(4) The benefits to be derived if the waiver is granted.

(b) The head of the Departmental central grants unit shall consider the operating unit's request. This request along with a recommendation on the action to be taken shall be sent to the Assistant Secretary for Administration. The Departmental central grants unit recommendation shall set forth supporting reasons.

(c) The Assistant Secretary for Administration shall make the final decision to grant or deny the request and forward this decision to the head of the operating unit and the Departmental central grants unit.

Guy W. Chamberlin, Jr.,

Acting Assistant Secretary for Administration.

Appendix 1—Statutes, Circulars and Other Directives Affecting Grant Administration

The following list contains references for the statutes, regulations, executive orders, management circulars, and other general laws and directives that affect grants administration in general. This list does not include statutes, regulations, and other materials applicable only to a particular grant program. This list is not intended to be exhaustive; however, it is intended as an aid for use by DOC grants personnel. Inclusion of a reference in this Appendix does not necessarily mean that it applies to all grant programs.

a. Application of Monies Appropriated, 31 U.S.C. § 628.

b. Restrictions on expenditures and obligations, 31 U.S.C. § 665(a).

c. National Environmental Policy Act of 1969, 42 U.S.C. § 4332.

d. National Historic Preservation Act of 1966, 16 U.S.C. § 470.

e. Coastal Zone Management Act of 1972, 16 U.S.C. § 1456.

f. Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1276(c).

g. Flood Disaster Protection Act of 1973, 42 U.S.C. § 4012a (Supp. V, 1975).

h. Clean Air Act of 1970, 42 U.S.C. § 1857.

i. Federal Water Pollution Act of 1972, 33 U.S.C. § 1368 *et seq.*

j. Endangered Species Act of 1973, 16 U.S.C. § 1536.

k. Historic and Archeological Data Preservation Act of 1966, 16 U.S.C. § 470 *et seq.*

l. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

m. Title IX of Education Amendments Act of 1972, 20 U.S.C. § 1681–§ 1686

n. Rehabilitation Act of 1973, 29 U.S.C. § 794.

o. Design and Construction of Public Buildings to Accommodate the Physically Handicapped, 42 U.S.C. § 4151 *et seq.*

p. Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.* (Supp. V, 1975).

q. Animal Welfare Act of 1970, 7 U.S.C. § 2131 *et seq.*

r. Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3334.

s. Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4201 *et seq.*

t. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361.

u. Joint Funding Simplification Act of 1974, 42 U.S.C. §§ 4251–4261 (Supp. V, 1975).

v. Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et seq.*

w. Hatch Political Activity Act, 5 U.S.C. § 1501 *et seq.*

x. Freedom of Information Act, 5 U.S.C. § 552

y. Federal Reports Act, 44 U.S.C. § 3501.

z. Budget and Accounting Procedures Act of 1950, 31 U.S.C. § 18a.

aa. Copeland "Anti-Kick Back" Act, 18 U.S.C. § 874, 40 U.S.C. § 276c.

bb. Contract Work Hours Standards Act of 1962, 40 U.S.C. §§ 327–330.

cc. Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

dd. Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. § 501 *et seq.*

ee. Safe Drinking Water Act of 1974, 42 U.S.C. § 300f *et seq.* (Supp. V, 1975).

ff. Fish and Wildlife Act, 16 U.S.C. § 742 *et seq.*

gg. Bribery, Graft & Conflicts of Interest, 18 U.S.C. § 201.

hh. Elections & Political Activity, 18 U.S.C. §§ 600–609.

ii. Fraud and False Statements, 18 U.S.C. § 1001.

jj. Public Officers and Employees, 18 U.S.C. § 1933.

kk. 15 CFR Subtitle A, Part 8, Nondiscrimination in Federally-Assisted Programs of the Department of Commerce—Effectuation of Title VI of the Civil Rights Act of 1964.

ll. 28 CFR § 42.401 *et seq.*, Judicial Administration. Nondiscrimination: Equal Employment Opportunity Policies and Procedures; (Subpart F) Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs.

mm. 42 CFR Part 85, Implementation of Executive Order 11914, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs.

nn. 15 CFR Part 930, Federal Consistency with Approved Coastal Management Programs. (Subpart F) Consistency for Federal Assistance to State and Local Governments.

oo. 32A CFR Part 134, Placement of Procurement and Facilities in Sections and Areas of High Unemployment.

pp. 20 CFR Part 654, Special Responsibilities of Employment Service System.

qq. Executive Order 11246, as amended by E.O. 11375, and Executive Order 12086, Relating to Equal Employment Opportunity.

rr. Executive Order 11288, Prevention Control, and Abatement of Water Pollution by Federal Activities.

ss. Executive Order 11593, Protection and Enhancement of the Cultural Environment.

tt. Executive Order 11625, Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise.

uu. Executive Order 11738, Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans.

vv. Executive Order 11764, Nondiscrimination in Federally Assisted Programs.

ww. Executive Order 11914, Nondiscrimination with Respect to the Handicapped in Federally Assisted Programs

xx. Executive Order 11988, Flood Plain Management.

yy. Executive Order 11990, Protection of Wetlands.

zz. Executive Order 12044, Improving Government Regulations.

aaa. OMB Circulars:

A–21 Cost Principles for Educational Institutions.

A–40 Management of Federal Reporting Requirements.

A–73 Audit of Federal Operations and Programs.

A–89 (Revised) Catalog of Federal Domestic Assistance.

A–95 Evaluation, Review, and Coordination of Federal Programs and Projects.

A–102 Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

A–110 Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations.

A–111 Jointly Funded Assistance to State and Local Governments and Other Nonprofit Organizations.

bbb. Federal Management Circulars:

73–3 Cost-Sharing Federal Research.

73–6 Coordinating Indirect Cost Rates and Audits at Educational Insitutions.

Parts Of:

73–7 Administration of College and University Research Grants.

74–4 Cost Principles (for) State and Local Governments.

ccc. Treasury Department Circulars:

1075 Withdrawal of Cash from the Treasury for Advances Under Federal Programs.

1082 Notification to States of Grants-in-Aid Information (formerly OMB Circular A–98).

[FR Doc. 79–29337 Filed 9–20–79; 8:45 am]

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federal register

Friday
September 21, 1979

Part VI

Department of the Interior

Fish and Wildlife Service

Endangered and Threatened Wildlife and Plants; *Sarracenia oreophila*

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination That Sarracenia oreophila Is an Endangered Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service determines *Sarracenia oreophila* (green pitcher plant) to be an Endangered species. The plant is currently known to occur only in Alabama although records indicate it may have also occurred in Georgia and Tennessee at one time. Past reductions in the range of *Sarracenia oreophila* and degradations to its populations and habitats have resulted from habitat destruction and over-collecting, both of which still threaten the species. A determination of *Sarracenia oreophila* to be an Endangered species would implement the protection provided by the Endangered Species Act of 1973 as amended.

DATE: This rulemaking becomes effective on October 21, 1979.

FOR FURTHER INFORMATION CONTACT: Mr. Harold J. O'Connor, Acting Associate Director—Federal Assistance, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240, 202/343–4646.

SUPPLEMENTARY INFORMATION:

Background

The Secretary of the Smithsonian Institution, in response to Section 12 of the Endangered Species Act, presented his report on plant species to Congress on January 9, 1975. This report, designated as House Document No. 94–51, contained lists of over 3,100 U.S. vascular plant taxa considered to be endangered, threatened, or extinct. On July 1, 1975, the Director published a notice in the **Federal Register** (40 FR 27823–27924) of his acceptance of the report of the Smithsonian Institution as a petition to list these species under Section 4(c)(2) of the Act, and of his intention thereby to review the status of the plant taxa named within as well as any habitat which might be determined to be critical.

On June 16, 1976, the Service published a proposed rulemaking in the **Federal Register** (41 FR 24523–24572) to determine approximately 1,700 vascular plant species to be Endangered species pursuant to Section 4 of the Act. This list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94–51 and the above mentioned **Federal Register** publication.

Sarracenia oreophila was included in both the July 1, 1975, notice of review and the June 16, 1976, proposal. A public hearing on the June 16, 1976 proposal was held on August 4, 1976, in Washington, D.C. In the June 24, 1977, **Federal Register**, the Service published a final rulemaking (42 FR 32373–32381, to be codified in 50 CFR Part 17) detailing the regulations to protect Endangered or Threatened plant species. The rules establish prohibitions and a permit procedure to grant exceptions to the prohibitions under certain circumstances. The Department has determined that this is not a significant rule and does not require the preparation of a regulatory analysis under Executive Order 12044 and 43 CFR 14.

