWA. See 45 FR 33098, May 19, 1980, and 40 CFR 261.4(a)(2).

Furthermore, it should be noted that impoundments pose a particular threat of contaminating ground water and also have been one of the chief concerns of the hazardous waste management program. Not only is containment without a liner system probably impossible, but materials are constantly in the presence of liquids, creating the situation most conducive to forming leachate. Since most impoundments are unlined and many are underlain by permeable soils, the potential for downward seepage of contaminated fluids into ground water is high. Moreover, wastewaters do not always go to wastewater treatment facilities; some other known management methods of these wastewaters include surface impoundment and deep well injection. In addition, there may be other management techniques currently being employed of which the Agency is unaware at this time. Since the Agency has determined that these wastewaters are hazardous, they should be regulated as such. If any facility wishes to have its waste delisted, it can petition the Agency to do so.

IX. Regulatory Impact Analysis

Under Executive Order 12291, EPA must determine whether a regulation is "major" and, therefore, subject to the requirements of a Regulatory Impact Analysis. In the proposal, EPA addressed this issue by citing the results of an initial economic analysis that was conducted based on a worst case scenario (*i.e.*, none of these wastes are currently being handled as hazardous and, thus, they would be subject to the hazardous waste rules for the first time); the total combined cost was $52 million. The Agency received a number of comments on this figure.

One comment concerned the need for a review and consideration of the basis for deriving the Agency's cost estimates, and the consideration of facility-specific costs.

EPA agrees that both of these requirements should be addressed. The original economic analysis of this listing represented a worst case situation based on the total costs of hazardous waste management. An additional analysis that considers facility-specific costs has now been completed. The following approach was used in the revised economic impact analysis.

- For each facility generating the listed wastes, waste composition, waste generation rates, production volumes, waste management methods, RCRA compliance status, and economic profiles were characterized. These profiles were based primarily on information collected directly through industry surveys.
- The RCRA compliance requirements for each facility were projected, and incremental compliance costs were estimated. These compliance cost estimates were annualized, and include incremental Parts 262 and 264 compliance costs, permit modification costs, groundwater monitoring costs, and the incremental projected costs of new waste management methods. We also considered any requirements imposed by the new RCRA amendments. The sum of these costs for the regulated industry was compared to the $100 million threshold for a "major economic burden." Using this method, EPA estimated that the total annualized cost of the DNT/TDA/TDI listings is less than $500,000, which is well below the "major" rule threshold.
- The annualized compliance costs were used to calculate a series of ratios that measure economic impacts. The ratios calculated for DNT/TDA/TDI manufacturing facilities indicate that none of the facilities affected by the DNT/TDA/TDI listings will bear a significant economic burden.

Industry has requested that EPA make a revised economic impact assessment document available for review and extend the comment period for 60 days following the release of the document.

The revised economic impact assessment document contains mostly confidential business information (CBI) and, therefore, cannot be made public. In addition, sanitizing the analysis so that no CBI would be released would not provide much useful information. As a result, EPA did not put this analysis out for comment.

Although the commenters stated that the costs to industry are far higher than were stated in EPA's economic analysis, they failed to provide any data to support their allegations. EPA is using the revised economic analysis as the basis for the final figure.

As stated above, based on the revised economic analysis, the total combined cost for disposal of the wastes as hazardous is less than $500,000. In addition, we also evaluated the impact on the costs, prices, and markets of these products. Based on this evaluation, EPA has determined that major increases in consumer prices are not likely, and since these products have negligible foreign competition, the implementation of these regulations will have little or no adverse impact on the ability of U.S.-based enterprises to compete with foreign-based enterprises in either domestic or export markets.

EPA stated in the proposal that the addition of the new toxicants of concern to Appendix VIII also will not result in any significant increased burden in ground-water monitoring requirements. One comment addressed the issue of costs associated with adding compounds to Appendix VIII of Part 261. These costs are incurred by those land disposal facilities which have initiated ground-water compliance monitoring programs. See 40 CFR 264.99. The commenter stated that under current

regulations, such facilities are required to establish background values for the new Appendix VIII compounds in their ground water, and thus, the facilities will incur the additional costs associated with sampling and analysis.

The cost of monitoring for the additional Appendix VIII compounds is an insignificant portion of the cost of sampling for all Appendix VIII compounds. Both the cost of establishing background values and monitoring for new Appendix VIII compounds have been included in the economic impact analysis of the DNT/TDA/TDI listing and do not constitute a significant economic burden. The total cost of analyzing for all Appendix VIII compounds is approximately $5000. Each additional compound is about $25, or about 0.5% of the total cost, therefore, the addition of two compounds (*o*- and *p*-toluidine) to Appendix VIII will add a minimal cost of about 1% to the total cost.

One commenter also raised the issue of start-up costs, such as the preparation of standards. The cost of preparation of standards is overhead built into the cost of analysis. Since most Appendix VIII analyses are performed by contract laboratories, these start-up costs will be shared by a large number of facilities.

Furthermore, one commenter pointed out that the new listing may require permit modification. The cost of permit modifications has also been included in the economic analysis of the listing and, likewise, does not constitute a significant economic impact. The cost of permit modifications is about 0.5% of the overall cost of getting a permit.

Furthermore, the addition of *o*-toluidine and *p*-toluidine to 40 CFR 261.33(f) (list of commercial chemical products) also will be minimal. Since the chemicals listed in § 261.33 are only hazardous when discarded, and we believe they are rarely discarded due to their inherent value, there will be minimal regulatory impact.

Since EPA does not expect that the amendments promulgated here will have an annual effect on the economy of $100 million or more, result in a measurable increase in costs of prices, or have an adverse impact on the ability of U.S.-based enterprises to compete in either domestic or export markets, these amendments are not considered to constitute a major action. As such, a Regulatory Impact Analysis is not required.

X. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601–612, whenever an agency is required to publish a General Notice of Rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required, however, if the head of the agency certifies that the rule will not have a significant impact on a substantial number of small entities.

The hazardous wastes listed here are not generated by small entities (as defined by the Regulatory Flexibility Act), and the Agency received no comments that small entities will dispose of them in significant quantities. Accordingly, I hereby certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation, therefore, does not require a regulatory flexibility analysis.

XI. Paperwork Reduction Act

This rule does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

List of Subjects

40 CFR Part 261

Hazardous waste, Recycling.

40 CFR Part 271

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply

Dated: October 7, 1985

Lee M. Thomas,

Administrator.

For the reasons set out in the preamble, Title 40 of the Code of Federal Regulations is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for Part 261 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended [42 U.S.C. 6905, 6912(a), 6921, and 6922].

§ 261.32 [Amended]

2. § 261.32, add the following waste streams to the subgroup 'Organic Chemicals':

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
K111	Product washwaters from the production of dinitrotoluene via nitration of toluene	(C, T)
K112	Reaction by-product water from the drying column in the production of toluenediamine via hydrogenation of dinitrotoluene	(T)
K113	Condensed liquid light ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene	(T)
K114	Vicinals from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene	(T)
K115	Heavy ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene	(T)
K116	Organic condensate from the solvent recovery column in the production of toluene diisocyanate via phosgenation of toluenediamine	(T)

§ 261.33 [Amended]

3. In § 261.33(f), add the following entries in alphabetical order:

Hazardous waste No.	Substance
U328	2-Amino-4-methylbenzene
U353	4-Amino-4-methylbenzene
U328	*o*-Toluidine
U353	*p*-Toluidine

Appendix III [Amended]

4. In Table 1 of Appendix III of Part 261, remove the column headed "First edition method(s)", revise the heading for the column now entitled "Second edition method(s)" to read "Method Numbers", and add the following compounds and analysis methods in alphabetical order:

Compound	Method numbers
2-Amino-4-methylbenzene (*o*-Toluidine)	8250
4-Amino-4-methylbenzene (*p*-Toluidine)	8250
Aniline	8250
2,6-Dinitrotoluene	8060 or 8250
2,4-Toluenediamine	8250
2,6-Toluenediamine	8250
3,4-Toluenediamine	8250

Appendix VII [Amended]

5. Add the following entries in numerical order to Appendix VII of Part 261:

EPA hazardous waste No.	Hazardous constituents for which listed
K111	2,4-Dinitrotoluene

INTERSTATE COMMERCE COMMISSION

49 CFR PART 1002

[Ex Parte No. 246 (Sub-3)]

Regulations Governing Fees for Services Performed in Connection With Licensing and Related Service—1985 Update

AGENCY: Interstate Commerce Commission.

ACTION: Final rules; Correction.

SUMMARY: On October 1, 1985, at 50 FR 40024, the Interstate Commerce Commission published final rules which updated the Commission's current cost of providing services and benefits. Corrections to those rules were published at 50 FR 41158 (10–9–85) and 50 FR 41899 (10–16–85). The purpose of this document is to make final corrections to the decision.

EFFECTIVE DATE: October 24, 1985.

FOR FURTHER INFORMATION CONTACT:
Kathleen M. King, (202) 275–7428
or
Paul Meder, (202) 275–5360.

SUPPLEMENTARY INFORMATION: In this notice we are correcting several additional errors that appeared in the fee schedule announced at 50 FR 40024, on October 1, 1985.

The most significant correction involves Fee Item (74). The phrase "and contracts" was omitted from the description of that item. The correct description should read as follows: "The filing of tariffs, rate schedules, and contracts, including supplements." There was never any intention to eliminate the filing fee for contracts. All other corrections are minor editorial changes.

Decided: October 21, 1985.

By the Commission.

James H. Bayne,

Secretary.

Appendix

The following corrections are made in the document that was published at 50 FR 40024 (10–01–85).

§ 1002.2 (Corrected)

1. In §1002.2 paragraph (f)(4), which appears at 50 FR 40026, the word "application" which appears in line four should be corrected to read "applicant."

2. In §1002.2 paragraph (f)(17), which appears at 50 FR 40026, the word "of" should be corrected to read "or."

3. In §1002.2 paragraphs (f) (46), (47), (48) and (49), which appear at 50 FR 40026, the cross reference to "49 CFR 1062.2" which appears in subparagraph (iv) of each of those paragraphs should be corrected to read "49 CFR 1180.2(d)."

4. In §1002.2 paragraph (f)(61), which appears at 50 FR 40026, the word "institution" should be corrected to read "institution."

5. In §1002.2 paragraph (f)(72), which appears at 50 FR 40027, a closing parenthesis should be added after the word "disaster."

6. In §1002.2 paragraph (f)(74), which appears at 50 FR 40027, the item description should be corrected to read as follows: "The filing of tariffs, rate schedules, and contracts, including supplements."

[FR Doc. 85–25316 Filed 10–23–85; 8:45 am]
BILLING CODE 7035–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 672

[Docket No. 50720–5154]

Groundfish of the Gulf of Alaska

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

ACTION: Final rule.

SUMMARY: NOAA issues a final rule to implement all but one of the proposed parts of Amendment 14 to the Fishery Management Plan for Groundfish of the Gulf of Alaska. Part 7 of the proposed amendment, incorporation of the NMFS habitat conservation policy, is approved but not implemented at this time until required analysis is prepared. The measures implemented by this rule will (1) allocate the sablefish resource to prevent potential gear conflicts and ground preemptions, (2) establish a new starting date for the harvest of sablefish, (3) reduce optimum yields (OYs) to prevent overfishing of certain groundfish species, (4) define a new regulatory district to manage rockfish stocks more discretely, (5) provide a flexible method for establishing prohibited species catch (PSC) limits for Pacific halibut, (6) revise the reporting system for catcher/processors, and (7) define directed fishing. This action is intended to implement measures that are necessary for conservation and management of the groundfish resources and for the orderly conduct of the fishery.

EFFECTIVE DATE: November 18, 1985.

ADDRESS: Copies of the amendment, the environmental assessment (EA), and the regulatory impact review (RIR)/final regulatory flexibility analysis (FRFA) may be obtained from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510, 907–274–4563.

FOR FURTHER INFORMATION CONTACT:
Ronald J. Berg (Fishery Biologist, NMFS), 907–586–7230.

SUPPLEMENTARY INFORMATION: The domestic and foreign groundfish fishery in the fishery conservation zone (FCZ) of the Gulf of Alaska is managed under the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP). The FMP was developed by the North Pacific Fishery Management Council (Council) under the Magnuson Fishery Conservation and Management Act (Magnuson Act) and implemented by regulations appearing at 50 CFR Part 672.

The Council approved the seven parts of Amendment 14 at its May 21–24, 1985, meeting and submitted it to the Secretary of Commerce (Secretary) for Secretarial review. The Secretary is required by the Magnuson Act to approve, disapprove, or partially disapprove plans and plan amendments before the close of the 95th day following receipt. Following receipt of Amendment 14 on June 24, 1985, the Director, Alaska Region, (Regional Director) immediately commenced a review of the amendment to determine whether it was consistent with the National Standards, other provisions of the Magnuson Act, and any other applicable law. A Notice of Availability of the amendment was published in the Federal Register on June 28, 1985 (50 FR 26812), and the receipt date was announced. Proposed regulations were published in the Federal Register on July 26, 1985 (50 FR 30481). Public review and comment were invited until September 9, 1985. The decisions on Amendment 14 take these comments into account; they are summarized below according to subject.

The preamble to the proposed rule (50 FR 30481, July 26, 1985) described and presented the reasons for each part of Amendment 14. A summary from the proposed rule of what each part accomplishes follows:

1. Allocate sablefish among gear types. Legal commercial fishing gear used in the directed domestic sablefish fishery is limited to hook and line gear, pots, and trawls. Sablefish quotas are allocated among gear categories by regulatory area, and a schedule for phasing out pot gear is established.

This measure makes hook and line gear the only allowable gear type for the directed sablefish fishery in the Eastern regulatory area, starting in 1990 (Table 1). It also makes hook and line and trawl

gear the only allowable gear types for the directed sablefish fishery in the Central regulatory area, starting in 1987, and in the Western regulatory area, starting in 1989. The measure establishes a schedule for phasing out the use of pot gear in the Central and Western regulatory areas, by which pot gear may harvest sablefish in the Central regulatory area in 1986 and in the Western regulatory area in 1986, 1987, and 1988.

The measure also allocates the sablefish QYs among the gear types. In the Eastern regulatory area, 95 percent of the OY is allocated to hook and line gear; the remaining 5 percent is allocated to trawl gear as a bycatch to support target fisheries for other species. In the Central regulatory area in 1986, 55, 25, and 20 percent of the OY is allocated to hook and line, pot, and trawl gear, respectively. When pot gear is phased out of the Central regulatory area in 1987, the portion of the sablefish OY for that area that is allocated to pot gear in 1986 will be reallocated to hook and line gear; the share allocated to trawl vessels will remain at 20 percent. In the Western regulatory area in 1986, 1987, and 1988, 55, 25, and 20 percent of the OY is allocated to hook and line, pot, and trawl gear, respectively. When pot gear is phased out of the Western regulatory area in 1989, the portion of the sablefish OY for that area that is allocated to pot gear during those three years will be allocated to hook and line gear; the share allocated to trawl gear will remain at 20 percent.

Table 1.—Percentages of Sablefish Allocated by Year Among Hook and Line (H&L), Pot, and Trawl Gear Users for Each Regulatory Area in the Gulf of Alaska

Regulatory area	Year				
	1986	1987	1988	1989	1990
Eastern:					
H&L	95				
Pot	0	(1)			
Trawl	5				
Central:					
H&L	55	80			
Pot	25	0	(2)		
Trawl	20	20			
Western:					
H&L	55	55	55	80	(3)
Pot	25	25	25	0	
Trawl	20	20	20	20	

(1) 1987 and subsequent years—same as 1986
(2) 1988 and subsequent years—same as 1987
(3) 1990 and subsequent years—same as 1989

2. Change the starting date for the directed sablefish fishery. This measure changes the starting date for the directed sablefish fishery from January 1 to April 1.

3. Establish lower optimum yields. New OYs by regulatory area are established for certain species as follows: pollock—Western/Central 305,000 metric tons (mt); Pacific ocean perch—Western 1,302 mt, Central 3,900 mt; Atka mackerel—Central 500 mt, Eastern 100 mt; "other rockfish"—Gulf-wide 5,000 mt; and "other species"—Gulf-wide 22,460 mt.

4. Define a new regulatory district. A new regulatory district—the Central Southeast District—between 56°00' and 57°30' N. latitude is established for purposes of better managing demersal shelf rockfish, which are part of the "other rockfish" category. The harvest of "other rockfish" in this new district is limited to 600 mt. This quota will be subtracted from the "other rockfish" OY for the remainder of the Gulf of Alaska. Thus, the remainder of the "other rockfish" OY, or 4,400 mt, is available for harvest elsewhere in the management unit.

Also approved is language to be incorporated into the FMP that recognizes the State of Alaska's management regime for demersal shelf rockfish which is directed at managing these rockfish stocks within smaller management units than are provided for by the FMP. Such State regulations are in addition to and stricter than Federal regulations and are authorized by the FMP as long as they are (1) not in conflict with the management objectives of the FMP, and (2) limited to establishing smaller areas and quotas, which would result in a harvest of demersal shelf rockfish in each FMP management area at levels no different from that provided for by the FMP. Such State regulations apply only to vessels registered under the laws of the State of Alaska.

5. Establish procedure for setting PSC limits for halibut. A framework procedure is established for setting the PSC limits for Pacific halibut in the joint venture and domestic trawl fisheries. The attainment of these limits will result in a ban on the use of bottom trawl gear for the remainder of the fishing year.

These measures include (1) the establishment of halibut PSC limits; (2) the apportionment of PSC limits among regulatory areas or parts thereof; (3) the apportionment of PSC limits among gear types and/or individual operations; and (4) the designation of gear types and modes of operation to be either prohibited or permitted after a PSC limit has been reached.

As soon as practicable after October 1 of each year and after consultation with the Council, the Secretary will publish in the Federal Register the proposed halibut PSC management measures for domestic and joint venture fisheries. The measures will be based on criteria contained in § 672.20(e) and comments will be invited on the proposed PSC measures for 30 days. The Secretary, after considering comments received, will publish final PSC measures in the Federal Register as soon as practicable after December 15 of each year. When the share of the PSC allocated to the domestic or joint venture fishery is reached, the Regional Director will, by notice published in the Federal Register, prohibit fishing with trawl gear other than off-bottom trawl gear for the rest of the year by the vessels and in the area to which the PSC limit applies, except that he may by such notice allow certain vessels to continue fishing with bottom trawl gear subject to the considerations listed in § 672.20(e)(2)(iv).