Summary of Comments and Recommendations

Section 4(b)(1)(C) of the Act requires that a summary of all comments and recommendations received be published in the **Federal Register** prior to adding any species to the list of Endangered and Threatened Wildlife and Plants.

Hundreds of comments on the general proposal of June 16, 1976, were received from individuals, conservation organizations, botanical groups, and business and professional organizations. Few of these comments were specific in nature in that they did not address individual plant species. Most comments addressed the program or the concept of Endangered and Threatened plants and their protection and regulation. These comments are summarized in the April 26, 1978, **Federal Register** publication which also determined 13 plant species to be Endangered or Threatened species (43 FR 17909–17916). The Governor of Alabama was notified of the proposed action. The Governor of Alabama, the Alabama Forestry Commission, and Union Camp Corporation all requested the comment period extend beyond August, 1976 allowing more time for evaluation and comment. Since the Service has now been gathering information on these plants for three years, adequate time for comment has been provided.

A number of people submitted comments concerning carnivorous plants. The Governor of Georgia commented that Georgia felt all species of the genus *Sarracenia* should be placed in protected status. Others interested in carnivorous plants submitted comments describing threats to carnivorous plants, those carnivorous plants most deserving protection, and commercial exploitation of carnivorous plants.

Conclusion

After a thorough review and consideration of all the information available, the Director has determined that *Sarracenia oreophila* (Kearney) Wherry (green pitcher plant) is in danger of becoming extinct throughout all or a significant portion of its range due to one or more of the factors described in Section 4(a) of the Act.

These factors and their application to *Sarracenia oreophila* are as follows:

(1) *Present or threatened destruction, modification, or curtailment of its habitat or range.* Historically, *Sarracenia oreophila* has been reported from northeast and central Alabama, Georgia and Tennessee. Both the Tennesee Natural Heritage Program and the Georgia Protected Plants Program report no known sites for this plant in either Tennessee or Georgia. *Sarracenia oreophila* has been reported for the following Alabama counties: Elmore, Cherokee, DeKalb, Jackson, Etowah, and Marshall. The central Alabama or Elmore county population has been reported to have been completely destroyed by over-collecting. The Etowah county report was based on a specimen collected in the 1800's and is not known to be extant today.

Past reductions in the range of *Sarracenia oreophila* and degradations to its populations and habitats have resulted from and are still threatened by increased rural residential, agricultural, and silvicultural development. Several populations of this species were inundated by the construction of the Weiss Reservior on the Coosa River. The best remaining populations of the species occur along the Little River and future impoundments for flood control or increased pollution of the river could wipe out large numbers of this species. Increased pressures to strip mine coal and increased road construction within the range of this plant may cause further habitat degradation. One location for *Sarracenia oreophila* is on state-owned land which is protected, however, the other populations occur on privately-owned lands.

(2) *Overutilization for commerical, sporting, scientific or educational purposes.* Carnivorous plants, including *Sarracenia oreophila* have been seriously threatened by over-collecting for many years. Removal of these unique plants from their natural habitats by curious individuals, carnivorous plant enthusiasts, botanists, and commercial

dealers has resulted in the depletion and destruction of populations. The Elmore county, Alabama population of *Sarracenia oreophila* is reported totally extirpated by collectors. This was the only central Alabama population of the species and thus this represents a reduction in the range of this species. As interests in carnivorous plants continue to increase, as they have in past years, the pressure from collectors on natural populations will also increase.

(3) *Disease or predation* (including grazing). Not applicable to this species.

(4) *The inadequacy of existing regulatory mechanisms.* There currently exist no State or Federal laws protecting this species or its habitat.

(5) *Other natural or man-made factors affecting its continued existence.* The regulation and removal of wild fire from the wetland habitats where *Sarracenia oreophila* occurs has resulted in the succession of the bog communities and the eventual elimination of the pitcher plants. When these bogs are managed with periodic prescribed burns, the pitcher plants have been noted to flourish.

Effects of the Rulemaking

Section 7(a) of the Act as amended provides:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purpose of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of Section 7 of the Endangered Species Act Amendments of 1978.

Provisions for Interagency Cooperation are contained in 50 CFR Part 402. These regulations are intended to assist Federal agencies in complying with Section 7(a) of the Act. This rulemaking requires Federal agencies to satisfy these statutory and regulatory obligations with respect to this species.

Endangered species regulations already published in Title 50 of the Code of Federal Regulations set forth a series of general prohibitions and exceptions which apply to all Endangered species. The regulations referred to above, which pertain to plant species, are found at § 17.61 and are summarized below.

All provisions of Section 9(a)(2) of the Act, as implemented by § 17.61 (42 FR 32373–32381), would apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, or to deliver, carry, transport or ship in interstate or foreign commerce in the course of a commercial activity, or to sell or offer for sale in interstate or foreign commerce this plant. Certain exceptions would apply to agents of the Service and State conservation agencies.

Regulations published in the **Federal Register** of June 24, 1977 (42 FR 32373–32381), to be codified in 50 CFR Part 17, provide for the issuance of permits under certain circumstances to carry our otherwise prohibited activities involving Endangered plants.

Effect Internationally

In addition to the protection provided by the Act, the Service will review the status of this species to determine whether it should be proposed to the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora for placement upon the appropriate Appendices to that Convention and whether it should be considered under other appropriate international agreements.

National Environmental Policy Act

An environmental assessment has been prepared and is on file in the Service's Washington Office of Endangered Species. The assessment is the basis for a decision that this determination is not a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969.

Endangered Species Act Amendments of 1978

The Endangered Species Act Amendments of 1978 added the following provision to subsection 4(a)(1) of the Endangered Species Act of 1973:

> At the time any such regulation [to determine a species to be an Endangered or Threatened species] is proposed, the Secretary shall by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat.

Populations of *Sarracenia oreophila* have already been greatly reduced in size and are threatened by taking, an activity not prohibited by the Endangered Species Act of 1973. Publication of critical habitat maps would make this species more vulnerable and therefore it would not be prudent to determine critical habitat.

Sarracenia oreophila was proposed on June 16, 1976, and since critical habitat is not being determined for this species, none of the other amended subsections are applicable. Accordingly, the Service is proceeding at this time with a final rulemaking to determine this species to be Endangered pursuant to the Endangered Species Act of 1973, as amended. This rule is issued under the authority contained in the Endangered Species Act of 1973 (16 U.S.C. 1531–1543; 87 Stat. 884).

The primary author of this rule is Ms. E. La Verne Smith, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240. (703/235–1975).

Regulation Promulgation

Accordingly, § 17.12 of Part 17 of Chapter I of Title 50 of the U.S. Code of Federal Regulations is amended as follows:

1. Section 17.12 is amended by adding, in alphabetical order by family, genus, species, the following plant:

§ 17.12 Endangered and threatened plants.

Species		Range		Status	When listed	Special rules
Scientific name	Common name	Known distribution	Portion of range where threatened or endangered			
Sarraceniaceae—Pitcher plant family						
Sarracenia oreophila	Green pitcher plant	U.S.A., AL	Entire	E		NA

Dated: August 30, 1979.

Robert S. Cook,

Deputy Director, Fish and Wildlife Service.

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federal register

Friday
September 21, 1979

Part VII

Department of Agriculture

Agricultural Marketing Service

Beef Research and Information

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[7 CFR Part 1260]

[Docket No. BRIA-2]

Beef Research and Information Order; Recommended Decision and Opportunity To File Written Exceptions

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This recommended decision concerns a Proposed Research and Information Order to establish a nationally coordinated program of research, information, and promotion to develop and improve markets for cattle, beef, and beef products as authorized by the amended Beef Research and Information Act. Interested persons may file written exceptions and/or suggested changes concerning the recommendations made herein.

The proposed program, if approved in a producer referendum, would be financed by value-added assessments of up to five-tenths of one percent of the value of cattle sold. The Order limits the assessment to not more than two-tenths of one percent for the first two years of the program. Those producers not wishing to support the program may request a refund of the assessment paid. The program would be administered by a Beef Board composed of up to 68 producer members reflecting, to the extent practicable, the proportion of cattle produced in defined geographic areas. The Board members are appointed by the Secretary of Agriculture from nominations submitted by certified organizations representing producers.

DATE: Written exceptions to this recommended decision may be filed by November 5, 1979. It has been determined that 45 days is a sufficient period for comment since this formal rulemaking proceeding has been before the public since March of this year, has been well publicized, and provides three distinct periods for public input totaling 120 days in addition to the opportunity to participate in a public hearing.

ADDRESSES: Five copies of written exceptions and/or suggested changes should be filed with the Hearing Clerk, room 1077, South Building, U.S. Department of Agriculture, Washington, D.C. 20250. All written submissions will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Ralph L. Tapp, Livestock, Poultry, Grain, and Seed Division, AMS, USDA, Washington, D.C., 20250. Phone: 202-447-2068.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Pre-Hearing Investigation—Available from Ralph L. Tapp; Notice of Hearing—Issued April 17, 1979 and published April 23, 1979 (44 FR 23858) with corrections published May 1, 1979 (44 FR 25464).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to a Proposed Beef Research and Information Order.

The above notice of filing of the decision and of opportunity to file exceptions thereto is issued pursuant to the provisions of the amended Beef Research and Information Act (7 U.S.C. 2901 *et seq.*), and in accordance with the applicable rules of practice and procedure governing proceedings to formulate such an Order (7 CFR Part 1260.1–1260.21).

In February 1979, a proposed Order was submitted to the Department by the Beeferendum Advisory Group, a coalition representing a number of national beef and farm organizations. On March 8, a press release was issued inviting others to submit proposed Orders or to make suggested changes in the Order submitted by the industry group. Only one respondent, the Community Nutrition Institute, suggested changes in the beef industry proposal. The suggested change recommended appointing consumer advisors, paying such advisors for actual work performed, and reimbursing them for necessary and reasonable expenses. A prehearing investigation analyzed these proposals to determine the probable impacts related to the criteria specified in the Act. It indicated that the Secretary has reason to believe that the issuance of an Order will tend to effectuate the declared policy of the Act. A notice of hearing and the proposed Order were published in the **Federal Register** on April 23, 1979. A hearing on the proposed Order was held with sessions in Dallas, Texas; Pittsburgh, Pennsylvania; Atlanta, Georgia; Reno, Nevada; and Des Moines, Iowa, during June 1979. An opportunity was provided for the submission of written briefs. This document contains the recommended decision and Order.

Recommended Decision

1. *Decision.* The Act provides that the Secretary shall determine, on the basis of hearing evidence, if the proposed order tends to effectuate the declared policy of the Act. The policy of the Act is to establish a program of research, consumer information, producer information, and promotion designed to strengthen the cattle and beef industry's position in the marketplace, and maintain and expand domestic and foreign markets and uses for United States beef. The criteria used in this determination included an evaluation of: (1) the need for the program, (2) the adequacy of the proposed funding level, (3) the type of potential plans and projects for research, consumer information, producer information and promotion, (4) the likelihood that these projects will strengthen the beef industry's position in the marketplace, and (5) the specific terms and provisions of the proposed Order. It is concluded from evidence introduced at the public hearing that the Order would tend to implement the policy of the Act. The bases for reaching this conclusion are summarized below. More detail is provided under "Findings and Conclusions".

Need for Program—Beef is the major source of protein in the diet of United States citizens, accounting for 15 percent of the average person's food expenditures. On January 1, 1979, there were 110.8 million cattle in the United States, produced on 1.7 million farms. Beef production is common to more farms than any other commodity. Forty-three percent of all farms produce beef. Historically, beef producers have been troubled by the 10-year cattle cycle. The cycle is marked by a period of low cattle slaughter supplies and favorable prices followed by a period of increased cattle slaughter and low cattle prices. Moderation of the extreme variations in profitability resulting from over and under-investment that underlies the cattle cycle may be accomplished through a program of research and information. Experience indicates that an imaginative approach will be needed to communicate such information before producer decisions based on this information will modify the cattle cycle. Such research and information programs could result in more stable beef supplies to the benefit of producers and consumers.

Research to maintain and enhance the marketing positions of beef through the development of production, processing, and marketing efficiencies would also benefit producers and consumers through reduced cost. Some of the more

promising projects would be further research in basic genetics, new feeding programs, cattle and beef marketing systems, and new merchandising techniques.

Information is necessary to aid producers in making marketing decisions as well as to provide consumers with scientifically based nutrition information. Promotion would likely include generic beef advertising designed to inform consumers of the nutritional benefits of beef.

Foreign market development efforts could increase the amount of U.S. produced beef shipped to overseas customers. For the long term, increased beef exports would raise the amount of beef produced in the U.S., and would likely lower per unit costs to American consumers and increased net income to producers due to expanded demand. Eighty-seven of the 94 witnesses at the public hearing testified in support of the need for a Beef Research and Information Order.

Funding.—The initial assessment level could be established at up to two-tenths of one percent of the value of cattle sold. An assessment of two-tenths of one percent would generate approximately $40 million annually, based on 1978 prices. Hearing testimony indicates that based upon industry needs, the funding of similar programs, and the amount spent by other industries, an initial assessment of two-tenths of one percent would be appropriate. Funds would be collected according to a value-added concept which would assess all sellers in the marketing chain. The sales of high-valued dairy and breeding animals would be exempted from assessment until the animals are sold for slaughter when the value would be equivalent to other similar slaughter cattle. After the first two years of the program's existence, the assessment level may be rasied up to a maximum of five-tenths of one percent, which would generate approximately $100 million annually based on 1978 prices. Producers who do not wish to support the program can request and receive a refund of their assessment.

Plans and Projects.—Examples of the types of activities which could be carried out under this program include:

1. Programs designed to develop improved economic data and analysis relating to current and future supply and price levels in the beef industry which could provide the foundation for improved communication to affect producer investment decisions which could modify the cattle cycle and its detrimental consequences.

2. Production research projects concentrating on such areas as basic genetics, feeding programs, disease control, and waste management.

3. Marketing research directed toward improving efficiencies in slaughtering, packaging, and merchandising of beef; research to explore improved energy conservation and to search for alternative marketing systems, and to improve utilization of beef products.

4. Nutrition research to further define the proper role of beef in the diet and improve and enhance the qualities of beef.

5. Consumer information to provide nutrititional information to homemakers, the food service industry, health professions, students, and the media.

6. Product promotion involving advertising, distributing recipes, providing the media with feature stories, and advising persons concerning product supplies as well as how to purchase beef to fit various family budgets.

7. Developing and maintaining foreign markets for established beef products and by-products may be accomplished through trade show participation, working with overseas customers, and finding new uses for less desirable beef by-products.

Based on hearing testimony concerning similar commodity programs, it appears that plans and projects authorized under the Order could be designed to achieve the objectives of the Act.

Possible Program Results.—While it is anticipated that the Order may strengthen the beef industry's position in the marketplace, problems in isolating its impact and the effects of other influencing factors may make it difficult to evaluate the program's performance. Greater production efficiencies, improved marketing techniques, and increased levels of nutrition information should benefit producers and consumers. To the extent the program could modify the extreme price fluctuations in the beef market, producers and consumers would also benefit.

Specific Terms and Provisions.—To accomplish the declared policy of the Act, numerous specific terms and provisions are needed to govern the operation of a program. The terms and conditions of the Order contained in this document are recommended as the detailed means of carrying out the declared policy of the Act.

Procedure and Background.—The Beef Research and Information Act, enacted in 1976, authorizes a research and information program to develop and improve markets for cattle, beef, and beef products subject to approval by producers voting in a referendum. The Act is enabling legislation which authorizes any individual or organization to submit a proposed Order to the Secretary designed to implement the program authorized by the Act. The Act provides that when the Secretary has reason to believe that the issuance of an Order will appropriately implement the program authorized by the Act, the Secretary shall issue a notice and hold a hearing on the proposed Order. The applicable rules of practice and procedure provide for the Department to issue a recommended decision and Order if it is determined, based on the hearing evidence and written briefs, that an Order will tend to implement the policy of the Act. A 45-day period is being provided for public comment on this recommended decision and Order. If the Secretary finds after a review of these comments and the entire hearing record that the Order will implement the policy of the Act, a final decision will be issued, and a referendum among producers will be held to determine if they wish to put the Order into effect. If a majority of those voting favor the Order, a beef research and information Order would be established.

In 1976, a proposed Order was submitted and a public hearing held on the Order. In 1977, the Secretary issued a final decision and Order. However, the Order did not receive the two-thirds majority approval of cattle producers voting in a referendum necessary to establish a program. The Act was amended in 1978 to allow a simple majority of those voting in a referendum to approve the Order. In February, 1979, a new proposed Order was submitted to the Department. The Beef Board, authorized under the proposed Order, would be responsible for preparing detailed project proposals for beef research and information. The Act requires that the proposed projects be reviewed and approved by the Secretary before project expenditures may be authorized by the Board.