6. Establish a weekly catch reporting system. A reporting system is established whereby applicants are required to indicate on their Federal groundfish permit applications whether their vessels are to be used for (1) harvesting/processing, (2) mothership processing, (3) harvesting only, or (4) support only. If vessel usage falls (1) or (2), vessel operators will be required to check in and out of regulatory areas or districts. Such harvesting/processing vessels and motherships that catch and hold, or receive and hold, groundfish for periods of 14 days or more will be required to submit a weekly catch report to the NMFS Regional Director, Alaska Region. Vessels that freeze or dry-salt their catches are considered to be in these categories.

The first part of this new regulation requires the operators of catcher/processors and motherships to so indicate on their applications for Federal fishing permits, showing their capability and intent to preserve their catch at sea. The second part requires them to notify the Regional Director of the date, hour, and position, 24 hours before starting and upon stopping fishing in a regulatory area. The third part requires each operator of a catcher/processor or mothership that retains fish at sea for more than 14 days from the time it is caught or received to provide the Regional Director a weekly written report of the amounts of groundfish caught by species or species group in metric tons by fishing area.

A definition of "directed fishing" is also established. When any species, stock, or other aggregation of fish comprises 20 percent or more of the catch, take, or harvest that results from any fishing over any period or time, such fishing is rebuttably presumed to be directed fishing for such fish during that period.

In addition, NMFS proposed some minor changes to the information

required from applicants for a Federal permit to fish for groundfish in the Gulf of Alaska.

7. Approve the incorporation of the NMFS habitat conservation policy. This part of Amendment 14 is approved but not implemented by regulation at this time. It amends the FMP to address the habitat requirements of individual species in the Gulf of Alaska groundfish fishery. It describes the diverse types of habitat within the Gulf of Alaska, delineates the life stages of the groundfish species, identifies potential sources of habitat degradation and the potential risk to the groundfish fishery, and describes existing programs applicable to the area that are designed to protect, maintain, or restore the habitat of living marine resources. The amendment responds to the Habitat Conservation Policy of NMFS (48 FR 53142, November 25, 1983), which advocates consideration of habitat concerns in the development or amendment of FMPs and the strengthening of NMFS' partnerships with States and the councils on habitat issues.

It authorizes, but does not require, certain regulations specific to habitat conservation objectives. One such regulation would require vessel operators to retrieve their own fishing gear and to make a reasonable attempt to retrieve any abandoned or discarded fishing gear that they may encounter. While a regulation of this type was proposed in the notice of proposed rulemaking, it has not been included in the final rule because it has not yet been adequately analyzed under Executive Order 12291, the Regulatory Flexibility Act, (RFA) and the National Environmental Policy Act (NEPA).

Changes in the Final Rule From the Proposed Rule

NOAA has made changes to cause this final rule to differ from the proposed rule. The definition of the Central Southeast District was inadvertently omitted in § 672.2 Definitions although it was included in the preamble to the proposed rule. It has been included in the final rule. In § 672.5(a)(3), paragraphs (a)(3)(i) and (a)(3)(ii), referring respectively to catching fish and receiving fish at sea but otherwise identical, are combined. The new § 672.25, Disposal of fishing gear and other articles, is held in reserve until additional analysis is provided. In addition, minor technical changes are made to regulatory text.

Public Comments Received

Seventy-three written responses were received, mostly from fishermen, fishing associations, or their representatives. Included among the comments were those from the Governor of the State of Alaska, the two Senators and the Congressman from the State of Alaska, and Congressmen from the State of Washington.

All comments addressed the issue of allocating sablefish among gear types and phasing out pot gear. Three comments addressed the new sablefish starting date, and one comment briefly addressed the catcher/processor reporting requirement. Of the individual letters received favoring the amendment, 36 were from the State of Washington and 11 were from Alaska. In addition, a petition was received from the Sitka-based Alaska Longline Fishermen's Association, containing 321 signatures, favoring approval of the amendment. Of the comments received against the amendment, 16 were from the State of Washington and 2 were from Alaska. Some of the letters were from fishing associations representing large numbers of fishermen; therefore the 73 letters represent a much larger number of constituents both for and against the amendment.

All of the unfavorable comments received are summarized, categorized, and responded to below. Most of these were balanced by comments that favored the sablefish allocations and phasing out of pot gear. Favorable comments are not published. Certain of the comments relate to the Magnuson Act's national standards and other applicable law. NOAA's guidelines (50 CFR Part 602), the national standards and Executive or Congressional intent of other applicable law were used as guidance in responding to comments.

Comments Against the Measure To Allocate Sablefish and Phase Out Pot Gear

Comment 1. The sablefish allocation measure violates National Standard 2, because the Council failed to take into account information readily available on the impact of this measure on the trawl fisheries.

Response. The Council did consider the effects of the allocation measure on the trawl industry. Representatives of the trawl industry testified that they needed not only a sablefish bycatch to support their other target fisheries, but a direct allocation of sablefish as well to help subsidize operations on species that provide only marginal profits. The Council recommended allocating to trawlers 20 percent of the available OYs in the Western and Central regulatory areas where the majority of trawl fisheries are conducted. This is about four times what is required for a bycatch, estimated from the NMFS "best blend" catch data to be no greater than 5 percent (sablefish are mostly taken when fishing for flounder). The Council thus provided for a limited directed trawl fishery. The Council's decision is consistent with National Standard 2.

Comment 2. The measure violates National Standard 4 in that (1) it discriminates in favor of Alaska residents of coastal communities in Alaska by eliminating Seattle-based, at-sea processors; (2) it is incapable of being analyzed regarding whether the allocation is fair and equitable, and therefore is unadoptable; and (3) it ultimately provides a single entity with an excessive share, over 67 percent, of the sablefish harvested.

Response. National Standard 4 requires that conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various fishermen, such allocations shall be (a) fair and equitable to all such fishermen, (b) reasonably calculated to promote conservation, and (c) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

Although many management measures have incidental allocative effects, only those that result in direct distributions of fishing privileges are judged against National Standard 4. This assignment of ocean areas and/or portions of available sablefish for harvest to particular gear users is such a direct allocation of fishing privileges. It is a direct and deliberate distribution of the opportunity to participate in the sablefish fishery. These measures do not differentiate either directly or indirectly among U.S. citizens on the basis of their States of residence; hook and line, pot, and trawl fishermen who participate in the fishery reside both outside and within the State of Alaska. These measures also do not discriminate against at-sea processing. At-sea processing is still permitted and may be conducted by both trawl and hook and line vessels.

Other factors to be considered in making allocations include whether allocations are fair and equitable, are reasonably calculated to promote conservation, and avoid excessive shares.

To allow pot vessels to continue to participate and to expand their efforts in the fishery indefinitely would be unfair to the hook and line fishermen. It is clear from the administrative record that pot gear preempts the fishing grounds

and forces the hook and line fishermen to either seek other fishing grounds or lie idle. Productive sablefish grounds occur in a narrow contour and a single pot vessel may easily displace several hook and line fishermen from the same grounds. Pot vessels can unfairly impose economic inefficiencies on the hook and line vessels indirectly by forcing them to search for other grounds and directly through losses of fishing gear and the resulting down time to regear.

Another consideration is the availability of alternative fisheries. Many hook and line sablefish fishermen participate in the severely overcapitalized Pacific halibut fishery. Many are smaller vessels with few, if any, alternative fisheries to which they can turn if the sablefish fishery becomes unprofitable through evolution to a highly capitalized large boat fleet which takes the entire OY in a short time period. Whereas many hook and line vessels would be unable to convert to pot gear or any other gear type, that option is available under the proposed regime to the pot vessel operators. The pot vessel owners can refit with longline gear, convert to other large-boat fisheries, to move to the Bering Sea to fish pots for sablefish. It is fair and equitable to exclude pot gear now while there are still only a small number of these vessels compared to several hundred hook and line vessels. Delaying action will only make it more difficult to remove pot gear in the future and would perpetuate hardships now being imposed on the hook and line fishery.

The national standards guidelines make it clear that the allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. An allocation need not preserve the status quo in a fishery to qualify as fair and equitable if a restructuring of fishing privaleges would maximize overall benefits. NOAA accepts the Council's conclusion that these measures maximize overall benefits.

Catch statistics from the last three years of the sablefish fishery reveal an increasing transfer of the OY from hook and line vessels to pot vessels. It is reasonable to assume this transfer will be maintained and probably increased unless these measures are undertaken.

The sablefish measures recognize that the hook and line fisherman and the processors to whom they sell have developed this fishery, including the wholesale markets, and, in Southeast Alaska, depend upon it. The sudden disruption of a major resource base, which is currently occuring, would result ultimately in economic hardship in a number of small communities that have few alternatives for employment. The Council has considered the dependence on the sablefish fishery by present participants and coastal communities in view of the fact that overall economic efficiency requires that such issues as employment impacts and community economic stability are taken into account in addition to production efficiency.

Another argument that has been made is that the allocation to trawl vessels is not fair and equitable because it constrains the ultimate full utilization of the multispecies groundfish complex in the Gulf of Alaska. NOAA doesn't agree with this allegation, at least with respect to the trawl fishery's present structure. As previously discussed, actual bycatch rates of sablefish by domestic trawlers fishing in a variety of joint venture operations in the Gulf in 1984 and 1985 are all less than 5 percent. The proposed allocation to trawlers of 20 percent of the sablefish OY in the Western and Central Gulf adequately provides for all bycatch needs plus some level of directed sablefish harvest to support marginally profitable operations on lower-valued species. Whether 20 percent of the sablefish is enough only time will tell. No quantifiable evidence has been presented that it is not adequate.

For the reasons above, NOAA has concluded that the phase-out of pot gear and the allocations between gear types are fair and equitable in this particular instance. This should not be viewed as a precedent for other fisheries where circumstances may differ.

Comment 3. The measure violates National Standard 5, because it does not promote efficiency and was selected solely for economic reasons.

Response. National Standard 5 requires conservation and management measures, where practicable, to promote efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose. The term "utilization" encompasses harvesting, processing, and marketing, since management decisions affect all three sectors of the industry.

"Efficiency" is a complex term to define as it relates to fisheries. In the national standards guidelines, NOAA defines efficiency as the ability to produce a desired effect or product (or achieve an objective) with a minimum of effort, cost, or misuse of valuable biological and economic resources. In other words, management measures should be chosen that achieve the FMP's objectives with minimum cost and burdens on society. NOAA has concluded that the sablefish measures do promote efficiency, where practicable, principally by addressing real and potential inefficiencies which are created by and would be contributed to by continuing the status quo within the fishery.

By reducing the potential for grounds preemption and/or gear conflicts the phasing out of pot gear will reduce or eliminate the inefficiencies of lost income and productivity imposed on the hook and line fishery by having to replace lost gear or having to find new fishing grounds.

The RIR concludes that the existing hook and line fleet is fully capable of harvesting the entire OY in every regulatory area of the Gulf of Alaska. By phasing out pot gear, the rate of overcapitalization in the fishery is reduced. More importantly, however, the economic loss that would result from the inefficient use of capital and from incompatible gear types competing for a limited resource is reduced or eliminated.

The allocation of the sablefish OY between the hook and line and trawl gear types will promote efficiency as well. Studies have shown that a significant amount of the trawl catch of a given species is discarded due to unsuitability of either its size or condition for the marketplace. These discards are both an economic and biological waste as they are usually juveniles which have not yet spawned. The hook and line fishery maximizes both the poundage yield and value from the sablefish resource with little wastage. The sablefish allocation measures promote efficiency by ensuring that the fishery that maximizes the net benefits from the sablefish resource is the principal harvester of that resource.

Overall social efficiency is also promoted by these measures. Although it is difficult to quantify and analyze the social and economic impacts throughout the community infrastructure, the analysis that was conducted and the large amount of public testimony and debate on the issues create a record adequate to conclude that to continue the status quo would be to condone the disruption and dislocation of harvesting, processing, marketing, and employment patterns within several local communities.

In determining whether the sablefish measures have economic allocation as their sole purpose, NOAA considered whether the problems the Council was attempting to address were solely economic. The administrative record of the Council's deliberations, public

testimony, Amendment 14's supporting documents, and comments received in response to the proposed rulemaking create a clear record of the problems within the sablefish fishery. These problems can be described in three general categories: (1) Conservation (2) grounds preemption and gear conflicts; and (3) the inequities and inefficiencies brought about by the rapid expansion of two new gear types, trawls and pots, in a fishery where the existing capital and capacity is already sufficient to harvest the full OY. A fourth category related to (3) is to maximize the benefits to the United States from the harvest of the sablefish resource as part of the Gulf-wide groundfish complex. Because of the diversity and character of problems the Council was attempting to address by the sablefish measures, NOAA can only conclude that the purpose of the measures is not solely economic, but biological and social as well.

NOAA also examined the argument that the Council may have passed up alternative measures with less allocative consequence and that the measures proposed are, therefore, chosen solely for allocative purposes. NOAA has concluded, as did the Council, that only the direct allocation of the sablefish resource between hook and line and trawl gear will maximize the yield and value (net benefits) from the harvest of both the sablefish resource and the entire groundfish complex, prevent wastage of juvenile or unmarketable sablefish, prevent overfishing, and stabilize the erosion of the harvesting, processing, marketing, and community infrastructure supporting the hook and line fishery.

Real alternatives do exist that might address, to some degree, the problem of incompatibility between pot and hook and line gear. These alternatives were extensively considered by the Council in developing its proposals and are discussed in the RIR. The most viable alternatives are (1) to allocate the OY among all three gear types, and (2) to segregate the gear types either spatially or temporally.

Allocating a portion of the OY to all three gear types doesn't address to any extent the incompatibility of gear types on the same fishing grounds. It also creates a greater monitoring burden while increasing the costs of management and enforcement. Segregating the gear types, especially pot and hook and line gear, spatially or temporally might address the gear incompatibility issue, but does little to make the fishery more easily manageable and thus prevent overfishing or address any other problems the Council was attempting to solve. In fact, such a solution would increase monitoring and enforcement costs and impose operational inefficiencies on all the participants in the fishery violating both National Standards 5 and 7.

The basis upon which gear types were segregated in time or space could create serious National Standard 4 questions of fairness and equitability as each group might be expected to perceive benefits and disadvantages related to the various areas or seasons. One gear group might easily claim that the other was given superior fishing grounds or a season that was more favorable for product quality, catchability, or marketing.

On the basis of the administrative record, Council discussions, the supporting documents, and comments on the proposed rulemaking, NOAA has concluded that the sablefish gear restrictions and allocative measures do not have allocation as their sole purpose and that they are consistent with National Standard 5.

Comment 4. The measure violates National Standard 7, because (1) the measure was not the least burdensome (2) elimination of directed trawl and pot gear east of 147° W. longitude is overly onerous, (3) phased elimination of pots west of 147° W. longitude and the reduction of the trawl catch to 20 percent is without any basis in the record, and (4) it fails to address any problem in the existing fishery.

Response. National Standard 7 requires conservation and management measures, where practicable, to minimize costs and avoid unnecessary duplication. The guidelines provide the overall test concerning this standard, which is that only those regulations which would serve some useful purpose, and where the present or future benefits of regulation would justify the costs, should be implemented. Although the comments contend that the measure fails to address any problem in the existing fishery west of 140° W. longitude, NOAA considers potential problems that are likely to become real in the present or the future to be appropriate candidates for Federal regulation. The types of problems intended for resolution by this measure are already occurring west of 140° W. longitude because the fishery is now being conducted there throughout the Gulf of Alaska.

The national standards guidelines' discussion of burdens as they relate to minimizing costs recognizes that management measures should be designed to give fishermen the greatest possible freedom of action in conducting business. Inherent in managing fisheries where conflicts among user groups are unavoidable without regulation is the fact that the greatest possible freedom of action is not practicable. Some measures likely will be necessary which will reduce freedom of action. The Council heard and considered a wide range of management alternatives during public testimony at its February, March, and May 1985 meetings, including smaller areas in which to prohibit pot gear and alternative OY allocations for the trawlers. The national standards guidelines state that alternative management measures should not impose unnecessary burdens on the economy, on individuals, or on the Federal, State, or local governments. In light of the circumstances reflected in the record, NOAA has concluded that this rule is necessary and is not unnecessarily burdensome. After considering the intent of the national standards guidelines, as they address National Standard 7, and a review of the Council action, NOAAA finds these measures to be consistent.

Comment 5. The Council did not articulate its objectives for sablefish management and the proposed restrictions are inconsistent with the FMP's objectives.

Response. NOAA agrees that the Council did not adopt new objectives for the FMP and did not clearly articulate its objectives in the RIR. Nevertheless, NOAA has concluded that the proposed measures are consistent with the FMP's current objectives.

Under the national standards guidelines, an allocation of fishing privileges should rationally further an FMP objective. Two existing objectives of the FMP are the (1) rational and optimal use, in both the biological and socioeconomic sense, of the region's fishery resources as a whole, and (2) provision for the orderly development of domestic groundfish fisheries. These measures further the rational and optimal use of the fishery resources by stabilizing and maintaining the existing hook and line fishery, which is capable of harvesting the entire sablefish OY. These measures will counteract the socioeconomic disruption to an established industry that has already begun to occur as the result of expansion of both pot and trawl gear in the fishery. These measures provide a regulatory regime in which the hook and line fishery can function without fear of gear conflicts and groundfish preemptions by trawl fisheries that have yet to fully utilize other groundfish stocks throughout the Gulf of Alaska by providing a reasonable sablefish

bycatch in the Eastern area and a small target allocation elsewhere in the Gulf of Alaska to contribute to their profitability.

Comment 6. The measure violates 16 U.S.C. 1853(b)(6), because the Council failed to address this amendment in the manner prescribed by this statute, which requires that the public be put on notice of intent to implement a limited access system, since gear limitation is a form of limited access system.