The Order would continue indefinitely unless: 1. The Act is repealed; 2. The Secretary finds that the Order or any provision(s) thereof obstructs or does not effectively carry out the policy of the Act; 3. Beef producers reject the Order in a referendum for termination, or; 4. Beef producers reject a revised Order in a referendum.

Material Issues

The material issues presented in the record of hearing are as follows:

(1) The need for the proposed Beef Research and Information Order to effectively carry out the declared policy and purpose of the Act.

(2) The adequacy of the proposed level of funding from beef producers to support the proposed program.

(3) The adequacy of the type of potential research and information plans and projects to implement the proposed program.

(4) The possible effect of the proposed program on research, consumer information, producer information and promotion of beef.

(5) The determination of the specific terms and provisions of the proposed Order necessary to effectively carry out the declared policy of the Act, including:

(a) Definitions of terms used therein which are necessary and incidental to achieving the objectives of the Order;

(b) The establishment, maintenance, composition, powers, duties, procedures, and operation of the Board which shall be the administrative agency for the Order;

(c) The authority for establishing and financing the development and implementation of programs and projects of research, information, education, and promotion to improve, maintain, and develop domestic and foreign markets for cattle, beef, and beef products;

(d) The establishment and maintenance of an effective working relationship with State beef boards, beef councils or other beef promotion entities organized to conduct programs with objectives similar to those of this Order;

(e) The procedures to levy assessments on the sales of cattle to make refunds of assessments to producers who request them, and to incur necessary expenses;

(f) The provisions concerning recordkeeping requirements and reports by slaughterers; and

(g) The need for additional terms and conditions as set forth in §§ 1260.181 through 1260.187 of the Order which are necessary to effectuate provisions of the Act.

Findings And Conclusions

Evidence presented on the record at the public hearing indicates that cattle are produced, in some quantity, in all 50 States and that beef and beef products are produced and consumed in all 50 States. Therefore, it is found that cattle, beef, and beef products move in interstate and foreign commence and that which does not move in such channels of commerce directly burdens, or affects interstate commerce of cattle, beef, and beef products. The findings and conclusions on the material issues are based on the evidence presented at the hearing and the record thereof and are as follows:

(1) *Need for the Order.* The record herein establishes that beef is a major source of protein in the diet of United States citizens. Beef accounts for 12 percent of the food energy in the American diet, 23 percent of the protein consumed, and 15 percent of the average person's total food expenditures. Beef is common to more farms than any other commodity. In addition, beef is among the top five income-producing commodities in 47 States, and accounts for about one-fourth of the farm value of all food produced on U.S. farms.

On January 1, 1979, there were 110.8 million cattle in the United States, produced on 1.7 million farms. Over half of the United States beef supply is produced from cattle herds of less than 100 cows. Forty-three percent of all farms produce some beef. This includes dairy animals that eventually become part of the beef supply.

Market instability resulting from the cattle cycle and other factors affect all beef producers. A cattle cycle usually runs for a period of 10 to 12 years, from one low point in cattle numbers to the next. During one phase of the cycle, the basic cow herd is increased, as individual producers react to favorable cost-price relationships by expanding their herds or getting into the cattle business. Eventually cattle numbers become too large and/or input costs rise too much. There is more beef than consumers will buy at a price allowing cattlemen to make a profit. This brings on the herd liquidation phase of the cycle. As cattlemen elect to cut back on herd sizes, the liquidation of breeding stock compounds the oversupply problem, further depressing prices and increasing financial losses. Cattle cycles have historically been a part of the beef industry. During the early part of this century, they were often 17 years in length, by 1938 to 1949, they had shortened to 13 to 14 years and since that time, they have been approximately 10 years in length. In recent years, the cattle cycle has caused extreme fluctuations in price and supply. According to records kept by Iowa State University during the period from September 1973, through May 1979, feedlot finished cattle have returned a profit in only 27 of those 69 months. Hearing testimony indicates that the average cow-calf operator lost $95 per calf in 1975; $54 per calf in 1976; $77 per calf in 1977; and $38 per calf in 1978. It has been estimated that total operating losses of the beef industry during 1974–78 were almost $15 billion. During the most recent cycle, per capita supplies of beef reached a low of 99.5 pounds per person in 1965. Per capita supplies increased to a peak of 129.3 pounds in 1976, and have declined to an estimated 107.7 pounds per capita for 1979. Because individual producers are free to make their own production decisions and have consistently responded to favorable prices by increasing their cattle herds, there is little likelihood that cattle cycles can be completely eliminated. However, to the extent that this program can moderate the extremes of the cattle cycle, it will be to the benefit of both producers and consumers. With a more stabilized supply, consumers, producers, and processors would be better able to adjust to moderate supply fluctuations and there would be fewer price inequities in the marketing system.

Traditionally, the beef industry has relied upon land-grant colleges to provide research. The hearing record indicates that the emphasis and the amount of funding from this source is declining and that a need exists to maintain and enhance the marketing position of beef through the development of production, processing and marketing efficiencies. Current estimates indicate that less than a quarter of one percent of the cash receipts from the beef industry are being reinvested in beef research. In some other industries, the level of investments range from 3–10 percent.

There is a need for further production, processing and marketing research, as well as nutrition research. The hearing record indicates a need for production research in the areas of basic genetics, feeding programs, disease control and waste management. The need for processing research is illustrated by hearing testimony which indicated that in 1977, the physical losses of fresh beef during the marketing process from the packer's shipping platform through the retail food stores amounted to 5.2 percent of all fresh beef. Marketing research is a term which can be used to encompass a broad range of needs from the merchandising of beef, to the marketing of cattle and beef, to the studies of effective use of advertising. While food merchandising in recent years has become highly sophisticated for many food commodities, meat products, including beef, have not shared fully in these advances. The risk of innovations has been too great for an individual retailer because significant innovations tend to be quickly adopted by competitors. Short-term benefits have not justified the cost of development on the part of any one firm. Cattle and beef marketing research is needed to study possible methods to more accurately reflect value and to provide equity in the

marketplace for all participants in the production and marketing chain. An additional area for study would be to develop improved market analysis and information systems to reduce price variability and minimize the cyclical economic stress on the industry.

The hearing record indicates a need for a program of foreign market development. The United States is the world's largest producer and importer of beef. Total U.S. imports approach 10 percent of domestic production while U.S. exports are less than one percent of domestic production. Although the United States exports a large share of its grain production to foreign countries for their use in beef production, the hearing record indicates that exporting beef instead of grain would be more energy efficient, would provide more economic activity and jobs in the United States, and would be a positive factor in improving the United States' balance of trade.

There is a need to establish an improved information system to serve producers and consumers. The hearing record indicates that consumers are presented with varying information which may not be sufficiently researched. It is important to provide consumers with accurate, scientifically based information on the cholesterol issue. There is also a need to provide nutritional information to consumers concerning the benefits of beef to homemakers, the food service industry, health professionals, students, and the media. To maintain and ehance the position of beef in the marketplace, it is also determined that there is a need for the generic promotion of beef. The promotion of beef could include advertising, distributing recipes, providing the media with feature stories and advising persons concerning product supplies, as well as how to purchase meat to fit various family budgets.

Opponents of the Order contend that the proposed program will not alleviate the impact of the cattle cycle, and that the research and promotion costs for such a program should be borne by all segments of the beef industry and the Government, not by just beef producers. Opponents state that the per capita consumption of beef has increased sharply during the past 30 years and that the consumption of beef is an inelastic economic function among the middle class and wealthy, but is elastic among the poor and unemployed. Opponents also state that the uptrend in consumption in recent decades is due to rising disposable income levels among the poor and unemployed. However, for the reasons previously outlined it is determined that the proposed Order, as modified, will appropriately implement the goals and policies of the Act.

Proponents of the Order testified that present beef research and information programs are underfinanced and fragmented. Currently, the beef industry spends approximately $5 million for research and information through 28 State beef councils and a national organization. Of the eighty-seven witnesses testifying in support of the proposed order:

1. Thirteen represented national beef and farm organizations, including the Beeferendum Advisory Group composed of a number of national organizations which considered and proposed the Order.

2. Forty-three represented State beef and farm organizations, including State cattlemen's associations, cattle feeders associations, beef councils, and State farm bureaus.

3. Nine represented dairy organizations.

4. Two represented national farm magazines.

5. Twenty represented organizations which are presently conducting research, including the National Livestock and Meat Board, State universities, and other commodity organizations conducting programs similar to the program which could be created under the proposed Order.

Seven witnesses testified in opposition to the Order including the National Farmers Union, several of its affiliated State organizations, and two State farm bureau organizations.