Response. The measure is not a limited access system for purposes of 16 U.S.C. 1853(b)(6). Access to the sablefish fishery in all parts of the Gulf of Alaska is still open to all who desire such access. It is only the type of gear that can be used in the fishery that is affected by the new measure.

Comment 7. Ground preemptions and gear conflicts were used to justify the allocation of the sablefish resource.

Response. Ground preemptions and gear conflicts were a major consideration of the Council when it adopted the management measure. However, the Council was also responding to the issue of stabilizing the infrastructure of the large hook and line fleet in the face of expansion into the fishery by pot and trawl gear types. The Council considered numerous factors when allocating the sablefish OY primarily to the hook and line fleet. These included providing the fleet alternatives to the Pacific halibut fishery, economic and social impediments to the hook and line fishery in the face of increased effort, risk of overfishing due to the effort, shorter seasons, reduced income, erosion of developed market channels, resource waste of small fish when discarded by trawlers, efficiency of hook and line gear, and the selectivity of that gear for large-size fish, which are high-valued in the market. NOAA is satisfied that factors other than ground preemptions and gear conflicts justify the sablefish allocation.

Comment 8. Other allocative measures were available which were less destructive to extant investments.

Response. Comment noted. As was discussed above, the Council and NOAA has concluded that these alternatives would not address all the problems raised in the record as completely as the measure that was chosen.

Comment 9. The historical dependence of hook and line gear on sablefish is overstated.

Response. NOAA recognizes that the hook and line fleet has fished for sablefish in the area east of 140° W. longitude and that domestication of the entire sablefish fishery Gulf-wide has occurred for the first time only in 1985.

Comment 10. The Administrative Procedure Act precludes the adoption of the policy formulated by the measure, because, as a policy-making body, the Council was predisposed to eliminate pots, failed to take into account the impact of the measure on trawlers, failed to articulate its objective for management, and failed to look at reasonable alternatives.

Response. Section 706 of the Administrative Procedure Act (APA) sets standards for agency action, findings, and conclusions, requiring them to be set aside following judicial review if they are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Since the Council plays a primary role in formulating policy regarding the conduct of fisheries in Federal waters off Alaska, and makes recommendations to the Secretary for the implementation of that policy, the process by which the Council makes such recommendations must be governed by the standards set forth in the APA.

NOAA is convinced that the Council was not predisposed to eliminate pots. It considered voluminous testimony at several Council meetings from pot fishermen with years of experience in the sablefish fishery off the Pacific coast. It considered testimony as to their needs to expand into the Gulf of Alaska sablefish fishery with pot gear as a result of reduced fishing off the Pacific coast, and the amount of effort, time, and money invested in pots and vessels. Trawl fishermen also testified that they needed to harvest the more valuable sablefish to subsidize their operations for other groundfish species for which their profit margin is small. Hook and line fishermen testified about their needs for an alternative to the severely over-capitalized hook and line fishery for Pacific halibut. The Council heard many arguments for and against variations of the Amendment concerning efficiency, product quality, potential for gear conflicts and ground preemptions, reduced employment among the fishing, processing, and transporting sectors, and conservation of the sablefish resource. Questions posed by Council members to those testifying from among all the user groups gave no indication that the Council was predisposed to eliminate pot gear, failed to take into account the impact of the measure on trawlers, failed to articulate its objectives for management, or failed to look at reasonable alternatives. NOAA concludes that the Council's process was consistent with the APA.

Comment 11. The RIR evidences a basis in favor of hook and line interests which is so pervasive as to render it vulnerable to judicial intervention.

Response. The RIR is an analysis of the potential problems of ground preemptions, gear conflicts, and socioeconomic disruption to the predominant existing infrastructure dependent on the sablefish resource, i.e., the problems highlighted to the Council by public testimony. If the RIR appears biased toward resolution of these problems, it is because it contains statements of the problems perceived by the hook and line fishermen and Council that justified resolution through Federal regulation. It must be emphasized strongly that the RIR is only one part of the total record of the consideration of the amendment by the Council and NOAA. Neither the Council nor NOAA necessarily concurs with all the conclusions of the RIR, and they went well beyond it in formulating their final decisions on the amendment.

Comment 12. The record does not clearly show that the Council adequately considered alternatives to the proposed amendment which would be more fair and equitable.

Response. The Council considered, and recorded on tape, voluminous public testimony at its February, March, and May 1985 meetings about possible combinations of areas and sablefish allocation shares. The subject of this testimony concerned fairness and equity as perceived by the fishermen or their representatives who presented it, and resulted in a vast range of alternatives being presented to the Council.

Comment 13. The amendment is inconsistent with the intent of the Magnuson Act to encourage full domestication of fisheries in U.S. waters.

Response. Sablefish is now a fully domesticated fishery in the Gulf of Alaska. The Council considered the effects that allocating sablefish to hook and line gear and trawlers and the scheduled phase-out of pot gear would have on U.S. fishermen who have been fishing in the Gulf of Alaska. The Council deliberately established hook and line gear as the primary gear type in the sablefish fishery partly to give users of that gear an alternative fishery they could depend upon during seasons when the Pacific halibut fishery would not support the hook and line fleet. Except for a small part of the hook and line fleet which is able to produce a little income from rockfish landings, a primary resource for the hook and line fleet is sablefish. The 20 percent allocation to U.S. trawlers is more than

is needed to support a bycatch in other target fisheries. It is intended by the Council to provide for a directed trawl fishery to aid trawl operations that are dependent on small profit margins resulting from low-value groundfish species. The Council's consideration of the needs of trawlers reflects its intent to foster the domestic harvest of all groundfish.

Comment 14. Panels in pots can be made of biodegradable material that would rot away, thus preventing "ghost" fishing.

Response. Current domestic regulations implementing the FMP at 50 CFR 672.24 require each sablefish pot to have a biodegradable panel of untreated cotton twine or natural fiber in the tunnel that will allow sablefish to escape. NOAA understands that this panel functions as intended.

Comment 15. Hooked undersized sablefish suffer mortality.

Response. Comment noted. Small fish often undergo physical trauma as a result of being hooked.

Comment 16. Large amounts of hook and line gear are lost annually.

Response. Comment noted. NOAA has no data to estimate how much hook and line gear is lost, but any type of fishing gear is subject to loss and this leads to costs in the fishery.

Comment 17. The RIR is inadequate under the RFA, Executive Order 12291, and NOAA guidelines.

Response. Requirements of the RFA, the Executive Order, and the national standards guidelines include the types of information that should be included when analyzing a regulation to determine whether it is "significant" under the RFA and/or whether it is "major" within the meaning of the Executive Order. NOAA has no rigid format to be followed in preparation of an analysis, but does set standards that the analysis must comply with to satisfy the requirements of the RFA and the Executive Order. Although NOAA recognizes that the RIR has certain shortcomings, it has concluded that it is adequate to satisfy the requirements of the RFA and Executive Order. NOAA emphasizes that the RIR is not the sole record of the Council's consideration of alternatives and impacts of the proposed actions. The Council considered extensive testimony and comments which form the full administrative record and upon which it relied heavily in making its recommendations.

Comment 18. The environmental assessment is inadequate, because it fails to identify individuals contacted in the process of preparing the document, and because the agency failed to actively solicit public comments.

Response. The Council identified agencies, but not individuals, when it prepared the EA. Although NOAA did not use the words "invite comments" or similar words to actively solicit public comments, both the Notice of Availability and the Notice of Proposed Rulemaking (NPR) stated that the EA was available for public review at the Council's office. NOAA considers the invitation for comments in the NPR to be an initiation for comments on all documents supporting the proposed rule. This is because the findings in the CLASSIFICATION section concerning "other applicable law" are based on the supporting documents, thus subjecting those documents also to comment during the comment period.

Comment 19. The decision not to prepare an environmental impact statement is substantively in error.

Response. The purpose of an EA is to determine whether significant impacts on the human environment could result from a proposed action. If the action is determined not to be significant, the EA and the resulting "finding of no significant impact" will be the environmental documents required under NEPA. NOAA believes the decision not to prepare an environmental impact statement on the basis of the EA is appropriate and complies fully with NEPA.

Comments on Other Issues

Comment 20. The April 1 starting date would promote resolution of problems associated with vessel safety and product quality.

Response. NOAA notes the comment and concurs that, on the basis of testimony on the season starting date issue, vessel safety will be enhanced, especially among those smaller vessels that would otherwise try to compete with larger pot and hook and line vessels during inclement late winter weather. NOAA has no information to take a position on product quality. Many fishermen and processors have stated that the occurrence of "jelly bellies" or fish which have soft, infirm flesh is common during the pre-April 1 spawning period.

Comment 21. Amendment 14 establishes a weekly catch reporting system for certain catcher/processor vessels. Initially, the Council considered requiring domestic observers on board such vessels, but problems of liability for the safety of such observers caused consideration of the catcher/reporting system instead. The commenter recommends approval of Amendment 14 as quickly as possible, including the reporting system.

Response. NOAA notes the comment.

Comment 22. The reporting requirements are not clear whether the statement at § 672.5(a)(3)(A), "no such operator may retain any part of the vessel's catch on board that vessel for a period of more than 14 days from the time it is caught unless the Regional Director has been notified as required under this paragraph during that period" is intended to be simply, a means of defining vessels which are subject to the reporting requirement, or whether this is intended to be a penalty, mandating seizure of the catch from a vessel failing to comply with reporting requirements. The planning burden and cost of giving 24 hours advance notification of starting and stopping fishing activities is high. The needs of management do not require such real-time information about the commencement of fishing.

Response. The purpose of this requirement is to define vessels that are subject to this reporting requirement. Prohibiting retention for more than 14 days does not mandate seizure of the catch from a vessel failing to comply with the requirement. Under the Magnuson Act, the vessel may receive a notice of warning or a citation. Depending on the gravity of the situation, further sanctions are possible. A catch may be seized, or the vessel may be seized. For serious infractions, even criminal penalties are possible.

This new reporting requirement is intended to collect information on catch from those catcher/processing vessels that remain at sea for lengthy periods and which do not otherwise land their catches frequently enough to provide managers information needed to make real-time management decisions. The Council discussed various ways by which catcher/processors could be defined and thus considered separately from the large number of vessels that make short trips, return to port, and report their catches within a time frame useful to managers. Experienced managers and processors suggested that catcher/ processors are likely to remain at sea for 14 days or more; 14 days, therefore, is a general guide to define the category of catcher/processors for which timely catch estimates have not been available in the past and which are subject to this requirement.

NOAA believes the benefits to the resource of requiring catcher/processors to give 24-hour notification before starting and stopping fishing in a regulatory area or district outweighs the costs to the industry. NMFS believes that effective fisheries management

requires effective enforcement; NMFS' experience of regulating the foreign fisheries using the same standards has proved that fishing vessels are able to comply with the requirement without inordinate costs.

Comment 23. The text in § 672.25(b), Disposal of fishing gear and other articles, must include the word "floating" between the words "discarded" and "fishing" to be consistent with specific regulatory language approved by the North Pacific Fishery Management Council.

Response, Comment noted. This regulation is being set aside at this time until further analysis is provided.

Classification

The Regional Director determined that this amendment is necessary for the conservation and management of the groundfish fishery and that it is consistent with the Magnuson Act and other applicable law.

The Council prepared an EA for this amendment and concluded that there will be no significant impact on the human environment as a result of this rule. A copy of the EA may be obtained from the Council at the address above.

The Administrator of NOAA determined that this rule is not a "major rule" requiring a regulatory impact analysis under Executive Order 12291. This determination is based on the RIR/FRFA prepared by the Council. A copy of the RIR/FRFA may be obtained from the Council at the address above.

The Council prepared a FRFA which describes the effects this rule will have on small entities. You may obtain a copy of the FRFA from the Council at the address above.

This rule contains collection of information requirements subject to the Paperwork Reduction Act. The collection of information has been approved by the Office of Management and Budget and continues under OMB Control Numbers 0648–0097 and –0016.

The Council determined that this rule will be implemented in a manner that is consistent to the maximum extent praticable with the approved coastal zone management program of Alaska. This determination was submitted for review by the responsible State agencies under section 307 of the Coastal Zone Management Act. The State agencies agreed with this determination.

List of Subject in 50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

Dated: October 18, 1985.

Carmen J. Blondin,

Deputy Assistant Administrator for Fisheries Resource Management, National Marine Fisheries Service.

PART 672—GROUNDFISH OF THE GULF OF ALASKA

For the reasons set out in the preamble, Part 672 is amended to read as follows:

1. The authority citation for Part 672 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In the table of contents, new sections are added in numerical order to read as follows:

Subpart B—Management Measures

* * * * *

Sec.

672.23 Seasons.

* * * * *

672.25 Disposal of fishing gear and other articles. [Reserved]

* * * * *

3. In § 672.2, a new definition, Directed fishing, is added in alphabetical order; in the definition for Regulatory district, paragraphs (1), (2), (3), and (4) are renumbered (2), (3), (4), and (5), respectively, and a new paragraph (1) is added, to read as follows:

§ 672.2 Definitions.

* * * * *

Directed fishing, with respect to any species, stock or other aggregation of fish, means fishing that is intended or can reasonably be expected to result in the catching, taking, or harvesting of quantities of such fish that amount to 20 percent or more of the catch, take, or harvest, or to 20 percent or more of the total amount of fish or fish products on board at any time. It will be a rebuttable presumption that, when any species, stock, or other aggregation of fish comprises 20 percent or more of the catch, take, or harvest, or 20 percent or more of the total amount of fish or fish products on board at any time, such fishing was directed to fishing for such fish.

* * * * *

Regulatory district * * *

(1) Central Southeast Outside district—all waters of the FCZ between 56°00' N. latitude and 57°30' N. latitude and east of 137°00' W. longitude;

* * * * *

4. In § 672.4, paragraphs (b), (d), and (e) are revised to read as follows:

§ 672.4 Permits.

* * * * *

(b) *Application.* The vessel permit required under paragraph (a) of this section may be obtained by submitting to the Regional Director a written application containing the following information:

(1) The vessel owner's name, mailing address, and telephone number;

(2) The name of the vessel;

(3) The vessel's U.S. Coast Guard documentation number or State registration number;

(4) The home port of the vessel;

(5) The type of fishing gear to be used;

(6) The length and net tonnage of the vessel;

(7) The hull color of the vessel;

(8) The names of all operators and/or lessees of the vessel;

(9) Whether the vessel is to be used in fish harvesting, in which case the type of fishing gear to be used must be specified; or for support operations, including the receipt of fish from U.S. vessels at sea; and

(10) The signature of the applicant.

* * * * *

(d) *Notification of change.* (1) Except as provided in paragraph (d)(2) of this section, any person who has applied for and received a permit under this section must give written notification of any change in the information provided under paragraph (b) of this section to the Regional Director within 30 days of the date of that change.

(2) A permit issued under this section will authorize either harvesting or support operations, but not both. The notification to the Regional Director under paragraph (d)(1) of this section of a change in the type of operations in which that vessel is to engage must be completed before that vessel begins the new type of operation.

(e) *Duration.* A permit will continue in full force and effect through December 31 of the year for which it was issued, or until it is revoked, suspended, or modified under Part 621 (Civil Procedures) of this chapter.

* * * * *

5. In § 672.5, a new paragraph (a)(3) is added to read as follows:

§ 672.5 Reporting requirements.

(a) * * *

(3) *Catcher/processor and mothership/processor vessels.*

The operator of any fishing vessel regulated under this part who freezes or dry-salts any part of its catch of groundfish on board that vessel and retains that fish at sea for a period of more than 14 days from the time it is caught, or who receives groundfish at sea from a fishing vessel regulated under this part and retains that fish at sea for a period of more than 14 days from the time it is received, must, in

PART 208—STATE GRANTS FOR STRENGTHENING THE SKILLS OF TEACHERS AND INSTRUCTION IN MATHEMATICS, SCIENCE, FOREIGN LANGUAGES, AND COMPUTER LEARNING AND FOR INCREASING THE ACCESS OF ALL STUDENTS TO THAT INSTRUCTION

Authority: Secs. 201–211, 213 of Title II, Education for Economic Security Act (20 U.S.C. 3961–3971, 3973), unless otherwise noted.

Subpart A—How States Obtain Funds for Programs Under This Part

General

§ 208.1 Purpose.

The Secretary provides financial assistance under this part to States to—

(a) Improve the skills of teachers and instruction in mathematics, science, foreign languages, and computer learning; and

(b) Increase the access of all students to that instruction.

(20 U.S.C. 3961)

§ 208.2 Regulations that apply to programs under this part.

The following regulations apply to programs for which the Secretary provides financial assistance under this part:

(a) The regulations in this part, except that—

(1) Subpart C does not apply to elementary and secondary education programs authorized under section 206 of Title II; and

(2) Subpart B does not apply to higher education programs authorized under section 207 of Title II.

(b) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants), Part 76 (State-Administered Programs), Part 77 (Definitions that Apply to Department Regulations), Part 78 (Education Appeal Board), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(20 U.S.C. 3961–3971, 3973)

§ 208.3 Definitions that apply to programs under this part.

(a) *Definitions in the Education for Economic Security Act.* The following terms used in this part are defined in sections 3 and 202 of the Education for Economic Security Act:

Area vocational education school
Elementary school
Governor
Institution of higher education
Junior or community college
Local educational agency
Secondary school
Secretary
State
State agency for higher education
State educational agency

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Application
Department
EDGAR
Fiscal Year
Nonprofit
Private
Public

(c) *Additional definitions.* The following terms are used in this part:

"Critical foreign languages" means languages designated by the Secretary in a notice published in the Federal Register as critical to national security, economic, or scientific needs.

"ECIA" means the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*

"EESA" means the Education for Economic Security Act, 20 U.S.C. 3901 *et seq.*

"Gifted and talented student," for the purpose of Title II, means a student, identified by various measures, who demonstrates actual or potential high performance capability, particularly in the fields of mathematics, science, foreign languages, or computer learning.

"Historically underrepresented and underserved populations" include females, minorities, handicapped persons, persons of limited-English proficiency, and migrants.

"Magnet school programs for gifted and talented students," as used in § 208.36(a)(2)(ii), means programs for gifted and talented students in magnet schools or magnet programs in regular schools that attract gifted and talented students from other schools. For the purpose of Title II, a magnet school is a school or education center that offers a special curriculum, including but not limited to schools or education centers capable of attracting substantial numbers of students of different racial backgrounds.

"Nonprofit organizations" include, but are not limited to, museums, libraries, educational television stations, professional science, mathematics, foreign language and engineering societies and associations, associations for the development and dissemination of projects designed to improve student understanding and performance in science, mathematics, and critical foreign languages, and other organizations that meet the definition of "nonprofit" in 34 CFR 77.1.

"Title II" means Title II of the Education for Economic Security Act.

(20 U.S.C. 3902, 3961–3971, 3973)

§§ 208.4–208.10 [Reserved]

State Application Procedures

§ 208.11 Conditions a State must meet to receive funds.

A State that desires to receive funds under this part shall have on file with the Secretary—

(a) An application that meets the requirements in § 208.12; and

(b) For the second year for which funds are made available, a State assessment of need submitted in accordance with the requirements in § 208.13.

(20 U.S.C. 3968, 3969)

§ 208.12 State application.

(a) *Contents.* A State application may be submitted in any form that the State determines is appropriate, provided the application—

(1) Designates the—

(i) State educational agency (SEA) as the agency responsible for the administration and supervision of the elementary and secondary education programs described in Subpart B of this part; and

(ii) State agency for higher education (SAHE) as the agency responsible for the administration and supervision of higher education programs described in Subpart C of this part;

(2) Describes the programs for which funds will be used under this part;

(3) Provides assurances that payments will be distributed by the State in accordance with the provisions of §§ 208.34 and 208.41;

(4) Provides procedures for—

(i) Submitting applications for the programs described in Subparts B and C of this part; and

(ii) Approval of applications by the appropriate State agency, including appropriate procedures to ensure that the appropriate State agency will not disapprove an application without notice and opportunity for a hearing in accordance with 34 CFR 76.401. The Secretary does not interpret disapproval of an application to include a determination by a SAHE as to the relative merit of a competing application under § 208.41(a);

(5) Provides assurances that—

(i) The State will prepare and submit the assessment of need required under § 208.13;

(ii) In the second year for which funds are available under this part, the State will use funds for purposes consistent with the findings of the State assessment of need;

(iii) For programs described in Subpart B of this part, the provisions of section 210 of Title II will be carried out; and

(iv) To the extent feasible, evaluations of the programs assisted will be performed;

(6) Provides assurances that funds made available under this part will be used to supplement and not supplant non-Federal funds in accordance with § 208.51;

(7) Provides assurances for the equitable participation of private school children and teachers in the purposes and benefits of Title II in accordance with § 208.61; and

(8) Provides fiscal control and accounting procedures to—

(i) Ensure proper accounting of funds made available under this part; and

(ii) Ensure the verification of the programs assisted under this part.

(b) *Amendments.* (1) A State shall amend its application as necessary in accordance with the provisions in 34 CFR 76.140–76.141.

(2)(i) For the second year for which funds are made available under this part, the State shall amend the program description required under paragraph (a)(2) of this section to describe how the services provided in the State address unmet needs identified in the final State assessment of need required under § 208.13(a)(2).

(ii) To meet the requirement in paragraph (b)(2)(i) of this section, the State may cross-reference the program description in § 208.13(b)(2) if that description includes the information required in paragraph (b)(2)(i) of this section.

(c) *Approval.* The Secretary approves any State application that meets the requirements of this section.

(Approved by the Office of Management and Budget under Control Number 1810–0515)

(20 U.S.C. 3969)

§ 208.13 State assessment of need.

(a) A State shall—

(1) After examining the local assessments submitted under § 208.33, prepare and make available to local educational agencies (LEAs) within the State a preliminary assessment of the status of mathematics, science, foreign languages, and computer learning within the State's public and private elementary and secondary schools and institutions of higher education (IHEs) not later than nine months following the date for which funds first become available for obligation by the State under this part; and

(2) Prepare a final version of the assessment for submission to the Secretary not later than twelve months after the date for which funds under this part become available for obligation by the State.

(b) The State assessment may be submitted in any form that the State determines is appropriate, provided the assessment—

(1) Describes and provides a five-year projection of—

(i) The availability of qualified mathematics, science, foreign languages, and computer learning teachers at the secondary and postsecondary education levels within the State;

(ii) The qualifications of teachers in mathematics, science, foreign languages, and computer learning at the secondary and postsecondary education levels;

(iii) The qualifications of teachers at the elementary level to teach mathematics, science, foreign languages, and computer learning;

(iv) The State standards for teacher certification, including any special exceptions currently made, for teachers of mathematics, science, foreign languages, and computer learning;

(v) The availability of adequate curricula and instructional materials and equipment in mathematics, science, foreign languages, and computer learning; and

(vi) The degree of access to instruction in mathematics, science, foreign languages, and computer learning of historically underrepresented and underserved populations and of the gifted and talented; and

(2) Describes the programs, initiatives, and resources committed or projected to be undertaken within the State to—

(i) Improve teacher recruitment and retention in the fields of mathematics, science, foreign languages, and computer learning;

(ii) Improve teacher qualifications and skills in the fields of mathematics, science, foreign languages, and computer learning;

(iii) Improve curricula in mathematics, science, foreign languages, and computer learning, including instructional materials and equipment; and

(iv) Improve access for historically underrepresented and underserved populations and for the gifted and talented to instruction in mathematics, science, foreign languages, and computer learning.

(c) The State assessment must be—

(1) Developed in consultation with the Governor, State legislature, State Board of Education, LEAs within the State, and representatives within the State of—

(i) Vocational secondary schools and area vocational education schools;

(ii) Public and private IHEs;

(iii) Teacher organizations;

(iv) Private industry;

(v) Other nonprofit organizations; and

(vi) Private elementary and secondary schools; and

(2) Submitted jointly by the SEA and the SAHE.

(Approved by the Office of Management and Budget under Control Number 1810–0512)

(20 U.S.C. 3968)

§§ 208.14—208.20 [Reserved]

Allotment Procedures

§ 208.21 Allotment to States.

(a)(1) From ninety (90) percent of the funds appropriated under Title II for each fiscal year, the Secretary calculates for each State an amount that bears the same ratio to the ninety (90) percent as the number of children aged five to seventeen, inclusive, in the State bears to the number of those children in all States, except that the amount for any State will not be less than 0.5 percent of the amount available under this section in any fiscal year.

(2) For purposes of this section—

(i) The term "State" does not include Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands; and

(ii) The Secretary determines the number of children aged five to seventeen, inclusive, on the basis of the most recent satisfactory data available to the Secretary.

(b) From the amount of funds that a State is eligible to receive under paragraph (a) of this section, the Secretary allots to the State—

(1) Seventy (70) percent of those funds for use in elementary and secondary education programs under section 206 of Title II and Subpart B of this part; and

(2) Thirty (30) percent of those funds for use in higher education programs under section 207 of Title II and Subpart C of this part.

(20 U.S.C. 3964(a), 3965)

§ 208.22 Reallotment to States.

(a) If, after consultation with a State, the Secretary determines for any fiscal year that the full amount the State receives under § 208.21 is not required for that fiscal year to carry out the purposes of this part, the Secretary reallots the excess funds to other States in proportion to the original allotments to those States under § 208.21 for that year.

(b) If the Secretary determines that the amount to be reallotted to a State under paragraph (a) of this section exceeds the amount the State needs and will be able to use for that year, the Secretary reduces the amount for that State and reallots the excess funds proportionately among the remaining States.

(c) Any funds realloted to a State are considered part of the State's allotment under § 208.21 for that year.

(20 U.S.C. 3964(b))

§ 208.23 Allotment to the Insular Areas.

(a)(1) From the amount available for carrying out section 204(c) of Title II for each fiscal year, the Secretary allots up to one-half of that amount among Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands according to their respective needs.

(2) The Secretary determines respective needs according to the relative number of children aged five to seventeen, inclusive, within each Insular Area. To make this determination, the Secretary uses the most recent satisfactory data available to the Secretary.

(b) An Insular Area may include the funds it is eligible to receive under paragraph (a) of this section in its consolidated grant application in accordance with 34 CFR 76.125–76.137.

(20 U.S.C. 3964(c); S. Rept. 151, 98th Cong., 1st Sess. 12 (1984))

§ 208.24 Allotment to the Bureau of Indian Affairs.

(a) From the amount available for carrying out section 204(c) of Title II for each fiscal year, the Secretary allots not less than one-half of that amount to the Bureau of Indian Affairs for programs under this part for children in elementary and secondary schools operated for Indian children by the U.S. Department of the Interior.

(b) The Bureau of Indian Affairs does not have to comply with the requirements for higher education programs in section 207 of Title II and Subpart C of this part.

(20 U.S.C 3964(c); S. Rept. 151, 98th Cong., 1st Sess. 12 (1984))

§§ 208.25–208.30 [Reserved]

Subpart B—Elementary and Secondary Education Program Requirements

§ 208.31 Conditions an LEA must meet to receive funds.

(a) For the first year for which funds are made available under this part, an LEA that desires to receive an allocation of funds shall submit to the SEA an—

(1) Application that meets the requirements of § 208.32(a); and

(2) Assessment of need that meets the requirements of § 208.33.

(b) To receive a renewal of funds under this part, the LEA shall submit to the SEA the information required in § 208.32(b).

(20 U.S.C. 3966(b)(3), 3969(b)(4), 3970)

§ 208.32 LEA application and renewal.

(a) *Application.* Each LEA application must include—

(1) Information the SEA may require describing the LEA's proposed activities and expenditures of funds for those activities under § 208.35;

(2) Any assurances the SEA may require to ensure that the LEA will comply with the provisions of Title II and this part; and

(3) An assurance that programs of inservice training and retraining will take into account the need for greater access to and participation in mathematics, science, and computer learning programs and careers for students from historically underrepresented and underserved populations.

(b) *Renewal.* To receive a renewal of funds under this part, an LEA shall submit to the SEA—

(1) Evidence that shows the LEA is implementing the programs assisted under this part so that—

(i) A substantial number of teachers in public and private schools in the LEA are being served; and

(ii) Several grade levels of instruction are involved in the LEA's program;

(2) A description of how the services assisted will address unmet needs described in the State's assessment of need in § 208.13; and

(3) Any other information required by the SEA.

(Approved by the Office of Management and Budget under control number 1810–0525)

(20 U.S.C. 3966(b)(1), (3), 3969(b)(4), 3970(b))

§ 208.33 LEA assessment of need.

(a) Each LEA assessment must include the need for assistance in—

(1) Teacher training, retraining, and inservice training and the training of appropriate school personnel in the areas of mathematics, science, foreign languages, and computer learning, including a description of—

(i) The availability and qualifications of teachers at the secondary level in the areas of mathematics, science, foreign languages, and computer learning; and

(ii) The qualifications of teachers at the elementary level to teach those areas;

(2) Improving instructional materials and equipment related to mathematics and science education; and

(3) Improving the access to instruction in mathematics, science, foreign languages, and computer learning of students from historically underrepresented and underserved populations and of gifted and talented students based on an assessment of the current degree of access to instruction of these students.

(b) The assessment of need must include a description of—

(1) The types of services to be provided under § 208.35(a) and (c); and

(2) How the services assisted will meet the program needs of the LEA.

(c) The assessment of need under this section must reflect the needs of children and teachers in public and private elementary and secondary schools in the LEA.

(Approved by the Office of Management and Budget under control number 1810-0525)

(20 U.S.C. 3970, 3971)

§ 208.34 Allocation of funds.

(a) *Funds for LEAs.* An SEA shall distribute to LEAs within the State for use under § 208.35 not less than seventy (70) percent of the funds made available for elementary and secondary education programs under § 208.21(b)(1) as follows:

(1) Fifty (50) percent of the funds must be distributed according to the relative number of children enrolled in public and private schools within the school districts of the LEAs.

(2) Fifty (50) percent of the funds must be distributed according to the same proportion as funds under Chapter 1 of the ECIA are distributed.

(b) *Funds for SEAs.* An SEA shall reserve for use in accordance with § 208.36 not more than thirty (30) percent of the funds made available for elementary and secondary education programs under § 208.21(b)(1).

(20 U.S.C. 3966(b); S. Rept. 151, 98th Cong., 1st Sess. 13-14 (1983))

§ 208.35 Use of funds by LEAs.

(a) Except as provided in paragraphs (b) and (c) of this section, an LEA shall use the funds it receives under § 208.34(a) for the expansion and improvement of inservice training and retraining in the fields of mathematics and science of teachers and other appropriate school personnel, including vocational education teachers who use mathematics and science in teaching vocational education courses.

(b)(1) If an LEA determines that it does not need some or all of the funds it receives under this part to meet the needs identified in its assessment of need for the training and retraining specified in paragraph (a) of this section, the LEA may request the SEA to waive to the extent necessary the provisions in paragraph (a) of this section in order that the LEA may use funds not needed under paragraph (a) of this section for programs under paragraph (c) of this section.

(2)(i) If the SEA determines that the LEA does not need some or all of the funds the LEA receives under this part to meet the needs identified in the LEA's assessment of need for the training and retraining specified in paragraph (a) of this section, the SEA shall grant the LEA's request for a waiver.

(ii) In granting a waiver, the SEA shall ensure that the LEA will meet the requirements for the equitable participation of children and teachers in private schools in accordance with section 211 of Title II and 34 CFR 76.651-76.662.

(c)(1) Except as provided in paragraph (c)(2) of this section, if an LEA receives a waiver under paragraph (b) of this section, the LEA shall use funds not needed under paragraph (a) of this section for—

(i) Computer learning and instruction;

(ii) Foreign language instruction; and

(iii) Instructional materials and equipment related to mathematics and science instruction.

(2) Of the funds an LEA receives under § 208.34(a), an LEA may not use more than—

(i) Thirty (30) percent for the purchase of computers and computer-related instructional equipment; and

(ii) Fifteen (15) percent to strengthen instruction in foreign languages.

(d) An LEA may carry out the training and instruction under this section—

(1) Through agreements with public agencies, private industry, IHEs, and nonprofit organizations; and

(2) In conjunction with one or more LEAs within the State, with the SEA, or with both LEAs and the SEA.

(20 U.S.C. 3966 (b), (c), 3970(c), 3971)

§ 208.36 Use of funds by SEAs.

(a)(1) Subject to the requirement in paragraph (a)(2) of this section, an SEA shall use not less than twenty (20) percent of the funds made available for elementary and secondary education programs under § 208.21(b)(1) for the benefit of children in public and private elementary and secondary schools for programs in the fields of mathematics, science, foreign languages, and computer learning for—

(i) Demonstration and exemplary programs for—

(A) Teacher training, retraining, and inservice upgrading of teacher skills;

(B) Instructional materials and equipment and necessary technical assistance; and

(C) Special projects that meet the requirements in paragraph (a)(2) of this section; and

(ii) The dissemination of information relating to demonstration and exemplary programs to all LEAs within the State.

(2) The SEA shall use not less than twenty (20) percent of the funds used to meet the requirement in paragraph (a)(1) of this section for special projects in mathematics, science, foreign languages, and computer learning for—

(i) Students from historically underrepresented and underserved populations; and

(ii) Gifted and talented students. The projects for gifted and talented students may include assistance to magnet school programs for those students.

(b) An SEA shall use not less than five (5) percent of the funds made available for elementary and secondary education programs under § 208.21(b)(1) to provide technical assistance to LEAs and, if appropriate, IHEs and nonprofit organizations that are conducting programs under § 208.35.

(c) An SEA may not use more than (5) percent of the funds made available for elementary and secondary education programs under § 208.21(b)(1) for—

(1) The State assessment of need required by § 208.13; and

(2) The costs incurred by the SEA for administering and evaluating programs assisted under this part in the State.

(20 U.S.C. 3966 (d)-(f), 3971)

§§ 208.37—208.40 [Reserved]

Subpart C—Higher Education Program Requirements

§ 208.41 Allocation of funds.

(a) *Funds for IHEs.* (1) A SAHE shall distribute on a competitive basis to IHEs within the State that apply for payments not less than seventy-five (75) percent of the funds made available for higher education programs under § 208.21(b)(2).

(2) The SAHE shall make every effort to ensure equitable participation of private and public institutions of higher education.

(b) *Funds for SAHEs.* A SAHE shall reserve for use in accordance with § 208.42 not more than twenty-five (25) percent of the funds made available for higher education programs under § 208.21(b)(2).

(20 U.S.C. 3967(b))

§ 208.42 Use of funds by SAHEs.

(a)(1) Subject to the requirement in paragraph (a)(2) of this section, a SAHE shall use not less than twenty (20) percent of the funds made available for higher education programs under § 208.21(b)(2) for cooperative programs among IHEs, LEAs, SEAs, private industry, and nonprofit organizations for the development and dissemination of projects designed to improve student understanding and performance in science, mathematics, and critical foreign languages.

(2) In carrying out the requirement in paragraph (a)(1) of this section, the

SAHE shall give special consideration to programs involving consortial arrangements that include LEAs.

(b) A SAHE may not use more than five (5) percent of the funds made available for higher education programs under 208.21(b)(2) for—

(1) The State assessment of need required by § 208.13; and

(2) The costs incurred by the SAHE for administering and evaluating programs assisted under this part in the State.

(20 U.S.C. 3967 (c), (d), 3971(b))

§ 208.43 Use of funds by IHEs.

(a) Subject to the requirement in paragraph (b) of this section, an IHE shall use the funds awarded under § 208.41(a) for—

(1) Establishing traineeship programs for new teachers who will specialize in teaching mathematics and science at the secondary school level;

(2) Retraining secondary school teachers, who specialize in disciplines other than the teaching of mathematics and science, to specialize in the teaching of mathematics, science, or computer learning, including provision of stipends for participation in institutes authorized under Title I of the EESA; and

(3) Inservice training for elementary, secondary, and vocational school teachers and training for other appropriate school personnel to improve their teaching skills in the fields of mathematics, science, and computer learning, including stipends for participation in institutes authorized under Title I of the EESA.

(b) To receive funds for programs under paragraphs (a) (2) and (3) of this section, an IHE shall enter into an agreement with an LEA, or a consortium of LEAs, to provide inservice training and retraining for elementary and secondary school teachers in public and private schools in the LEA or LEAs.