(2) *Level of Funding:*

(i) *General.* The research and information activities to be considered under the proposed program would be funded by a value-added assessment on the sales of cattle. During the first two years, the proposed Order calls for an assessment of up to two-tenths of one percent of the value of cattle sold. It is estimated that initial collections at the two-tenths of one percent level would be about $40 million annually. At the maximum assessment level of five-tenths of one percent, collections would be about $100 million annually.

The value-added concept will assess all producer-sellers in the marketing chain. The initial purchaser in the marketing chain would deduct the amount of assessment from the payment to the original owner. Each succeeding purchaser would deduct an assessment based on the animal's value at the time of sale. The amount collected would include the assessment paid by the previous owner(s) plus an amount reflecting the value added by the seller. The purchaser at the point of slaughter would deduct the total assessment due and pay it to the Beef Board.

The sales of dairy and breeding animals with a value significantly above the commercial market value in the slaughter market chain, would be exempted from assessment until the animals are sold for slaughter. Any producer who does not wish to support the program can request and receive a refund of the assessment paid. It is determined from hearing testimony that the proposed initial funding level will adequately implement the plans and projects authorized by the Order. The majority of witnesses stated that the initial two-tenths of one percent level would be adequate, if not modest, for the implementation of the Order.

The implementation of the Act would directly affect all cattle producers. There are 1.7 million farms with cattle. All cattle slaughterers would also be directly affected because slaughterers would deduct the assessment and remit it to the Beef Board. Other groups directly affected would include the recipients of the funds expended by the Beef Board, such as universities and other research organizations, product promotion firms, advertisers and the media. Any impact on wholesalers, retailers, and demestic consumers of beef would be small.

Exporters of live cattle, beef, and products would be affected to the extent funds used in export development affected entry into the export market. Any impact on the domestic feed industry due to adjustments in beef production levels would be small.

(ii) *Cost Impacts.* The cost impact on producers could vary from up to two-tenths of one percent of the value of cattle sold during the first two years to the maximum of five-tenths of one percent permitted by the Order in later years.

Since cattlemen do not set the price on cattle sold, but must accept the market price, it would not be possible for cattlemen to increase their sale price to pass the assessment on to consumers in the short run. The impact of the assessments could only be passed on to consumers through adjustments in production and demand levels over a period of years.

The potential impact of the assessments from the beef research and information program is insignificant when compared to adjustments in producer and consumer prices recently occuring in the beef industry.

If the total cost of the program were passed on to consumers with no offsetting benefits, it is estimated that the initial assessment level would result

in an increase of less than one-third of a cent per pound in the price of retail beef. At the maximum assessment level, the comparable impact on price would be about eight-tenths of a cent per pound of retail beef.

(iii) *USDA and Other Federal Costs.* The direct costs of conducting the hearing and the referendum, excluding salaries, will be reimbursed by the beef industry. Should the Order fail to be approved by the majority of those voting, the Department will be reimbursed from an irrevocable letter of credit which has been posted with the Department for non-salary costs incurred. Should the Order be approved in referendum, the Department will be reimbursed from assessments, collected by the Beef Board. Also, the Act provides for the Department to be reimbursed from assessments for all expenses, including salaries, incurred relating to this program, when the Order becomes effective following the passage of an Order in a producer referendum.

(3) *Plans and Projects.* Below is a description of the type of impacts that may result from a research and information program based on experience in other commodity programs. Also included is a brief discussion of the types of programs which could be conducted by the Beef Board.

In 1975, egg producers voted to assess themselves to conduct a program of research and promotion. In 1978, after a downtrend in per capita egg consumption lasting more than three decades, egg use increased by 6 eggs per person compared to a year earlier. Hearing testimony reveals that in June of 1979, according to Urner Berry, a private egg price reporting service, egg prices were 8–10 cents above a year earlier. USDA statistics on April 1, 1979 showed a 3 percent increase in laying hens over 1978, indicating a strengthening in consumer demand for eggs and a continued uptrend in egg production and consumption. Although some of the increase in per capita consumption of eggs may be attributed to the research and promotion efforts of the egg industry, rising prices of other protein foods has also been a contributing factor.

Cotton producers began a research and promotion program about 12 years ago to alleviate the declining use of cotton resulting from the increased popularity of synthetic fibers. Hearing evidence indicates that the annual decline in cotton's share of total fiber consumption has been moderated. While the research and promotion program may be partially responsible for slowing down the annual rate of decline, it is also recognized that other factors, such as price increases of synthetic fibers associated with higher prices of petroleum products, affected consumption levels.

Several representatives of milk producer organizations testified in favor of the proposed Order, based on their success in the promotion of milk.

The true impact of any ongoing research and promotion program is difficult to measure because assumptions must be made to isolate the effect of this variable from other influencing factors. Measuring the possible impacts of a potential program is even more difficult.

The results of the various programs under the Beef Research and Information Order will be a function of the priority given to the research and information programs by the Beef Board. It is anticipated that the Beef Board will become involved in programs of promotion, basic research, consumer and producer information, and foreign market development.

Basic research could include nutrition research as well as production, processing, and marketing research. Nutrition research could further investigate the proper role of beef in the diet and the possibility that beef consumption may contribute to the high rate of heart disease and cancer in the United States.

Production research could study such areas as basic genetics, feeding programs, disease control, and waste management. Research efforts could focus on increasing the incidence of twinning, identifying the key characteristics for future breeds or lines such as size and adaptability, seeking new infromation relative to factors that limit the rate of protein synthesis which could improve the growth process improving the utilization of forage by-products such as crop residue and fibrous feed materials for ruminants, reducing death losses, improving methods of utilizing nutrients in animal waste and utilizing animal waste to produce methane fuel, and reducing or eliminating the undesirable odor level associated with some systems of beef production.

Research designed to improve beef processing efficiencies could study product loss in the marketing chain, improved product safety, increased energy conservation, and improved productivity in transportation, handling, fabrication and packaging. Research could also investigate improved product utilization through such means as further development of tenderizing techniques and further development of flaked and formed products for optimum utilization of less tender cuts of beef.

Marketing research could investigate improved methods of merchandising beef, alternative marketing systems for cattle, and improved market analysis and information systems for long term decision making.

An information system for producers and consumers could aid producers in making production and marketing decisions, based on research to alleviate the impact of the cattle cycle through better informed producers, while consumer information could provide consumers with scientifically based nutrition information concerning beef. Consumer information could also provide information to assist people in buying, meal planning, preparing, serving, and storing beef.

A foreign market development program could endeavor to increase the exports of beef produced in the United States. Through participation in foreign trade shows, development and maintenance of markets for established beef products, by-products, and new uses for less desirable products the exports of beef may be increased.

Obviously, for all of these possible opportunities, there is always a risk of failure. The rate of return for various potential projects could undoubtedly vary significantly. Thus, the Beef Board should attempt to choose those projects with the highest probability of successfully achieving a high rate of return.

(4) *Possible Results:*

(i) *General.* To the extent the program successfully addresses the needs of the beef industry through the possible plans and projects, the Order will result in strengthening the cattle and beef industry's position in the marketplace. Should the extreme price fluctuations associated with the cattle cycle be moderated, consumers would be benefited by more stable supplies of beef at a more constant price level, while beef producers would receive a more stable price for their cattle. If research can improve efficiencies in production, processing, and marketing, consumers would benefit through lower per unit beef costs while producers net income may be increased. Increased exports of beef would lead to increased domestic beef production and also provide for lower per unit cost of domestically consumed beef. Consumer information may increase the level of nutrition awareness among consumers and may lead to increased per capita consumption.

(ii) *Competitive Impact.* It is anticipated that the Order may increase the demand for cattle, beef, and beef

products. The impact of the proposed program on different types of beef producers will depend on the specific research and information projects undertaken by the Beef Board. However, it is the intent of the proposed Order that the Beef Board represent and act in the best interest of the entire beef industry, including all types of beef producers.

(iii) *Distribution of Effects by Income Classes.* All income groups should receive some benefits from the program. However, the poor, elderly, and teenage groups could benefit more from nutritional information and information which assists them in the selection and preparation of less expensive cuts of meat. All consumers could benefit through more stable beef supplies and lower per unit costs. People who have lower levels of income spend a larger proportion of their income on food, therefore, food related research may have a greater benefit for low income groups.

(5) *Terms and Provisions of the Order:*

(a) *Definitions.* "Secretary" means the Secretary of Agriculture or any other employee of the Department who may be authorized to act in his stead.

"Department" means the United States Department of Agriculture, the Secretary, or nay other authorized employee of the Department. Since the terms "Department" and "Secretary" both include all authorized individuals within the Department, the terms could be used interchangeably. However, since many of the functions to be performed will be delegated, the term "Secretary" is used in the Order only for those functions which the Secretary would normally perform, and the term "Department" is used in all other instances.

"Act" is defined to provide the correct legal citation for the statute pursuant to which the Order may be put into effect and operated. The inclusion of this definition makes it unnecessary to refer to such law and statutory citation each time reference is made to the Act in the provisions of the Order. "Act" also is defined to include any amendments that have been, or may be, made to the Beef Research and Information Act (7 U.S.C. 2901 *et seq.*).

"Fiscal Period" is defined as the 12-month period corresponding with the USDA's fiscal year. The Beef Board is required by the Act to submit budgets to the Department on a fiscal period basis for approval of the anticipated expenses and disbursements in the various areas expenditures are authorized. A clearly defined and predetermined fiscal period of 12 months can facilitate auditing, budgeting, accounting, and making expenditures on an orderly basis. The period corresponds with USDA's fiscal period for convenience in administration. Should conditions change or if it may be more convenient for the Board, the Beef Board, with the approval of the Department, may select some other 12-month period as its fiscal year.

"Beef Board" or "Board" is defined as the administrative agency or body charged by the Act with the duty to administer the Order. The definition is made to insure that when used in the Order, the terms "Beef Board" or "Board" refer to the entity established by the Order. The Act requires that a Beef Board of up to 68 producer members be appointed by the Secretary from nominations submitted by organizations representing producers.

"Executive Committee" is defined to mean those 11 members of the Beef Board, elected by the Board to administer the Order under Board supervision and within Board policies. The Act requires the establishment of a seven to eleven member Executive Committee. The hearing record indicates that an 11-member committee would be more representative of the cattle industry. The Act states that such a committee shall be broadly representative of the beef industry. As provided in § 1260.146(b), the Beef Board will initially divide the United States into eight geographic regions. The members of the Board from each region will select one member for the Executive Committee from among themselves. The remaining three members of the Executive Committee will be selected by the Board on an at-large basis.

"Producer" is defined in the Order to identify the persons responsible for payment of assessments under the Order. It is essential to the value-added concept of assessment that all producers in the marketing chain who add value to an animal be assessed based on that value added, therefore, any person who takes title to an animal, other than for the purpose of immediate slaughter, is a producer regardless of the period of ownership. In addition to be being subject to the assessment, producers have the right to vote in any referendum on the Order and are eligible to serve on the Board and to nominate, primarily through eligible organizations, others to serve on the Board. "Producer" is defined by the Act to mean any person who owns or acquires ownership of cattle, unless his or her only share in the proceeds of a sale is a commission, handling fee, or other service fee. It was not the intent of Congress to include slaughters in the definition of producers since slaughters usually do not perform the function of producing cattle, therefore, persons acquiring cattle solely for the purpose of slaughter shall not be included in the definition of a producer. A cattle slaughterer or packer may be a producer and subject to assessment, if that entity has cattle on feed or buys cattle for purposes other than immediate slaughter. The term "immediate slaughter" includes those cattle purchased for the sole purpose of slaughter which are not held on feed for an extended period of time prior to slaughter. It is recognized, however, that under normal trade practices, cattle purchased for "immediate slaughter" may not actually be slaughtered for several days.

"Producer-buyer" is defined to mean a producer who purchases cattle. The producer-buyer is required to collect or deduct the assessment authorized under the Order from the seller or from the amount paid to the seller for the animal.

"Producer-seller" is defined to mean a producer who sells cattle. The producer-seller is required to pay to the buyer the assessment authorized under the Order.

"Slaughterer" is defined to mean any person who slaughters cattle. Since the intent of the Act is to only assess producers, slaughterers are exempted from assessment unless they purchase cattle for other than immediate slaughter. A slaughterer is the entity required by the Act to collect the total assessment on an animal and to forward such assessment to the Beef Board.

"Producer organization" or "eligible organization" means any organization, association, general farm organization, or cooperative representing cattle producers in a geographic area which has been certified eligible to make nominations to the Secretary for appointment to the Beef Board. The Act lists criteria for use by the Secretary in certifying eligible organizations. As specified by the Act, the final determination of whether an organization is an eligible organization rests with the Secretary.

"Promotion" is defined in the Act to mean any action to advance the image or desirablity of beef or beef products. This definition could include advertising, advertising services, education, exhibits, seminars, publications or any other means to advance the image or desirability of beef and beef products. It is anticipated that promotion would be substantially devoted to presenting nutritional and other educational information.

"Research" is defined to mean any type of systematic study or investigation, and/or the evaluation of any study or investigation, to advance

the desirability, marketability, production, or quality of cattle, beef, and beef products. This definition does not require the evaluation of all studies or investigations undertaken pursuant to this Order, but provides that such evaluations may be made on any or all studies and investigations undertaken by the Board. The evaluation of such studies is appropriate to aid the Beef Board in determining the most effective use of funds collected under the Order.

The Board may enter into contracts, with the approval of the Secretary, for the purpose of carrying out authorized activities. The term "Contracting Party" is defined to include any individual, group of individuals, partnership, corporation, association, cooperative, or other entity, public or private, with which the Beef Board may enter into a contract or agreement in the manner provided in the Order.

"Marketing year" means the calendar year ending on December 31 unless some other consecutive 12-month period is designated by the Board with Department approval. The hearing record reflects that the calendar year is the most appropriate period to be designated as the marketing year since most marketing statistics applicable to the Order are maintained on a calendar basis. If conditions or circumstances should change, some other 12-month period could be designated by the Board with the approval of the Department.

"Part" refers to 7 CFR Part 1260, containing rules, regulations, orders, supplemental orders, amendments, and similar matters concerning the amended Beef Research and Information Act. The term "subpart" is used when referring to a portion or segment of Part 1260.

(b) *Beef Board.* A "Beef Board" is established to act as the administrative body for the Order as required in Section 8 of the Act. It is composed of producers appointed by the Secretary from nominations submitted by eligible organizations in specified geographic areas. Each member has an alternate to serve in his or her stead as necessary.

Membership. Members of the Beef Board shall be selected to reflect the varied character of the cattle and beef industry. The Act specifies that the Beef Board shall consist of not more than 68 members. Section 8 of the Act requires that Board members and alternates be named from specified geographic areas designated to reflect, to the extent practicable, the proportion of cattle in each such geographic area. Organizations representing cattle producers normally are organized and operate on a statewide basis, although there are also regional and national organizations, often formed by an affiliation of similar State organizations. Statistics measuring cattle production are available on a State by State basis. Accordingly, to the extent practicable, a State is the geographic area used for determining representation on the Board, with each major cattle producing State entitled to at least one Board member and one alternate. The geographic areas for the initial Board and the number of Board members for each are listed in § 1260.138(e) of the Order.

January 1 inventory numbers of cattle and calves on farms, published annually by the Department of Agriculture, are generally considered the best available measure of the proportion of cattle in the various States. In determining this initial distribution of membership, a geographic area is defined as a State or combination of States with 500,000 head of cattle or more. Each such geographic area is entitled to one Board member and alternate plus an additional member and alternate for each additional 2.5 million head of cattle. Such a formula will provide for an initial Board of 60 members. The use of this formula provides for broad, equitable representation of producers, flexibility in adjusting to possible future shifts in cattle production, and accommodation of future reapportionments without exceeding the maximum of 68 Board members. Use of this definition accomplishes the objective of providing separate representation on the Board for most States, recognizing the usual boundaries of producer organizations and the similarity of interests of producers within many States.

Important considerations in combining States which have too few cattle to qualify as a geographic area are geographic location and similarity of interests, among other factors. To the extent possible, a geographic area containing several States includes those which are contiguous and which have similar interests. The practical problems of caucusing and reaching agreement on nominations then are simplified.

It was suggested in hearing testimony that Board representation should be based on the number of producers in a geographic area rather than based on the number of cattle. This suggestion is not adopted as it conflicts with the Act.

It was proposed that only individuals who are producers would be eligible for nomination and appointment to membership on the Beef Board. However, all producers, whether they be an individual, group of individuals, partnership, corporation, association, cooperative, or any other entity are regulated by the Order for the purpose of determining who is required to pay assessments and who is eligible to vote in any referendum held pursuant to the Act. Since all producers regardless of their form of business organization are required to pay the assessment and are eligible to vote in a referendum, it would be inconsistent to preclude any producer from membership on the Beef Board. Further, the record fails to establish any sound basis for excluding from service on the Board those producers who are not individuals. In support of their proposal, the proponents testified that individuals would be more responsive to the needs of other producers and would probably be more closely associated with beef producers generally. This position, however, lacks support in fact and logic. In addition, the caucus mechanism is specifically designed and included in the Order, to insure that those producers nominated to the Board are persons judged by their peers to be capable of effectively representing the interests of the other producers from their respective geographic areas. Accordingly, it has been determined that the Order should provide that the Beef Board shall be composed of producers, without regard to whether or not they are individuals. Thus, if nominated and appointed by the Secretary, a corporate producer could serve on the Board through a duly authorized officer or other appropriate respresentative of the corporation.