(c) Each IHE receiving funds under § 208.41(a) shall assure that programs of training, retraining, and inservice training will take into account the need for greater access to and participation in mathematics, science, and computer learning and careers for—

(1) Students from historically underrepresented and underserved populations; and

(2) Gifted and talented students.

(20 U.S.C. 3967(b))

§§ 208.44—208.50 [Reserved]

Subpart D—Fiscal Requirements

§ 208.51 Supplement, not supplant.

Any grantee or subgrantee that receives funds under this part—

(a) May use those funds only to supplement and, to the extent practicable, to increase the level of funds from non-Federal sources that would, in the absence of funds made available under this part, be made available for the purposes described in sections 206 and 207 of Title II; and

(b) May not use funds made available under this part to supplant funds from non-Federal sources.

(20 U.S.C. 3969(b)(6))

§§ 208.52—208.60 [Reserved]

Subpart E—Participation of Children and Teachers in Private Schools

§ 208.61 Participation of children and teachers in private schools.

(a) *Participation of children.* To the extent consistent with the number of children in the State or an LEA who are enrolled in private elementary and secondary schools, an SEA or LEA, after consultation with appropriate private school representatives, shall provide services and arrangements for the benefit of these children to ensure their equitable participation in the purposes and benefits of Title II.

(b) *Participation of teachers.* (1) To the extent consistent with the number of children in the State or an LEA who are enrolled in private elementary and secondary schools, and SEA, LEA, or SAHE, after consultation with appropriate private school representatives, shall provide teacher training, retraining, and inservice training to ensure the equitable participation of private school teachers in the purposes and benefits of Title II.

(2) To receive funds for programs under § 208.43(a) (2)–(3), an IHE shall meet the requirements in § 208.43(b) for serving teachers in private elementary and secondary schools.

(c) *Applicable requirements.* In fulfilling the equitable participation requirements in paragraphs (a) and (b) of this section, an SEA, LEA, or SAHE shall comply with the provisions in 34 CFR 76.651–76.662.

(20 U.S.C. 3966(b)(3), 3967(b)(3), 3971(a), (b))

§ 208.62 Bypass—General.

(a) The Secretary implements a bypass if an SEA, LEA, or SAHE—

(1) Is prohibited by law from providing the services under this part for private school children and teachers on an equitable basis as required in § 208.61; or

(2) Has substantially failed or is unwilling to provide the services under this part for private school children and teachers on an equitable basis as required in § 208.61.

(b) If the Secretary implements a bypass, the Secretary waives the responsibility of the SEA, LEA, or SAHE for providing Title II services for private school children and teachers and arranges to provide the required services. Normally, the Secretary hires a contractor to provide the Title II services for private school children and teachers under a bypass. The Secretary deducts the cost of these services, including any administrative costs, from the appropriate allotment of Title II funds. In arranging for these services, the Secretary consults with appropriate public and private school officials.

(c) Pending the final resolution of an investigation or a complaint that could result in a bypass action, the Secretary may withhold from the allocation of the affected SEA, LEA, or SAHE the amount the Secretary estimates is necessary to pay the cost of the services referred to in paragraph (b) of this section.

(20 U.S.C. 3971(c))

§ 208.63 Notice by the Secretary.

(a) Before taking any final action to implement a bypass, the Secretary provides the affected SEA, LEA, or SAHE with written notice.

(b) In the written notice, the Secretary—

(1) States the reason for the proposed bypass in sufficient detail to allow the SEA, LEA, or SAHE to respond;

(2) Cites the requirement with which the SEA, LEA, or SAHE has allegedly failed to comply; and

(3) Advises the SEA, LEA, or SAHE that it has at least 45 days from receipt of the written notice to submit written objections to the proposed bypass and to request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the SEA, LEA, or SAHE by certified mail with return receipt requested.

(20 U.S.C. 3971(c))

§ 208.64 Bypass procedures.

Sections 208.65–208.67 contain the procedures that the Secretary uses in conducting a show cause hearing. These procedures may be modified by the hearing officer if all parties agree it is appropriate to modify them for a particular case.

(20 U.S.C. 3971(c))

§ 208.65 Appointment and functions of a hearing officer.

(a) If an SEA, LEA, or SAHE requests a show cause hearing, the Secretary

refers to "private nonprofit . . . organizations, including . . . educational television stations. . . ." S. Rept. 151, 98th Cong., 1st Sess. 16 (1983).

There is no persuasive evidence in either the statute or the legislative history that Congress sought to preclude either public or private libraries, museums, educational television stations, and other appropriate organizations from participating in Title II. Moreover, there is no indication that Congress intended only private libraries and museums, for example, to participate in programs under section 206(b)(1) of Title II while limiting involvement in the State's needs assessment process to only their public counterparts. Consequently, to promote competition, to enhance flexibility, and to recognize the valuable contributions both public and private organizations can make toward accomplishing the purposes of Title II, the Secretary has revised the regulations to refer to "nonprofit organizations," thereby permitting involvement by appropriate public and private organizations.

Comment. One commenter questioned why the definition of "private nonprofit organizations," which includes specific entities, does not include the term "other appropriate institutions" included in section 208(b) of Title II.

Response. A change has been made. The definition of "nonprofit organizations" in § 208.3(c) includes the phrase "other organizations." The Secretary believes the addition of this phrase addresses the commenter's concern and permits the potential for participation by any nonprofit organization interested in the purposes and programs of Title II.

Comment. One commenter requested that the definition of "private nonprofit organizations" be extended to include "institutions and centers whose primary purpose is to improve the educational opportunities of historically underrepresented and underserved groups."

Response. No change has been made. The entities listed in the definition in § 208.3(c) are only examples and in no way constitute an exhaustive list. As a result, the definition, particularly as revised, is sufficiently broad to include the organizations suggested by the commenter.

Comment. One commenter requested that § 208.3(c) be amended to include the definition for "handicapped children" found in Part B of the Education of the Handicapped Act.

Response. No change has been made. The Secretary has decided that to define "handicapped children" or any of the other groups of children classified as historically underrepresented or underserved would unduly restrict the flexibility of grantees under Title II to serve children who may not fit within the Federal definition.

Section 208.12 State application

Comment. One commenter suggested that § 208.12 prescribe specific criteria for submitting a State's application similar to the criteria contained in § 208.13. Another commenter recommended that separate applications be required from the SEA and the State agency for higher education (SAHE).

Response. No change has been made. Section 209(a) of Title II requires a State to file *an* application. Section 208.12 does not prescribe a precise format for that application in order to permit the State maximum flexibility to submit an application that best meets the State's needs. For example, a State may file an application consisting of two parts: one part completed by the SEA and one part completed by the SAHE. Another State may submit an application in which the elementary and secondary programs and the higher education programs are described together. Either format is acceptable, as long as the application meets the requirements of § 208.12(a).

Comment. One commenter questioned the requirement in § 208.12(a)(4)(i) that requires the State application to provide procedures for submitting applications for both the elementary and secondary portion and the higher education portion of the program. The commenter pointed out that section 209(b)(4)(A) of Title II only requires procedures for submitting applications for the elementary and secondary portion of the program.

Response. No change has been made. Although section 209(b)(4)(A) of Title II only specifically mentions "programs described in Section 206," several other aspects of section 209(b)(4) support the Secretary's decision to require a State's application to describe the procedures regarding the submission of applications for higher education programs as well as for elementary and secondary education programs.

First, section 209(b)(4)(A) refers to applications by "local educational agencies, institutions of higher education, junior or community colleges, and other organizations for programs described in section 206. . . ." Although it is possible that institutions of higher education (IHEs), junior or community colleges, and other organizations may apply for the funds the SEA reserves under section 206, nearly three-fourths of the funds for elementary and secondary programs must be distributed to LEAs. As a result, it would appear unnecessary for section 209(b)(4)(A) to include procedures for submitting applications from IHEs, for example, unless the section includes procedures for submitting applications for higher education programs.

Second, section 209(b)(4)(B) requires a State's application to describe the procedures "for approval of applications by the *appropriate State agency*" (emphasis added). Thus, section 209(b)(4)(B) clearly includes procedures for both the SEA and the SAHE. It seems anomalous to limit § 208.12(a)(4)(i) to applications concerning elementary and secondary education programs when § 208.12(a)(4)(ii) clearly applies to applications for higher education programs too.

Comment. One commenter requested that LEAs be apprised of what would constitute rejection of an LEA application.

Response. No change has been made. In accordance with an SEA's supervisory and administrative responsibilities in § 208.12(a)(1)(i), the SEA is responsible for developing LEA application requirements and for assisting LEAs in submitting successful applications. Because LEAs are entitled to receive funds on a noncompetitive formula basis under Title II, it is unlikely that LEA applications that meet the SEA's requirements will be rejected. If an SEA does decide to reject an LEA's application, section 209(b)(4)(B) of Title II and § 208.12(a)(4)(ii) of the regulations require the SEA to provide the LEA notice and an opportunity for a hearing before disapproving the application.

Comment. One commenter questioned why the term "appropriate" was omitted before the terms "procedures" and "State agency" in § 208.12(a)(4)(ii).

Response. A change has been made. The term "appropriate" precedes the terms "procedures" and "State agency" in § 208.12(a)(4)(ii). This change makes § 208.12(a)(4)(ii) consistent with section 209(b)(4)(B) of Title II.

Comment. One commenter, noting that § 208.12(a)(4)(ii) requires the use of Federal hearing procedures, questioned the legislative authority for this requirement.

Response. No change has been made. Section 209(b)(4)(B) of Title II and § 208.12(a)(4)(ii) of the regulations require a State agency to provide an applicant notice and opportunity for a hearing before disapproving an application. The hearing procedures referenced in § 208.12(a)(4)(ii) are contained in 34 CFR 76.401 of the Education Department General Administrative Regulations (EDGAR). 34 CFR Part 76 of EDGAR, which governs

most of the Department's State-administered programs, applies to Title II. *See* § 208.2(b). Thus, the hearing procedures in 34 CFR 76.401 also apply. As indicated in 34 CFR 76.401(d), an SEA must follow prescribed procedures before disapproving an application. Those procedures are required by section 425(a) of the General Education Provisions Act (GEPA), 20 U.S.C. 1231b-2(a). A SAHE, however, is not required to use those procedures. *See* 34 CFR 76.401(e). Thus, the requirement in § 208.12(a)(4)(ii) to use Federal hearing procedures actually only affects SEAs, which are required by statute to use those procedures.

Comment. One commenter recommended that § 208.12(a)(4)(ii), which requires notice and opportunity for a hearing prior to disapproval of an application, not apply to the ranking of applications from IHEs.

Response. No change has been made. As § 208.12(a)(4)(ii) specifically states, the "Secretary does not interpret disapproval of an application to include a determination by a SAHE as to the relative merit of a competing application under § 208.41(a)." Thus, § 208.12(a)(4)(ii) does not require notice and opportunity for a hearing for unsuccessful applicants after a SAHE ranks and selects successful applications from IHEs.

Comment. One commenter requested that a clarification be included in §§ 208.12(a)(4)(ii), 208.12(a)(5)(ii) and (iv), and 208.13(a)(1) and (2) to provide for the specific involvement of teachers.

Response. No change has been made. As written, the regulations accurately reflect the statutory requirements. Moreover, the regulations include sufficient flexibility to permit the specific involvement of teachers, if a State so chooses. Sections 208.12(a)(5)(ii) and 208.13(a)(1) and (2), in particular, already involve teachers because teacher organizations are one of the groups listed in § 208.13(c) with which the State must consult in developing its needs assessment.

Comment. One commenter questioned why the assurance required in section 209(b)(5)(C) of Title II, which requires a State to assure that the LEA needs assessments will be carried out, is not included in § 208.12.

Response. No change has been made. The assurance regarding LEA needs assessments is contained in § 208.12(a)(5)(iii).

Section 208.13 State assessment of need

Comment. Several commenters requested the dates when funds become available for obligation and when the preliminary needs assessment is due.

Response. No change has been made. Funds are presently available. Grants will be awarded as soon as a properly completed State application is submitted to the Department, reviewed, and approved. The preliminary needs assessment must be prepared not later than nine months after a State receives its Title II grant.

Comment. One commenter, interpreting § 208.13(a)(1) to require a State to make its preliminary needs assessment available to LEAs after the LEAs have submitted their needs assessments and the State has examined those assessments, questioned whether this interpretation is correct.

Response. No change has been made. Section 210(a) of Title II requires an LEA to submit its needs assessment to the SEA in order to receive a grant award under Title II. Section 208(a) of Title II, on the other hand, permits a State to prepare its preliminary needs assessment within nine months after it receives a grant award under Title II. Thus, § 208.13(a)(1) accurately reflects these statutory provisions when it requires a State to examine the LEAs' needs assessments in preparing its preliminary assessment. This provision is supported by the Senate Report, which states that "it is expected that the state assessments will incorporate the findings of the local educational agency assessments required under section 210, but will in fact be more comprehensive than those local assessments." S. Rept. 151, 98th Cong., 1st Sess. 10–17 (1983). A State must make its needs assessment available to LEAs to enable the LEAs to meet the requirement in section 210(b) of Title II that, for the second year for which funds are available, the LEAs address unmet needs described in the State's needs assessment.

Comment. One commenter requested that § 208.13(a)(2) require a State to include with its final State assessment of need the methodology used for the State's needs assessment. The commenter suggested that the Department publish these methodologies in the Federal Register or print them in a report.

Response. No change has been made. Section 208 of Title II contains no requirement that a State submit to the Department the methodology it used to conduct its needs assessment. Such information may be obtained by contacting the individual States.

Comment. One commenter requested that the term "appropriate" precede "instruction" in §§ 208.13(b)(2)(iv) and 208.33(a)(3) to assure improved access to appropriate instruction for the handicapped.

Response. No change has been made. Sections 208.13(b)(2)(iv) and 208.33(a)(3) accurately reflect the statutory language.

Comment. One commenter requested clarification of the phrase "developed in consultation with" in § 208.13(c)(1). In particular, the commenter questioned whether the phrase involves design of the assessment as well as the collection, analysis, and presentation of the assessment data.

Response. No change has been made. Section 208(c)(1) of Title II appears to contemplate consultation at all stages of the needs assessment process. There is no requirement, however, that representatives of every group listed in § 208.13(c)(1) participate in all phases of that process. Thus, § 208.13(c)(1) provides maximum flexibility to a State to establish a level of involvement that meets the State's needs and is commensurate with the wishes of the individuals and groups involved.

Comment. One commenter questioned whether the requirement in § 208.13(c)(1) that the State needs assessment be developed in consultation with representatives of various entities refers to both the preliminary needs assessment and the final needs assessment or only to the final needs assessment.

Response. No change has been made. Section 208(c)(1) of Title II does not appear to limit the consultation required by that section to only the State's final needs assessment. As a result, the consultation requirement in § 208.13(c) applies to both the preliminary and final needs assessments. Consultation, however, does not have to be conducted through a State advisory committee. Rather, the consultation can occur directly with representatives of the entities listed in § 208.13(c)(1).

Comment. One commenter suggested that the SEA should control the needs assessment process and should be responsible for determining who should be consulted in its development.

Response. No change has been made. Section 208 of Title II and § 208.13 of the regulations place responsibility on the *State* for completing the assessment of need. Section 208(c)(2) of Title II and § 208.13(c)(2) of the regulations indicate that the assessment must be submitted jointly by the SEA and the SAHE. Of course, a State could assign responsibility to the SEA for conducting the needs assessment process.

Comment. One commenter questioned the addition of "private nonprofit organizations" in § 208.13(c)(1)(v) when that term was not included in section 208(c)(1)(E) of Title II. Another

included under the term "appropriate school personnel."

Comment. One commenter suggested amending § 208.33(c) to reflect the needs of children and teachers in private schools that choose to participate in the Title II program. The commenter noted that it may be difficult to obtain information from private schools that do not choose to have their children and teachers participate.

Response. No change has been made. An LEA's needs assessment should be as comprehensive as possible. If private schools choose not to participate or to provide information to the LEA, however, the LEA would not be able, or be required, to include information about the teachers and children in those schools in its need assessment.

Section 208.34 Allocation of funds.

Comment. One commenter questioned whether the funds generated by the children specified in § 208.34(a)(2) had to be used for services to those students or whether the funds could be used for services to benefit all students.

Response. No change has been made. There is no requirement in Title II that the funds generated by children from low-income families in § 208.34(a)(2) be used for programs for only those children.

Section 208.35 Use of funds by LEAs.

Comment. One commenter requested inclusion of a "miscellaneous" category for innovative programs to stimulate more creative approaches.

Response. No change has been made. Flexibility for those programs is inherent in the regulations.

Comment. One commenter requested the specific inclusion of special education teachers of mathematics and science in § 208.35(a).

Response. No change has been made. Section § 208.35(a) accurately reflects the statutory language in section 206(b)(1)(A) of Title II. Nothing in this language in any way excludes special education teachers of mathematics and science from receiving the retraining and inservice training to be provided under § 208.35(a).

Comment. One commenter inquired why the waiver provision in § 208.35(b) differs slightly from that found in the statute. According to the commenter, the statute permits a waiver if an LEA has met its training and retraining needs; the regulations permit a waiver if an LEA does not need some or all of the funds to meet the needs for training and retraining.

Response. No change has been made. The Secretary believes that § 208.35(b) is wholly consistent with the statute. Like section 210(c) of Title II, § 208.35(b) of the regulations requires an LEA to meet fully its training and retraining needs in mathematics and science. However, if the LEA can fully meet those needs without using all of the funds it receives under Title II, § 208.35(b) makes clear that the LEA can request a waiver so that it can use the remaining Title II funds for the purposes in § 208.35(c).

Comment. One commenter recommended amending § 208.35(c)(1) to delete the use of funds to purchase equipment and instructional materials.

Response. No change has been made. Section 206(b)(1)(B) of Title II specifically authorizes an LEA to use Title II funds for instructional materials and equipment related to mathematics and science instruction after the LEA's training and retraining needs in mathematics and science have been met.

Comment. One commenter requested that LEAs be allowed to determine specific percentage ceilings for the purchase of instructional materials and equipment.

Response. No change has been made. The percentages limiting the purchase of instructional materials and equipment in § 208.35(c)(2)(i) are stipulated in section 206(c)(1) of Title II.