Testimony was received at the public hearing stating that the Board membership should be set at 68 members rather than up to 68 members. Establishing an initial Board of 68 members and would necessitate using a different formula to apportion membership, however, the witnesses favoring this position failed to develop a workable alternative to the existing formula. In addition, it would eliminate the flexibility to accommodate increasing cattle numbers. Finally, there is no evidence to suggest that producer representation would be enhanced by requiring 68 members. Accordingly the proposal has not been adopted.

Following consideration of the Act, the Congressional committee of conference submitted a conference report (Number 94–1044) which recommended that the Secretary appoint five consumer advisors to the Beef Board. In addition, several witnesses testified to the importance of consumer input. Accordingly, it is determined that the Order should provide that the Secretary shall appoint to the Board up to five non-voting consumer advisors deemed to be knowledgeable in nutrition and food. In addition, the Order specifies that the Board may

recommend to the Secretary qualified individuals to serve as consumer advisors. Although it is intended that there shall be five consumer advisors, a lesser number could serve at times if for any reason five could not be appointed. Thus, it is anticipated that the initial Board will recommend to the Secretary 10 qualified individuals to serve as consumer advisors and that the Secretary will appoint up to five advisors to the Board from the candidates submitted. However, should the Board fail to make these recommendations or in the event that the persons nominated are not qualified to serve as consumer advisors, the Secretary shall appoint up to five qualified consumer advisors from persons of his own choosing. Thus, consumer input into the actions of the Board would not be denied if the Board fails to nominate appropriate persons to serve as consumer advisors. In making recommendations to the Secretary, it is intended that the consumer representatives suggested by the Board will not be individuals affiliated with cattle producing or farm organizations. After the initial appointment of the consumer advisors the Board shall have the opportunity to recommend to the Secretary at least two nominations for each consumer advisor vacancy which occurs.

It was stated at the public hearing that elected Board members would be more representative of producers than appointed members. However, section 8(b) of the Act provides that the Beef Board and its alternates shall be composed of cattle producers appointed by the Secretary. Accordingly, there is no authority to include in the Order provisions for the election of Board members. The Order does provide for producer input through the caucusing of eligible organizations to nominate Board members and alternates.

Term of Office. The term of office for Board members and their alternates is three years as provided in the Act. However, initial appointments shall be, proportionately for one, two, and three-year terms. The staggered terms for Board members will prevent the possibility of all experienced Board members leaving the Board at the same time and should help provide continuity of program efforts and program direction. The Secretary shall determine on a random basis which initial members shall serve for one, two, and three-year terms, though assuring that the terms of members from a geographic area with multiple representation expire at different times.

No member may serve more than six consecutive years as a Board member or alternate, except that members appointed to the initial Board for terms of one or two years are eligible to serve two additional consecutive terms. However, the limitation does not preclude a member or alternate from switching to the other capacity at the end of the six-year period. For example, a Board member could serve six consecutive years as a Board member, then serve as an alternate, and then serve again as a Board member for an additional six consecutive years.

Although an alternate member may serve at Board meetings in the absence of the Board member, to allow producers the greatest opportunity to designate who will represent them on the Board, the Order provides that alternates do not automatically move from being an alternate to a Board member when a vacancy occurs.

Certification of Organizations. Record evidence shows that there are many organizations representing cattle producers throughout the country. Although, the Department is charged with the responsibility of setting the criteria to be used in determining the eligibility of organizations to nominate members of the Board, as required by the Act, the Order includes specific criteria that must be considered in evaluating all organizations requesting certification. As required by the Act, the primary consideration in determining the eligibility of an organization is whether it represents a substantial number of producers who produce a substantial number of cattle. The Department has the final authority to make the determination if an organization is or is not eligible.

Record testimony shows that the bulk of the organizations which should be certified are Statewide organizations. Statewide and regional organizations which meet the specified criteria would be eligible for certification. Organizations which represent a significant area within a State and meet the specified criteria would also be eligible for certification. It is not anticipated that county organizations would be certified since membership in a county organization generally duplicates the membership of State and regional organizations. Further, in the context of a national program, county organizations, normally, would not represent a substantial number of producers with a substantial volume of cattle production. The certification process will be initiated by the Department through media announcement that organizations may apply for certification during a specified period. Organizations certified will be notified and asked to caucus within specific geographic areas for the purpose of submitting nominations for the Board.

The proposed Order required that following the original certification of an organization, recertification would be required at any time the organization wished to make nominations. Because this could require organizations within a geographic area with multiple representation on the Board to request recertification each year, this requirement is found to be burdensome and unnecessary. Under normal conditions, an organization's membership and purpose does not change significantly within five years, however, if the Department should have reason to suspect that an organization's status has changed it can request recertification. It is possible that organizations whose status had changed could be identified through the caucus process. Also, five years would seem to be adequate to require recertification and will not create an unnecessary burden on organizations or the Department. Accordingly, the Order provides that after the original certification of organizations, the Department will require recertification at least once every five years, and may request recertification at any time.

It was suggested in the hearing testimony that this section may allow the certification of an excessive number of localized organizations which would diffuse the nomination process making the selection of the best qualified candidate for Board membership difficult. It was also suggested that the criteria listed in the section did not restrict certification to those producer groups that are truly representative of producers in an entire geographic area, or to those groups whose basic policies and funding come from cattle producers. The Department is not limited to the criteria specified in the Order, and has the flexibility to establish standards to eliminate such problems if they should develop. The record does not support the conclusion that these problems will actually occur, particularly in light of the fact that the criteria for certification necessitate the evaluation of organizations against national standards to determine whether each applicant represents a substantial number of producers who produce a substantial volume of cattle.

Nominations. Orderly procedures determined by the Department are established for producer organizations, associations, general farm

organizations, and cooperatives within a geographic area, to submit nominations for Board members and alternates to the Department. It is essential that the nominations and appointments be completed in a timely fashion, but adequate time must be provided for producers to consider and select their nominees and for the Secretary to make the appointments. As required by the Act, a final Order establishing a Beef Board becomes effective only after approval by producers voting in a referendum. The nominations shall be submitted to the Department within 90 days after it is determined that the results of the referendum favor the Order, but the Department may prescribe a longer period if necessary.

The Order provides that at least two nominations will be provided to the Secretary for each member and each alternate member to be appointed for each geographic area. Although proponents proposed and testifed that a single nomination for each position on the Board would be sufficient, it has been determined that such a requirement would not best serve the interests of producers in having the Board promptly and efficiently constituted. The record shows that unnecessary delays and costs could be incurred if the Secretary were to reject a nomination. Organizations within the affected geographic area would be forced to hold a second caucus to arrive at a substitute nomination. This could be costly and would require additional time. The Act states that the Secretary shall appoint such members and alternates. The Act also states that such appointments shall be made from nominations submitted. The term "nominations" implies that more than one person will be nominated for each member and alternate to be appointed.

For the above reasons the Order requires that at least two nominations be obtained by the Department for each member and each alternate member to be appointed in each gepgraphic area.

After the initial Board has been established, nominations for subsequent appointments of Board members and alternates should be submitted sufficiently in advance to permit the Secretary to appoint the members, to inform them of their appointment, and to obtain from them acceptance of such appointments before the beginning of the term of office for which they are being appointed. Therefore, submission of nominations to the Department for subsequent Board members and alternates shall be at least 60 days prior to the expiration of the terms of members and alternates previously appointed to the Board. To assure that eligible organizations are notified when a vacancy on the Board exists, and thus provide the maximum opportunity for board participation by producers in the nominations process, the Order provides that the Department shall announce within the affected geographic area or areas that a vacancy does or will exist.

Hearing testimony indicates that there will likely be more than one eligible organization in each geographic area. Such eligible organizations in each geographic area shall caucus to jointly nominate at least two qualified producers for each member and each alternate member to be appointed to the Board. This requirement should achieve significant unanimity in the nomination process and thus contribute to an efficient and organized nominating procedure. However, if no agreement on a joint nomination is reached, or if any organization does not agree with the nomination, such eligible organization(s) is authorized to submit nomination(s) for each position to be filled. The language in this section of the Order is modified to show that no eligible organization is to be precluded from participating in the nomination process.