Comment. One commenter recommended that § 208.35(d) be changed to require LEAs to enter into agreements with IHEs to carry out training and instruction. The proposed regulations make such agreements optional.

Response. No change has been made. Section 208.35(d) accurately reflects the statutory language in section 206(b)(1) of Title II that makes agreements with IHEs permissible but not mandatory.

Section 208.36 Use of funds by SEAs.

Comment. One commenter questioned the constitutionality of establishing a set-aside of Title II funds that must be used for private nonprofit schools.

Response. No change has been made. Section 208.36 does not contain a set-aside of Title II funds that must be used for private schools. Rather, § 208.36(a), consistent with section 211 of Title II, requires an SEA to use the Title II funds reserved for its use to provide benefits for children and teachers in both public and private schools.

Comment. One commenter requested that § 208.36(a)(2) be amended to include an explanation of the types of projects which are intended for the historically underrepresented and underserved.

Response. No change has been made. This decision should be determined by the SEAs. However, the Senate Report accompanying Title II contains several examples:

> These programs could include, (1) counseling programs and career workshops to increase knowledge of and access to scientific and technical careers, such as the "Women in Medicine" currently being operated by the Harvard Medical School, (2) extracurricular activities, such as after-school programs offering hands-on or practical experience with computers and other equipment, or, (3) programs for counselors, teachers, students, and parents to increase awareness of the status of underrepresented groups in mathematics and science programs and of the need for mathematics and science in future careers.
>
> S. Rept. 151 98th Cong., 1st Sess. 14 (1983).

Comment. One commenter inquired why the phrase "if appropriate" was added in § 208.36(b) in referring to IHEs and nonprofit organizations when this phrase was not included in the statute.

Response. No change has been made. The phrase "if appropriate" was included in § 208.36(b) to indicate to SEAs that technical assistance may not be necessary for IHEs and nonprofit organizations because those institutions and organizations may not be conducting programs under § 208.35. Section 208.35 is primarily directed at LEA activities.

Section 208.41 Allocation of funds.

Comment. One commenter recommended that the reference to IHEs in § 208.41(a)(1) be modified to require those institutions to be State-authorized.

Response. No change has been made. According to section 3(6) of Title II, the term "institution of higher education" has the same meaning given that term by section 1201(a) of the Higher Education Act of 1965, as amended. That definition includes a requirement that, to be considered an IHE, the institution must be legally authorized within a State to provide a program of education beyond secondary education.

Comment. One commenter suggested that the rules for applying for funds for higher education programs under Title II state that those funds are to be made available on a competitive basis only.

Response. No change has been made. Section 208.41(a)(1) clearly states that a "SAHE shall distribute *on a competitive basis* to IHEs within the State that apply for payments" not less than 75 percent of the funds made available for higher education programs (emphasis added).

Comment. One commenter requested clarification of the competitive process for higher education programs under § 208.41(a)(1) since § 208.41(a)(2) and section 207(b)(1)(B) of Title II call for the

equitable participation of private and public IHEs.

Response. No change has been made. In order to meet the equitable participation requirement in section 207(b)(1)(B) of Title II and § 208.41(a)(2) of the regulations and still make awards to IHEs on a competitive basis, a SAHE must ensure that private and public institutions are provided every opportunity to apply and compete for funds. The awards, however, must be made on a competitive basis, as required by section 207(b)(1)(B) and § 208.41(a)(1) of the regulations, without consideration of the private or public nature of the institution.

Comment. One commenter recommended involvement of the faculty in procedures, assessments, and program implementation by IHEs funded under Title II.

Response. No change has been made. The degree of faculty involvement in procedures, assessments, and program implementation is an institutional prerogative. Since the awards under this program are competitive, however, IHEs would most likely involve their faculties in order to improve the quality of their proposals.

Section 208.42 Use of funds by SAHEs.

Comment. One commenter suggested that LEAs be permitted to be the lead agency in contracting with IHEs to establish consortial arrangements under § 208.42(a).

Response. No change has been made. Section 208.42(a)(1) requires a SAHE to use a portion of its Title II funds for cooperative programs among IHEs, LEAs, SEAs, private industry, and nonprofit organizations. Depending on how the State agency structures its use of those funds, it is entirely possible that an LEA could be the lead agency in developing a cooperative program. Moreover, as provided in § 208.35(d), an LEA may carry out training and instruction through agreements with private industry, IHEs, and nonprofit organizations. Under these circumstances, the LEA would be the lead agency.

Section 208.43 Use of funds by IHEs.

Comment. One commenter expressed concern that higher education grants would be limited to teacher-training institutions and suggested that consideration also be given to institutions without schools of education.

Response. No change has been made. Funds for IHEs are in no way restricted to teacher-training institutions. Any IHE in a State may apply.

Comment. One commenter suggested that IHEs be permitted to use Title II funds to procure mathematics, science, and computer equipment in order to conduct training and retraining programs.

Response. No change has been made. Section 208.43 accurately reflects the authorized uses of funds by IHEs contained in section 207(b) of Title II. IHEs may expend Title II funds to procure equipment if that equipment is an integral part of the proposal funded through the competitive process.

Comment. One commenter noted that there are no criteria for selecting teachers for traineeship programs that may be established by IHEs under § 208.43(a)(1) and asked if teachers applying for those programs are to secure their own placement or be sponsored by LEAs.

Response. No change has been made. Section 207(b)(2)(A) of Title II does not prescribe any criteria for selecting teachers for traineeship programs that may be funded by IHEs. As a result, it appears that IHEs may establish their own criteria, which they would most likely describe in their applications for Title II funds. Although not expressly required, there is nothing in section 207(b)(2)(A) of Title II or section 208.43(a)(1) of the regulations to prohibit an IHE from entering into an agreement with an LEA or LEAs, which would sponsor teachers to be trained.

Comment. One commenter requested that the subgroups in § 208.43(c)(1) and (2) be combined or that § 208.43(c)(1) be expanded to include all entities that are described under the term "underrepresented" in section 207(b)(2).

Response. No change has been made. The definition of "historically underrepresented and underserved populations" in § 208.3(c) adequately describes all of the entities that are included in section 207(b)(2). The use of subgroups is not meant to signify any greater importance of gifted and talented students than of the populations defined as historically underrepresented and underserved.

Section 208.61 Participation of children and teachers in private schools.

Comment. One commenter requested that SEAs assist LEAs to cover their administrative costs in determining the needs of private school children and teachers.

Response. No change has been made. Sections 206(f) of Title II and 208.36(c) of the regulations prohibit and SEA from using more than five percent of the funds made available for elementary and secondary education programs in the State for the State assessment of need and the costs incurred by the SEA for administering and evaluating elementary and secondary programs under Title II. Thus, it is doubtful that SEAs will be of assistance to LEAs concerning administrative costs. An LEA may use its own Title II funds to pay for reasonable administrative costs for providing Title II services to private school children and teachers as well as to public school children and teachers. The rate for charging those costs, however, must be applied equally to the amounts of Title II funds available for services to public and private school children and teachers.

Comment. One commenter requested information pertaining to the specific responsibilities of LEAs in meeting the needs of teachers and children in private elementary and secondary schools.

Response. No change has been made. As indicated in § 208.16(c), in fulfilling the equitable participation requirements in section 211 of Title II, and LEA must comply with the provisions in 34 CFR 76.651–76.662 of EDGAR.

Comment. One commenter requested that § 208.61 include a broader definition of private schools to include those serving handicapped and gifted children.

Response. No change has been made. "Private," as defined in 34 CFR 77.1 of EDGAR, means a school that "is not under Federal or public supervision or control." "Elementary school" and "secondary school," as defined in section 198(a)(7) of the Elementary and Secondary Education Act of 1965, are dependent upon how State law defines elementary and secondary education. Provided that a private entity serving handicapped or gifted children provides elementary or secondary education under State law, that school would be included under the definition of private school in Title II.

Comment. One commenter requested a more detailed definition of the term "equitable participation" as it refers to the participation of teachers in private schools. In particular, the commenter expressed concern that an LEA cannot conduct activities under § 208.35(c) until the LEA has assured that *all* teachers, including private school teachers, are trained in mathematics and science.

Response. No change has been made. As stated in § 208.61(c), the provisions in 34 CFR 76.651–76.662 of EDGAR contain the requirements for "equitable participation." As the Secretary envisions the waiver provision in § 208.35(b), however, a waiver would be able to be received if public and/or

private school teacher training needs in mathematics and science are met. The waiver would apply only to that segment in which the needs are met. For example, if the mathematics and science training needs of private school teachers are met, a waiver could be granted to permit training of private school teachers in foreign languages. That waiver would not extend to public school teachers, however, unless their needs in mathematics and science are also met. Obviously, the converse would also be true.

Sections 208.62–208.68 Bypass procedures

Comment. One commenter requested information on the origin of the bypass procedures and asked if the procedures were identical to those used in any other programs.

Response. No change has been made. Bypass procedures were originally developed to implement bypass provisions in Titles I and IV of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2740(b); 3086(d)–(h)). Those procedures were in 34 CFR 201.90–201.97 (1981) (Title I) and 34 CFR 774.81–774.82 (1981) (Title IV). Currently, bypass provisions are contained in five programs: Chapter 1 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3806(b)); Chapter 2 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3862(d)–(i)); Part B of the Education of the Handicapped Act (EHA) (20 U.S.C. 1413(d)(1)); the Follow Through Act (42 U.S.C. 9861(b)); and the Bilingual Education Act (20 U.S.C. 3231(j)). Bypass procedures virtually identical to those proposed in Part 208 implement the Chapter 1 bypass provision (34 CFR 200.80–200.85 (1984)) and the Chapter 2 bypass provision (34 CFR 298.31–298.36 (1984)). The bypass procedures for the EHA (to be codified in 34 CFR Part 300) are generally similar, although they have been adopted to conform to that statute's specific requirement. Follow Through and the bilingual program do not have regulatory bypass procedures.

Comment. One commenter requested that a process, similar to that provided to ensure the equitable participation of private school children and teachers in the purposes of Title II, also be provided for children and teachers in public schools.

Response. No change has been made. Title II requires the equitable participation of private school children and teachers in the purposes and benefits of Title II. Whether equitable participation is being provided is determined through the due process procedures in §§ 208.62–208.68 by comparing the benefits provided to private school children and teachers with those provided to public school children and teachers. Because the LEA operates the program, there is no need for similar due process procedures for public school children and teachers.

Comment. One commenter questioned why there is no discussion of the provisions relating to withholding and judicial review that are described in section 211(c) of Title II.

Response. A change has been made. Provisions regarding the withholding of funds pending final resolution of a bypass and judicial review of the Secretary's decision regarding a bypass are contained in §§ 208.62(c) and 208.68, respectively.

[FR Doc. 85–25545 Filed 10–24–85; 8:45 am]
BILLING CODE 4000–01–M

for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a) (4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55998, Nov. 29, 1978, unless otherwise noted.

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

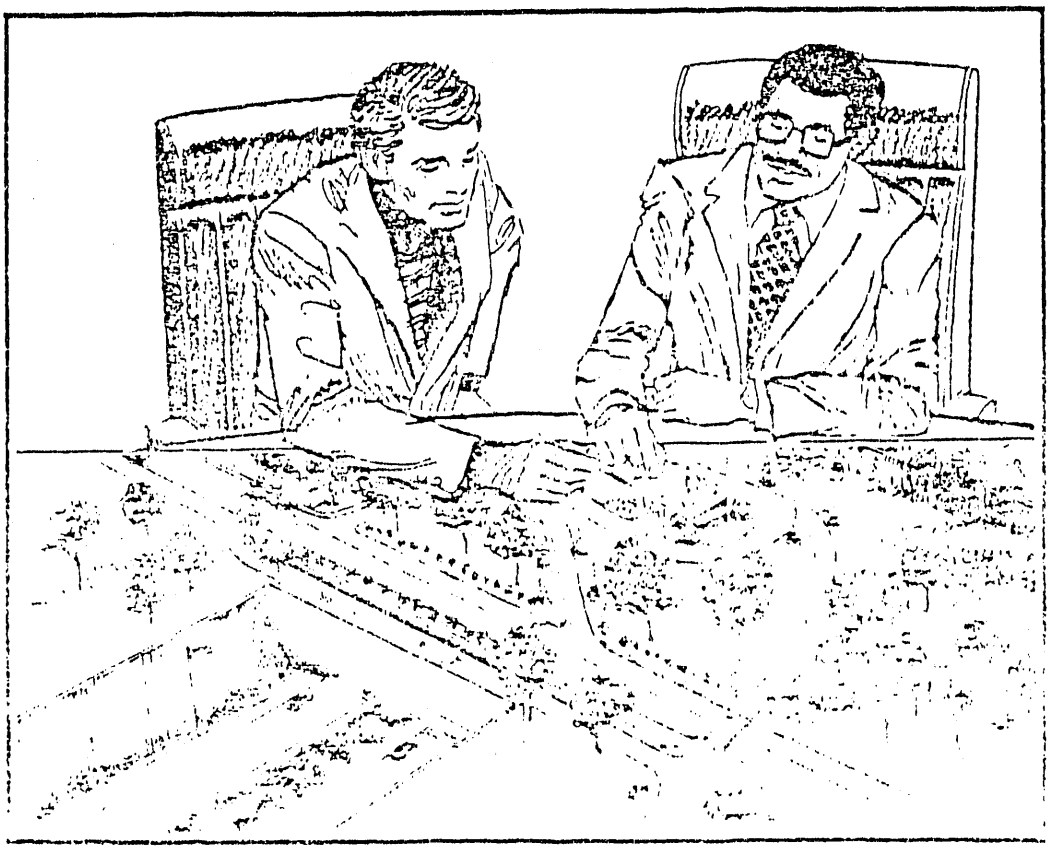
(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

Environmental
Action Plan
Report

Number 10
July 1980



Environmental Awareness Shapes a Highway

The Redesign of Nashville's I-440

U.S. DEPARTMENT OF TRANSPORTATION/Federal Highway Administration

The Environmental Action Plan Report, issued periodically by the Federal Highway Administration Offices of Environmental Policy, Engineering, and Highway Planning, presents papers on innovative techniques and procedures that assure the consideration of social, economic, and environmental effects in highway development. The techniques and procedures presented are contained in State Action Plans or have been otherwise developed in accordance with the objectives outlined in the Process Guidelines (FHPM 7-7-1). The Reports include evaluations of the techniques and procedures based on the experience gained to date. These subjects are selected on the basis of anticipated interest and their importance to the most States.

The Federal Highway Administration welcomes the submittal of papers for publication or suggestions for topics to be reported on in the Environmental Action Plan Report. Papers should be sent to:

Federal Highway Administration
Office of Environmental Policy (HEV-12)
400 Seventh Street, SW.
Washington, D.C. 20590

In recent years concerned citizens have been playing a greater and greater role in shaping the government programs and projects that most directly affect them. Increased impetus has been given to community involvement by the Council on Environmental Quality's regulations for implementing the National Environmental Policy Act (NEPA), which sets forth requirements for getting the public involved early in the decisionmaking process. (See specifically 40 CFR 1506.6)

Public involvement has been an integral part of the Federal-aid highway program for many years. Supplementing the regulatory material in the Federal-Aid Highway Program Manual, State Action Plans contain the mechanisms for getting the public involved, for keeping the public informed, and for utilizing the public's input. Moreover, experience with community involvement in recent years has shown that public involvement has led to improved highway projects.

A very fine example of how input from the public helped to shape a controversial highway proposal can be seen in the community involvement effort that has taken place on the I-440 project in Nashville, Tennessee.

Like many States during the early years of the Interstate program, Tennessee wanted to get the most road for its dollars and thus opted to construct the rural sections of its Interstate network before completing the more expensive urban sections. And like many other States, Tennessee's long-range plans were short-circuited by NEPA.

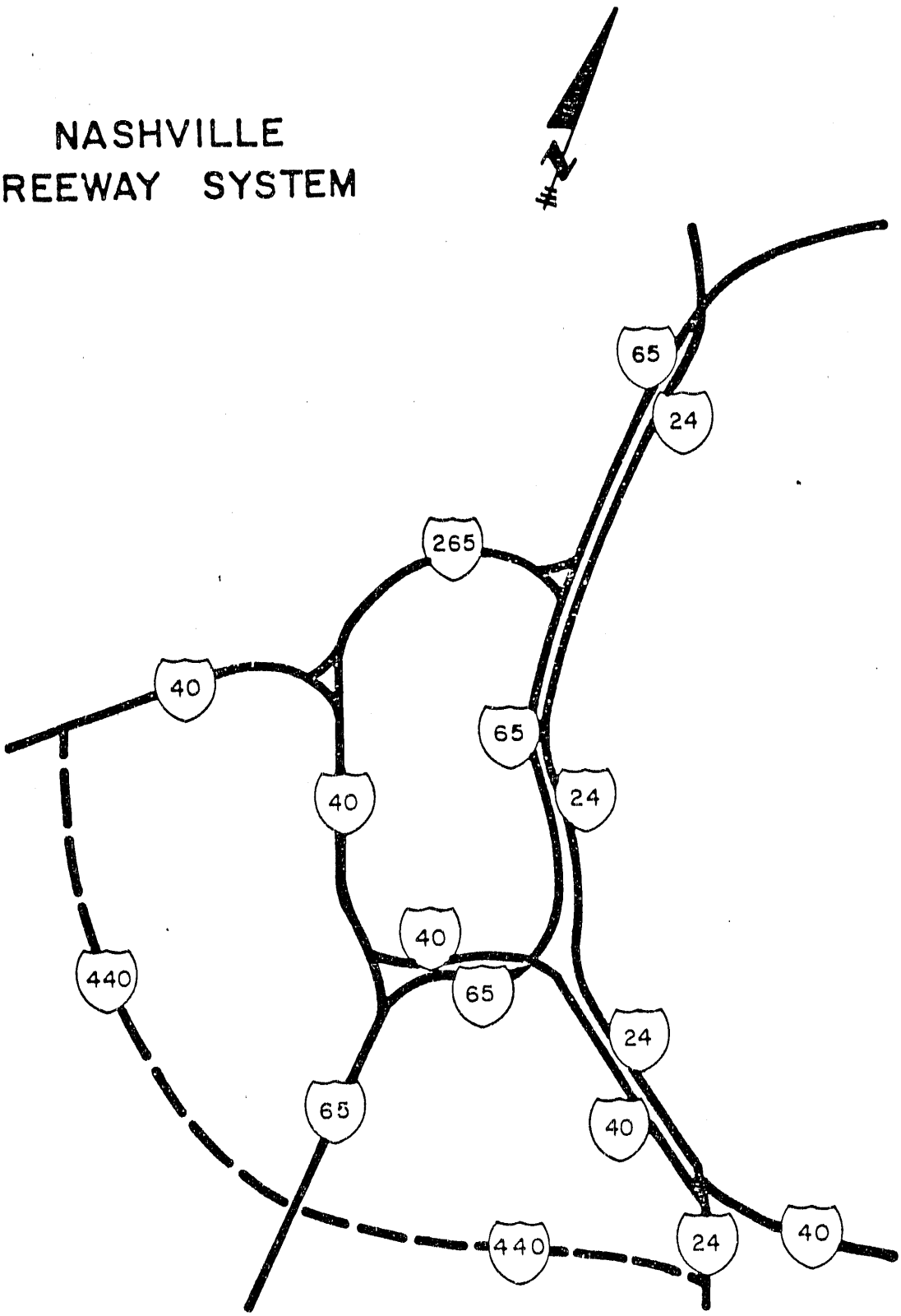
As early as 1957, the Tennessee Bureau of Highways held a public hearing on the location of the Interstate System in Nashville, which included the proposed I-440. This portion of the Nashville Interstate network was planned as an outer loop to improve crosstown transportation in the southern portion of Nashville (see map on page 3). In 1958 the basic plans for the location of Nashville's Interstate System were approved by the Federal Highway Administration (FHWA) and by the city of Nashville. I-440 was planned to connect three legs of Nashville's urban Interstate System: I-40 west, I-65 south, and I-24 east.

In 1964 the FHWA approved a six-lane section of I-440 from I-40 west to I-65 south. In 1968 and 1969 design public hearings were held, and between 1969 and 1973 most of the right-of-way acquisition and relocation had taken place, and the property was cleared.

NEPA was enacted during this period, but the FHWA believed that due to the advanced stage of the I-440 project an environmental impact statement (EIS) was not required. However, as a result of a class action suit filed by the National Wildlife Federation against FHWA, the courts determined that the preparation of an EIS was necessary for projects in which a substantial Federal action remained. I-440 was back to square one.

Unprepared for this setback, the Tennessee Department of Transportation (TennDOT) decided to proceed with other projects and left the I-440 proposal temporarily in abeyance. In the mid 1970's TennDOT decided to reactivate the I-440 proposal. Tennessee officials attended meetings with neighborhood groups who were just beginning to express concerns about the I-440 project. Based on the negative responses received at these meetings, it soon became apparent to TennDOT that a more

NASHVILLE FREEWAY SYSTEM



effective means of citizen participation would be required in order to completely reevaluate I-440. Early help from the Metropolitan Planning Commission was sought for this reevaluation. That agency began a comprehensive study of the project to determine if an urban freeway was still the appropriate solution to crosstown traffic problems.

Nearly 20 years had passed since I-440 was included in the Nashville Interstate System, and in that time several strong organizations had developed, both in support of the I-440 project and against it. Some of the opposition developed after the second segment of I-440 (from I-65 to I-24) was redesigned from four to six lanes in 1974.

The TennDOT began looking for the most effective way to reach the greatest number of citizens along the I-440 corridor. About this same time, Mr. Ben Smith, Administrator of the Tennessee Bureau of Highways Environmental Planning Division, attended a pilot course sponsored by FHWA on "Community Involvement in Highway Planning and Design, Phase II."* Believing that the techniques suggested at this course would facilitate the kind of interaction and citizen participation he was looking for, Mr. Smith contacted the consultants that had put on the course (Toner and Associates) and enlisted their assistance in preparing a series of workshops.

*Since the initial pilot course in 1976, the FHWA has been putting on a similar course (Improving the Effectiveness of Public Meetings and Hearings) at various locations throughout the United States. Anyone desiring additional information about the course may contact Mr. George Duffy or Mr. Harold Peaks at the following address: Office of Environmental Policy, Federal Highway Administration, 400 7th Street SW., Washington, D.C. 20590. Telephone number (202) 426-0303.

In retrospect, Mr. Smith admits that if he had the workshops to do over again, he would try to better prepare the public about what to expect. If the public had known more about what was to be expected of them, Mr. Smith feels that the first workshops would have run smoother, with less open hostility and less initial public scepticism. Many individuals who attended the first workshop were unhappy with the workshop format. They had come prepared to argue their views before the entire assembly, and when they were asked to break up into small groups for tabletop discussions, some were reluctant to do so.

Others were unprepared for the openness of the meetings. They had come expecting TennDOT to take charge of the meeting and to tell the public what decisions had been made on the I-440 proposal. These individuals were rather surprised when they became the focal point rather than TennDOT. Some attendees were upset with Mr. Smith and other TennDOT officials because they felt that their specific questions about what TennDOT proposed were being evaded or ignored. What these individuals failed to comprehend was that these workshops were intended to be informational in nature and not a forum for TennDOT to explain its proposals.

However, in terms of achieving their purpose, Mr. Smith believes that the workshops were very successful: "The purpose of these meetings was to give citizens a chance, early enough in the process, to influence the outcome." The far-reaching influence that citizen input had in shaping the final proposal for I-440 will be discussed later. Mrs. Arthur Ebbits, a long-time opponent of I-440, attended the first two workshops. She had high praise for the way that TennDOT conducted the meetings and presented the I-440 proposal. Moreover, she felt that Mr. Smith conducted the

workshops in a fair, interesting, and impartial manner. Says Mr. Smith, "We tried to make the meetings interesting enough to get to the silent majority." Judging from the diversity of suggestions and opinions expressed at the workshops, one would have to term them successful.

Another attendee, Dr. Dennis Loyd, was even more impressed. He says that the citizen input at the workshops permitted TennDOT to "look at alternatives they had never conceived of. I wish this kind of interaction between the community and TennDOT had been done 15 years ago."

Using the workshop format, the participants broke into groups in order to compile a list of ideas, solutions, and suggestions concerning Nashville's crosstown transportation problems. Each list was recorded by one member at each table, in a session appropriately called "brainstorming." After discussing the items on the list, the group ranked the items from most important to least important. Then each table presented its findings to the whole assemblage. Ben Smith admits that one of the problems with the workshop format was that the opponents tended to sit together and the proponents tended to do the same. But because each side was given an equal opportunity to present its position, both groups benefited.

On the next page is a sample of the instructions that were given to each group.

EACH TABLE SHOULD CHOOSE 1 PERSON TO BE THE GROUP RECORDER

Your group discussion on the following questions will help the Tennessee Department of Transportation to better understand important neighborhood places and community activities that could be affected either by completing I-440 or by not building I-440. This is also an opportunity to describe what alternatives you feel should be considered.

To help us understand your community and your concerns involving this crosstown transportation problem, please discuss the following questions in your groups and write down your ideas.

This group brainstorming process has been used productively for group discussions in a variety of situations. This process helps a large number of people to be able to use their time effectively in focusing on problems and solutions.

The process involves the following steps:

+ PRESENT THE QUESTION for discussion.
+ BRAINSTORM a list of ideas, solutions, suggestions,
+ DISCUSS, CLARIFY, AND COMMENT on the brainstorm list,
+ ASSIGN PRIORITIES to items in the brainstorm list.

The purpose of brainstorming is to get everyone's ideas on paper before the group begins to discuss or debate. In this way, the discussion does not get bogged down on one idea before all the ideas have been suggested.

Hints for Brainstorming:

+ Recorder writes down everyone's ideas in large letters on the chart paper.
+ Do not discuss or comment during the brainstorm.
+ Work as quickly as possible.
+ After all suggestions, then discuss the pros & cons of each idea.

Assigning priorities to the results of each questions, is a method that allows groups at other tables to know what your table thinks is important. Either the recorder or another person at the table may report back to the group the results of each table's discussion. At the end of the meeting we will tape the chart paper on the wall so that you may walk around and look at the results of other groups. Do not be concerned if others at your table do not think that your idea is important. By leaving your individual responses with us each person's ideas can be studied on its own merit.

I-440 DISCUSSION GUIDE

Suggestions for Assigning Priority:

+ Recorder at each table asks each person to think of the three ideas he or she considers most important.
+ Recorder then asks each person what they consider 1st, 2nd, & 3rd most important.
+ Using the chart paper, Recorder puts three marks by the idea each considers most important, two marks by the 2nd most important, and one mark by the 3rd most important.
+ After asking each person their opinion and marking the ideas on the chart paper, the idea with the most marks would be most important, second most marks the second most important, and so on.

After all the community workshops have been held, a summary of the meetings will be sent to those who attended any of the workshops and filled out a registration card. In this manner you will know the ideas and concerns of other neighborhoods. These ideas will be forwarded to the Project Review Committee within the Department, since some of the suggestions may require further technical evaluation. The Draft Environmental Impact Statement (DEIS) will reflect the citizen suggestions as well as provide citizens another opportunity for input. Citizens are welcome to comment on the DEIS as well as speak at the public hearing following the circulation of the DEIS.

Several groups at work. Mr. Smith (standing second from the left) circulated throughout the room to answer questions.

Mr. Smith admits that the meetings probably caused very few individuals to change camps, but he feels that everyone came away with a deeper understanding and appreciation of each others' views. This was underscored by Dr. Carroll Bourg, a member of Citizens for Better Neighborhoods, which is an organization against construction of I-440. Although opposed to the project on the grounds that TennDOT's basic transportation assumptions are inaccurate and outmoded, Dr. Bourg admitted, nonetheless, that the workshops "raised questions that allowed the State to write a better environmental impact statement."

At the end of each workshop, the participants were given a questionnaire to fill out (see below). These questionnaires gave TennDOT an additional barometer to use in its evaluation of I-440 proposals. They also gave those individuals who were unable or unwilling to talk to the entire group a chance to present their ideas and concerns.

I-440 Individual Questionnaire

I-440 INDIVIDUAL QUESTIONNAIRE

1. a) Do you live on property next to the I-440 right-of-way?

☐ Yes ☐ No

b) In what neighborhood do you live (or nearest street intersection)?

_____

2. What best describes your personal feelings about I-440?

☐ For completing I-440
☐ Against completing I-440
☐ Generally for I-440, but concerned about some aspects
☐ Generally against I-440, but would like more information
☐ Interested but have not formed an opinion
☐ Indifferent - don't care one way or the other
☐ Other_____

3. If you checked the block indicating "concerned about some aspects", please list those aspects you are concerned about.

_____

_____

_____

_____

4. a) Do you think that noise along I-440 will be a significant problem?

☐ Yes ☐ No

b) If noise is a problem, what method of noise abatement would appeal to you?

☐ Landscaped earth mound along the edge of the highway
☐ Pleasantly designed and landscaped walls
☐ Buffer zone - buy more homes and businesses along the right-of-way
☐ Elimination of heavy trucks from the highway
☐ Soundproofing homes and businesses
☐ Depressing the highway in sensitive areas
☐ Other_____

5. a) In your opinion will I-440 improve or restrict access in your travel:

	Improve	Restrict	No Change
To work	☐	☐	☐
To shopping places	☐	☐	☐
To school	☐	☐	☐
To religious activities	☐	☐	☐
To social or recreational activities	☐	☐	☐
To medical services	☐	☐	☐
Other - _____	☐	☐	☐

b) If any blocks are indicated as "Restrict", write the street name or general area: _____

_____

_____

6. Do you anticipate that construction activities relating to I-440 would cause you problems? If so, to what degree.

	Severe	Moderate	No Problem
Difficulty in travel	☐	☐	☐
Noise	☐	☐	☐
Dust	☐	☐	☐
Utility interuptions	☐	☐	☐
Heavy equipment in the area	☐	☐	☐
Other - _____	☐	☐	☐

If you have any suggestions how these problems could be reduced, please discuss._____

_____

_____

_____

_____

7. Do you think that building or not building I-440 would result in undesirable changes in the present land use characteristics of your neighborhood? If so, where and what kind of changes?

If I-440 is Built	If I-440 is Not Built

8. Based on what you know about I-440, do you think that the proposed interstate highway fits into its surrounding urban environment in an acceptable manner? If not, what changes would you like to see made? _____

_____

_____

_____

_____

_____

_____

9. a) How did you learn of this meeting? _____

_____

_____

b) How do you think the Department can best inform citizens of community meetings? _____

_____

_____

_____

Several months after the final workshop, Mr. Smith's office prepared a Summary of I-440 Community Workshops,* which was distributed to all those who filled out registration cards at the workshops. This document was just what its title suggests: a summary of the comments and suggestions that were expressed at the workshops. Below are two pages from the report--one listing some of the positive effects of constructing I-440 and one listing some of the negative effects.

Comments Concerning Good Effects

- relief of traffic on residential streets - put heavy traffic on highway designed for it, not a residential street
- present design most sensible and economic way to ease crosstown travel problem, building it with fewer lanes would help but would eventually need widening
- better safety for residential areas due to less traffic
- improved access for exergency vehicles, particularly for hospitals, but also for fire and police vehicles
- complete the Interstate and Defense Highway System in Nashville
- school zones on Woodmont Blvd. and Thompson Lane - I-440 will relieve traffic and improve safety of school children
- will save millions by building it now instead of waiting; we'll have to have it sooner or later
- present plan of using Tennessee Central Railroad minimized disruption
- not building highway would be unfair to those whose homes were bought and cleared for this purpose
- if Woodmont Blvd. widened and I-440 not built, land would only be good for commercial use, people would no longer live there
- less trucks on residential streets
- why widen crosstown streets when that will not relieve the crosstown traffic problems
- putting loop further out does not serve major traffic generators and would be too costly
- any alternative to I-440 is inadequate in every respect
- provide new jobs
- enable Woodmont Blvd. to be a neighborhood street as it should have been all these years
- shorter travel time in getting from one part of the city to another
- better traffic flow will save fuel
- fact that it was not completed five years ago is another example of bad faith on the part of the federal government

Comments Concerning Bad Effects

- destroy stable, integrated, middle-class, inner-city neighborhoods
- older homes will be abandoned and allowed to deteriorate
- speculators will build stores, offices, and apartment complexes
- isolation between neighborhoods - city's best neighborhoods would be split
- greenery would be destroyed
- plant and wildlife destroyed
- adverse effects on downtown business - benefits surburban shopping centers
- decrease residential property values
- rise in crime because of easier access to neighborhoods
- rise in crime due to dead-end streets
- will be concrete where there should be vegetation
- more auto traffic will cause more fuel to be wasted
- destruction of nature
- I-440 fits into the environment of LA and NY not Nashville
- inadequate drainage will cause flooding
- reduce incentive to upgrade public transportation
- unsightly chain-link fences
- commercialization near interchanges and then spreading in residential areas
- too large, too immense to fit into surrounding environment, perhaps fewer lanes would reduce bad effects
- loss of neighborhood stability
- creates more problems than it solves
- visual pollution

*TennDOT has a limited number of these summaries and will provide them to interested parties as supplies permit. Copies may be obtained by writing to Mr. Ben Smith, Administrator of Environmental Planning Division, Highway Building, Corner 6th Avenue, North and Deaderick Streets, Nashville, Tennessee 37219.

The summary also contained the following page, which made it easier for citizens to continue to voice their concerns to the individual who would ultimately make the final decision for TennDOT.

Eddie Shaw, Commissioner
Tennessee Department of Transportation
Nashville, Tennessee 37219

Dear Commissioner Shaw:

Concerning crosstown transportation in the southern portion of Nashville, of which I-440 is one alternative solution, I wish that you would consider:

Sincerely,

Near the end of the workshop summary report was a section entitled "Where Do We Go From Here?" This section briefly discussed the steps that remained in the I-440 development process, one of these being the preparation of a draft environmental impact statement (EIS). The TennDOT tried to impress on the workshop participants that their suggestions would be utilized in the preparation of this document.

This was no hollow promise. After giving due consideration to the hundreds of comments and suggestions that were submitted by the public, TennDOT significantly changed the scope and the design of the I-440 proposal, as well as its approach to developing an EIS. In other words, the effects of these meetings were more far reaching than the development of a single project. Some of the specific changes that were suggested at the workshops and eventually presented in the final EIS are:

A. An alteration in the emphasis given to subjects to be covered in the EIS. More emphasis was given to the following:

   1. An analysis of the current and projected energy impacts
   2. A section on safety
   3. A section on the future of the automobile
   4. Consideration of land use and property values
   5. The transporting of hazardous materials

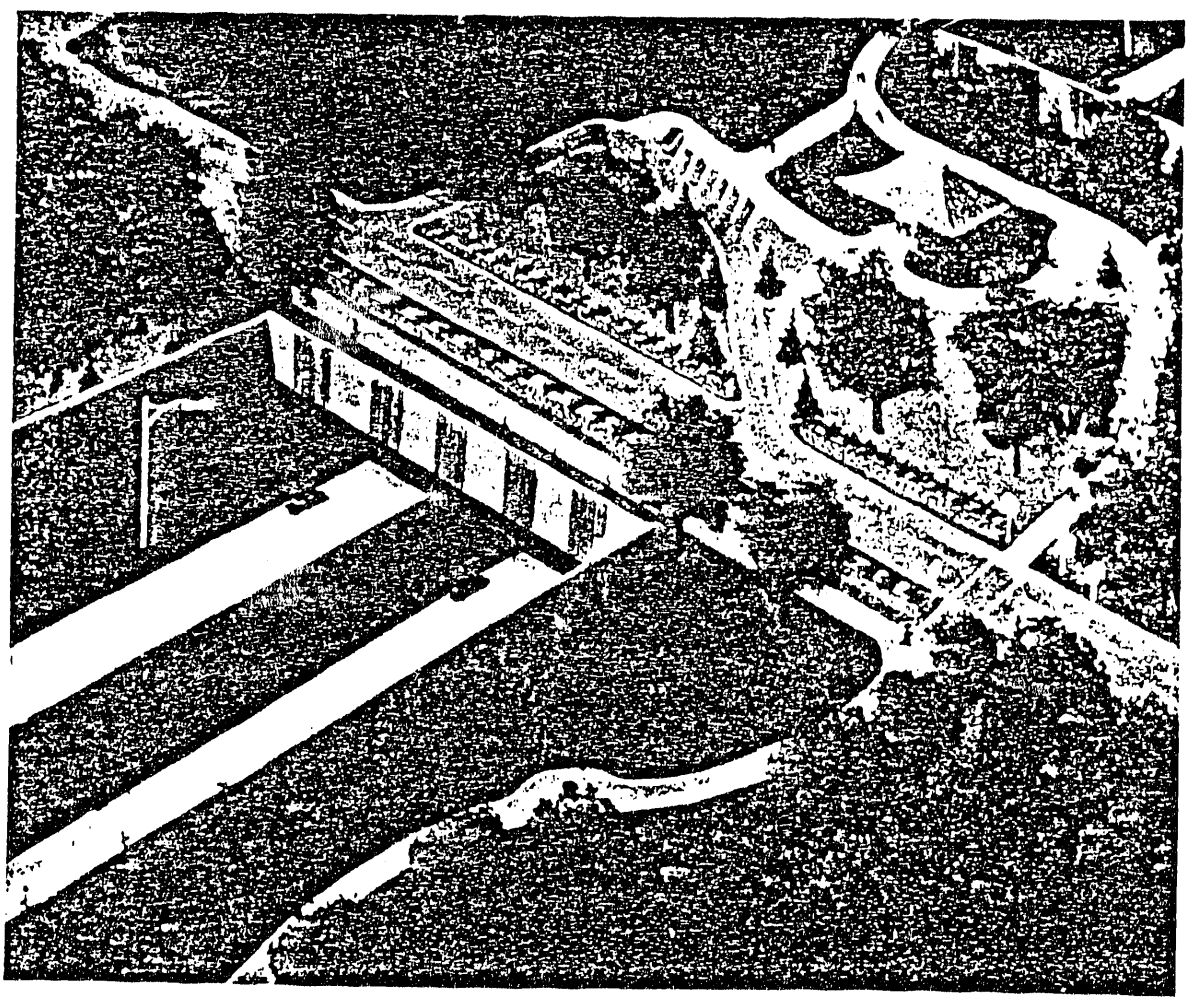
B. The consideration of a new alternative: the Boulevard.

C. Major design changes*

   1. The addition of a bikeway along part of I-440
   2. Additional crossings of I-440 in order to alleviate the separating of neighborhoods
   3. Elimination of parallel side roads
   4. Elimination of an interchange at Granny White Pike, a highway listed on the National Register of Historic Places

*It should be noted that the current Commissioner of TennDOT, Mr. William B. Sansom, was instrumental in ensuring the inclusion of many of these changes, especially the proposed plaza and the parkway concept.

5. A major reduction in the scope of the facility from six lanes to four lanes
6. A major shift in the design of the facility to a below-ground level "parkway"
7. The construction of a plaza structure where the bikeway crosses I-440 (see illustration below)
8. Commitment to monitor land use around the historic district
9. Alteration of access for the First Church of Christ Scientist
10. More than usual landscaping to enhance the beauty of the I-440 parkway and attention to architectural design of structures and bridges

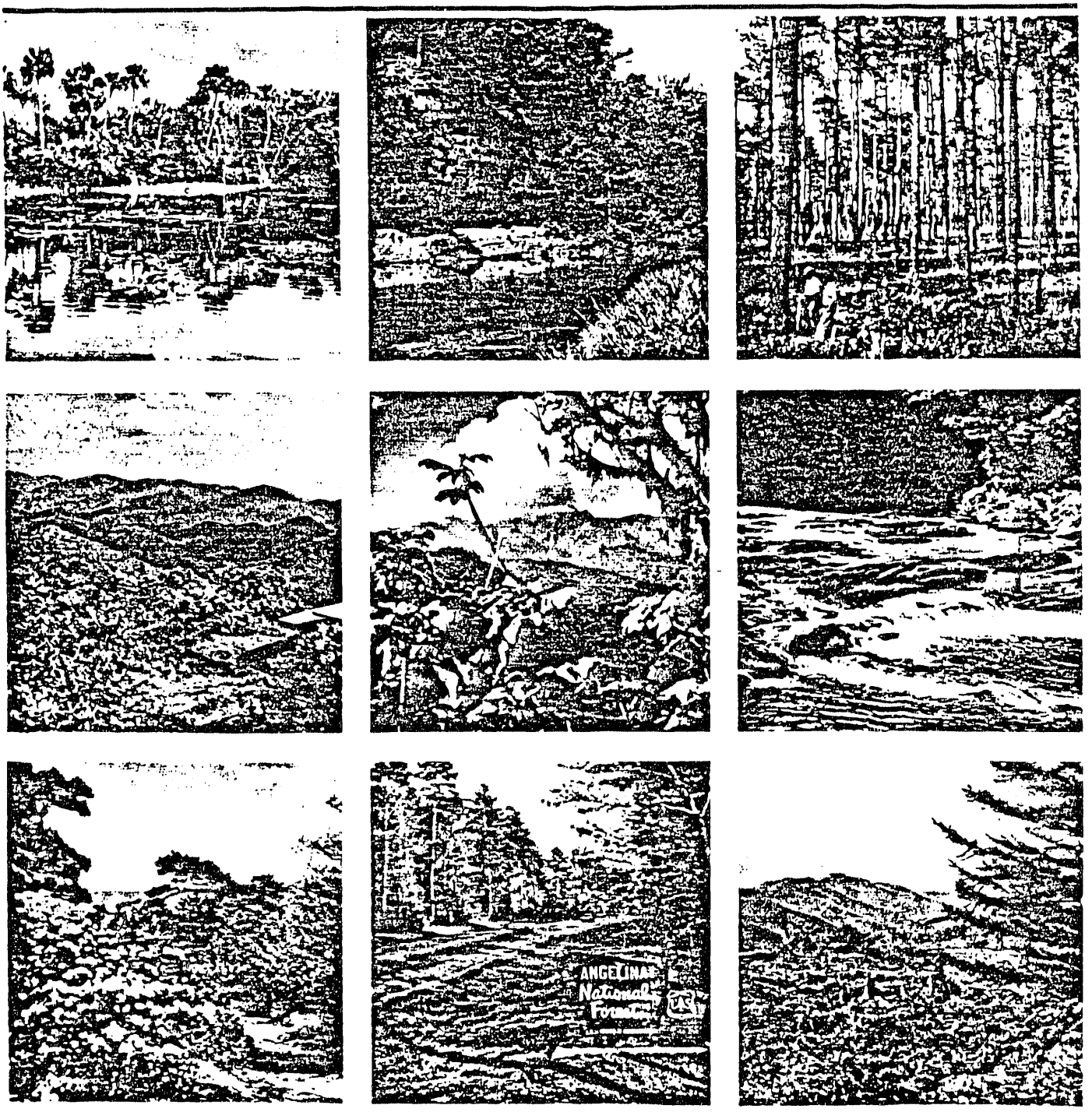


Proposed Plaza Overpass and Bikeway.

United States
Department of
Agriculture

Forest Service
Southern Region

Final Environmental Impact Statement Standards and Guidelines for the Southern Regional Guide



Multiple Use (MU) Management

COMMENTS: Letter 24: No mention of MU in no action alternative.

Letter 44: Preferred Alternative should not exclude other considerations.

Letter 69: No effort to consider multiple use.

Letter 76: Management direction unsatisfactory — overproduction in commodities.

RESPONSE: The text in Chapter 2 has been changed to indicate that each alternative includes multiple-use resource management as defined in 36 CFR 219.3

Regional Direction for Forest Planning

COMMENTS: Letter 70: Need to show latest Chief's direction.

Letter 71: Like to see further guidance to Forests.

Letter 89: Did not establish detailed direction to Forests.

Letter 94: Should show Chief's direction to go beyond RPA levels.

RESPONSE: The Regional Guide has been changed to reflect the new national direction.

Issues Difficult to Track, Read, and Understand

COMMENTS: Letter 83: Difficult to connect a standard and guideline with effects. Public participation can be hindered by a confusing document.

Letters 37, 39, 70, 71, 72, 76, 80, 93, 99: The Draft EIS is very difficult to follow and understand. Issues, alternatives, and environmental consequences sections are not clearly presented; does not promote easy comparisons.

RESPONSE: The EIS has been reformatted to facilitate ease of reading. Additional graphics and two summary matrixes have been added to aid the reader in the comparison of alternatives.

Chapter 2, for instance, has been completely reformatted to make the chapter more readable. This chapter now contains an overview that informs the reader of what is in the chapter. The alternatives considered in detail are described at the beginning of the chapter directly after the formulation of alternatives section and includes a matrix summary at the beginning of the section. The order of the issues was alphabetized to remove any inference of priority and to allow the reader to become accustomed to the format before reading about a complex issue such as timber. The alternatives considered but eliminated from detailed study have been moved to the end of the chapter.

Effects Not Clearly Related to Actions Proposed

COMMENTS: Letter 70: Violates CEQ guidelines for NEPA. Effects do not match alternative solution to issues.

Letter 99: Impacts should be more clearly stated.

Letter 105: Impacts are not adequately addressed.

Letters 83, 93, 94: Evaluation of impacts is missing or superficial.

RESPONSE: A summary matrix comparing the effects of implementation for each alternative has been added to Chapter 2 of the EIS. In addition, the text of this chapter has been changed to aid in comprehension. To present the alternatives and their standards and guidelines, the interdisciplinary planning team chose to display the alternatives by issue areas. The assumption and rationale for each alternative were presented in the Draft EIS. To reduce the text of the EIS, the Affected Environment, Chapter 3 EIS, was presented to describe the environment to be affected by the alternatives under consideration. An attempt was made to keep this description no longer than necessary to understand the characteristics of the area to be affected by the alternatives. Specific differences among alternatives were identified in Chapter 4, Environmental Consequences. It was determined that the progression from "what are the alternatives?" to "where will they take place?" to "what are the differences (environmental effects) among them?" was the most logical way to present the alternatives and discuss their environmental consequences.

Since the standards and guidelines are interrelated in their program and environmental effects, the display of the alternatives, affected environment, and environmental consequences presented in the EIS focused on the most readily identifiable characteristics of each part.

RESPONSE: The text of this section has been modified to explain the elimination process in greater detail.

Equal Treatment of Alternatives

COMMENTS: Letters 70 and 80: The EIS should devote substantial treatment to each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.

RESPONSE: The alternatives were treated with the same detail. A summary matrix has been added to the EIS to give the reader a clearer understanding of the differences among the alternatives so that an evaluation can be made on their comparative merits.

No Action Alternative

COMMENTS: Letter 70: A no action alternative is not displayed.

RESPONSE: Alternative "A" is the no action alternative. It continues the current Regional standards and guidelines to implement the RPA Program and, where current standards and guidelines do not exist, it establishes those required by NFMA regulations.

Preferred Alternative

COMMENTS: Letter 70: Disclose how the preferred alternative was chosen.

Letters 69, 76, 93: Draft EIS appears to be justifying the preferred alternative after the decision was already made.

Letter 83: Appendix F is a defense of the preferred alternative.

RESPONSE: A matrix has been added to the alternatives section to display the differences in the alternatives. The rationale for selection of the preferred alternative is contained in the record of decision.

A decison was not reached on a preferred alternative in the draft EIS until the interdisciplinary planning team had completed the planning and environmental analysis as required by NFMA regulations.

Appendix F is a technical background paper written to provide additional information on the relative merits of timber management practices. The alternatives, including the preferred alternative, are supported by the information presented in this Appendix.

Incorporating by Reference

COMMENTS: Letter 93: An inordinate amount of material is included by reference (for example, the RARE II EIS).

RESPONSE: The CEQ regulations (40 CFR 1502.21) allows incorporation by reference for materials that are reasonably available for inspection by potentially interested persons within the time allowed for comment. Major documents referenced, such as the RARE II EIS, are readily available at Forest Service offices, some libraries, and were widely distributed to interested persons.

Draft EIS Supplement

COMMENTS: Letter 93: A supplement to the Draft EIS and a revision of the Regional Guide should be prepared and circulated because of numerous unfounded claims, lack of data, unequal treatment of resource priorities, bias toward timber production, and vagueness in the Draft EIS.

RESPONSE: The EIS and Regional Guide have been revised as described in this appendix. This EIS, as revised, is considered to adequately disclose the environmental consequences of each alternative. The vagueness and unclear language in the EIS has been corrected. A supplement to the EIS will not be prepared.

Economic — Census Figures

COMMENTS: Letter 40: Census figures should be updated.

Letter 93: Draft Regional Guide, page 4, Table I-I. A footnote is needed to explain the numbers under projected population.

RESPONSE: Table headings were changed for Tables 3-1 in the EIS and 2-1 in the Regional Guide to explain the index number under projected population. The data source reference was changed from "OBERS Projections" to "1980 RPA."

The population data and indices of change used in the Regional Guide are from the 1980 RPA Program, which incorporated data available at the time of completion. Population data for 1980 are now available and presented below. These data with accompanying projections will be developed for the 1985 RPA Assessment.

the cooperating agencies to identify significant issues regarding the impacts of the various alternatives, to develop mitigation measures to be incorporated in the alternatives, and to select the preferred alternative.

When the comment period closed on January 27, 1984, DEA prepared a summary of the comments, questions, and concerns that had been submitted. This summary included the seven questions that the cooperating agencies had developed for screening the alternatives. DEA sent copies of the summary to everyone who attended any of the scoping meetings and to most of the people who had received the original information packet. (See Appendix E of the Draft EIS.)

DEA, with the assistance of the people included in the List of Preparers (Chapter 6 of the EIS) and the Interagency Committee, prepared the Draft EIS. DEA published a Notice of Availability of the Draft EIS in the Federal Register on July 5, 1984 (49 FR 27645). In both the Notice of Availability and in the Draft itself, DEA announced that it would conduct public meetings to provide interested individuals with an opportunity to present their comments on the Draft EIS to DEA representatives. DEA sent the Draft EIS to more than 1,500 interested parties. The meeting locations and dates were: Atlanta, Georgia, on August 13, 1984; Portland, Oregon, on August 15, 1984; San Francisco, California, on August 17, 1984; and Washington, D.C., on August 20, 1984. DEA also filed a copy of the Draft EIS with the U.S. Environmental Protection Agency, which also noted the availability of the Draft EIS in the Federal Register on July 13, 1984.

In July 1984, DEA sent press releases on the Draft EIS and the public meetings to 32 major newspapers nationwide. DEA also published notices of the meetings in many of these newspapers. Television and radio stations in the four cities where the meetings were scheduled were notified of the dates, locations, and times of the meetings. Press and broadcast journalists covered all four public meetings.

The public review and comment period on the Draft EIS began on July 13, 1984. The comment period was originally 45 days long; however, DEA extended the deadline to September 10, 1984 (49 FR 34316). During the comment period 61 speakers presented testimony at the public meetings, and 140 people submitted written comments to DEA.

After the Draft EIS was published, DEA received new information concerning material discussed in the Draft. DEA decided to publish this new information in a Supplement to the Draft EIS to enable the public to comment on the new information. DEA published a Notice of Intent to Prepare a Supplemental EIS in the Federal Register on November 27, 1984 (49 FR 46599).

DEA made the Supplement to the Draft EIS available to EPA and the public on March 8, 1985. More than 2,000 copies were mailed to all interested parties, including every State Governor, U.S. Senator, and Member of the U.S. House of Representatives; to the same individuals and organizations and corporations that received copies of the Draft EIS; and to those people who commented on the Draft. The official 45-day comment period began on March 15, 1985, and ended on April 30, 1985. On March 27, 1985, DEA published a notice of the public meeting to be held on April 17, 1985, in the

G-4 COMMENT: Some commentors questioned the integrity or sincerity of DEA in assessing the environmental impacts of the alternatives (4/176, 7, 20, 22, 40/152, 58/154, 60, 159, 186, 192) and in selecting the preferred alternative (2).

RESPONSE: In accordance with Council on Environmental Quality (CEQ) regulations, DEA has made every effort to conduct a thorough, accurate analysis in choosing the preferred alternative and in assessing the impacts of the eradication alternatives and to involve the public throughout the process.

G-5 COMMENT: Several commentors stated that the Draft EIS was inadequate or deficient in some respect. Some people claimed that the Draft EIS was so inadequate that DEA was required by 40 CFR 1502.9(a) to publish another draft for public review before it could publish a Final EIS for this program.(5, 6, 58/154, 61/180, 185, 186, 187) Two commentors also stated that the EIS fails to weigh the need for the action against the scope and severity of the impact, as required by 40 CFR 1502.22.(6, 77)

RESPONSE: DEA feels that the Draft, Supplement, and Final EIS have been prepared in strict compliance with all the CEQ and Justice Department's regulations for implementing NEPA, including provisions for public participation. Chapter 4 and Appendix C examine a range of worst case scenarios that allow DEA to weigh the risks of the alternatives against the need for action.

G-6 COMMENT: A number of commentors were concerned that this EIS did not respond to previous litigation brought against the Forest Service and the Bureau of Land Management for the use of herbicides in their vegetation management programs. Some believed that DEA was subject to the same injunction against the aerial application of herbicides and that NEPA as construed by the Ninth Circuit in NCAP v. Block requires DEA to conduct further study of the environmental impacts of the proposed herbicides.(3/181, 4/176, 5, 6, 60, 61/180, 157, 192, 193)

RESPONSE: DEA was not party to NCAP v. Block and is, therefore, not bound by the injunction entered by the court. Any herbicidal eradication, however, would be conducted in accordance with procedures established by the landholding agency. DEA has carefully considered the decisions of the Ninth Circuit Court of Appeals concerning the Forest Service and BLM vegetation management programs, as well as other applicable case law. DEA prepared this EIS pursuant to the requirements of the National Environmental Policy Act and the CEQ regulations implementing NEPA, as the law and regulations have been authoritatively construed by the courts.

As required by CEQ regulations, 40 CFR 1502.22, DEA carefully weighed the costs and benefits of proceeding in the face of uncertainty, given that some information regarding the environmental impacts of

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6/2/92