In addition, if there is no eligible organization certified for a geographic area or if the Department determines that a substantial number of producers are not members of, or their interests are not represented by an eligible organization, the Department as required by the Act, will provide a method for such producers to submit nominations. The record indicates that most producers are represented by producer organizations and that most organizations would likely caucus and submit nominations on a joint basis. Thus, there is no reason to conclude that the nomination process will be unduly burdened with numerous nominations as a result of these Order provisions.

Apportionment of members to the initial Board from the various geographic areas established by the Order cannot be permanent. Representation must be reviewed periodically to take into account shifts in cattle production and thus insure, as nearly as possible, fair representation on the Board for producers from all designated areas. Accordingly, the Board is required to review the distribution of membership periodically, and at least every five years. Five years is an appropriate period of time since, although inventory numbers of cattle may vary, cattle populations do not change radically in short periods of time. Past trends in cattle numbers or shifts in production could be adequately compensated for in requiring the review of Board member distribution every five years. In the event circumstances or conditions should change dramatically before five years have elapsed, the distribution of membership could be reviewed at an earlier date. Since the Act requires that the representation of producers on the Board shall reflect, to the extent practicable, the proportion of cattle produced in each geographic area, it has been determined that it would be inappropriate to include in the Order any other criteria such as the level of cash assessments, cash receipts for cattle, and other related factors when redefining geographic areas for board membership. To avoid, as much as possible, the unnecessary disruption of the Board's activities, changes made when redefining the geographic areas should be made at the expiration of the terms of members. Likewise, this procedure will minimize the inconvenience to Board members from geographic areas where the number of members is being reduced and will contribute to fair representation of producers.

Appointments. As required in the Act, the Order provides that the Secretary will appoint Board members and an alternate for each member from nominations submitted. Representation on the board will be by geographic area. Written notice of their acceptance of the appointment will be submitted to the Department promptly by member and alternate designates so that the initial Board can be fully convened without inordinate delay. This will allow replacements to be promptly appointed if, for any reason, a designated member or alternate is unable to serve after being appointed. The Order and the Act state that the Secretary shall appoint the Board members and alternates. The proponents testified that the term "select" would be more descriptive, however, the term "appoint" is a commonly used and understood term and is used to conform with the Act.

Vacancies. The nomination and appointment procedures for individuals to fill unexpired terms when vacancies occur are the same as those specified for the normal appointment and reappointment of members and alternates. It is important that vacancies be filled promptly in order to maintain full membership and representation on the Board so all producers will be adequately represented to provide continuity, and so there will be a minimum of disruption in the functioning of the Board. Accordingly, nominations to fill vacancies are to be submitted to the Department within 60 days of the

time the vacancy occurs. Such a period provides a reasonable amount of time for the appointment of nominees. However, should a vacancy occur within 6 months of the expiration of the term of a Board member or alternate, the Secretary need not fill the vacancy. In such a case the alternate of the member will serve in his or her stead since the cost of nominating and appointing a new member cannot be justified for such a short period of time.

Alternate Members. As required by the Act, each Board member has an alternate designated to serve in his or her place as necessary. On occasion, a Board member may find it necessary to be absent from Board meetings and in such cases his or her alternate will serve in his or her stead. Alternate members should be available to attend meetings as necessary so that the business affairs of the Board will not be impaired. Also, in the event of a vacancy on the Board for any reason, the alternate will act until a successor is appointed. This will enable the producers from the geographic area where the vacancy occurs to continue to be represented. The Beef Board may determine and assign duties to an alternate. The same criteria and procedures are used for nominating and appointing alternates as those for Board members. Nothing precludes an alternate from replacing or succeeding a member, if nominated for membership. Further, to encourage the participation of new producers on the Board and thus bring in new ideas, alternates, like members, are limited to six consecutive years of service as an alternate. In the event that an alternate is appointed to the Board as a member, that alternate is permitted to serve up to two consecutive terms in that capacity, without regard to the length of time served as an alternate.

Procedure. To insure the proper conduct of meetings, the Board should adopt bylaws governing its organization and operation. However, the method of voting in decisions of the Board and quorum requirements are specified in the Order to assure producers that these basic requirements for the conduct of a meeting are observed.

The presence of a majority of the members and alternates acting for members constitutes a quorum. While it was suggested in hearing testimony that the presence of two-thirds of the members and alternates acting for members should constitute a quorum the record fails to show the need for such a requirements. Further, it is possible that such a requirement could unduly hamper the Board's ability to meet and conduct business, particularly in light of the fact that members will be attending from all areas of the nation. In addition, it is common practice for the presence of fifty percent of the membership of corporate boards and similar organizations to constitute a quorum. On any vote taken by the Board, a majority of those present and voting must concur before any action can be taken. Finally, to encourage maximum attendance at meetings all votes cast at an assembled meeting shall be cast in person with no proxy voting permitted.

It is necessary that the Board adopt procedures which will assure that it operates properly and efficiently and it should schedule regular meetings. However, there may be instances when it is necessary to transact routine, noncontroversial business or take rapid action at times when it would be expensive and unnecessary to call an assembled meeting. Therefore, the Board is authorized to vote by telephone, telegraph, or other means of communication in such instances. However, to avoid any misunderstanding and to assure an accurate record of all Board actions any such vote by telephone shall be confirmed promptly in writing. The Board shall have the authority to determine when it will be necessary to transact business without calling an assembled meeting. It was suggested in the hearing testimony that it was extremely unlikely that a situation important enough to require this type of action would occur, and that authority to transact business in this fashion should not be authorized. Although the record does not indicate that such emergency type actions will be common or frequent, it is determined that important situations requiring an immediate decision of the Board may arise and that it is prudent to provide for such an occasion, therefore the suggestion is not adopted.

Compensation. The Act requires that Board members and alternates shall serve without compensation, and that they be reimbursed for necessary and reasonable expenses incurred when in the performance of their duties under the Order. The record indicates that consumer advisors should also be reimbursed from necessary and reasonable expenses incurred when in the performance of their duties under the Order. The Board with the approval of the Department, shall set standard procedures governing reimbursement, including the forms to be used, receipts, or other documents required, and the limits of reasonable expenses. Proposal Number 2, which was submitted to the Department by the Community Nutrition Institute, provides that the Order shall require that consumer advisors to the Board be paid for actual work performed. Although the record fails to support such a provision as a requirement, there is no statutory prohibition to the payment of compensation by the Board for services of employees and contractors in connection with work performed for the Board. Accordingly, it is determined that the Order should not prohibit the payment of such compensation, but should provide the Board flexibility to exercise its authority under the contracting provision of the Order as specified in § 1260.146(e) to compensate advisors to the Board for work performed when determined to be appropriate to obtain the services of some well qualified candidates for these positions.

Powers. The Board must have the powers specified in Section 8 of the Act in order to effectively provide administrative direction to the program. The Board has the power to administer all terms and provisions of the Order and carry out the plans and programs authorized by the Act. Although the Board is empowered to develop rules and regulations necessary for implementing and operating the program, only those rules and regulations issued by the Secretary under the authority of the Act and published in the Code of Federal Regulations have the force and effect of law. Therefore it would be incumbent upon the Board to draft the proposed rules and regulations and submit them to the Department for review, appropriate revision, and issuance. Such rules and regulations are necessary to set the procedures under which the program would operate. They govern the method of collecting assessments, the refund procedures, the actions to be taken to implement specific programs, the records that must be kept by slaughterers and others, and the related provisions necessary to meet the requirements of the Order.

The Board has the power to investigate alleged violations of rules and regulations issued pursuant to the Order. Procedures established for handling such violations should assure fair and equitable treatment in all instances. The Board should take all reasonable steps to settle violations and in the event that settlement cannot be reached, report violations to the Department for appropriate action. The reported violation should include the necessary facts and details of the specific violation that will allow the Department to take corrective action.

Problem may arise or conditions may change within the industry that would necessitate amendments to the Order. The Board should maintain regular surveillance of the need for amendments and recommend amendments of the Order to the Department when it deems that such action is necessary.

Duties. The duties of the Board as set forth in the Order are necessary for fulfilling its functions as designated in the Act. These duties are similar to those specified for administrative agencies under other programs of this nature. The record justifies that such duties are necessary. The stated duties provide authority and guidance concerning many details common to the operation of an administrative entity such as the Board. They include the duty to meet and organize, elect officers' and establish committees and subcommittees of Board members as necessary to handle the affairs of the Board. The Board also has authority to appoint advisory groups which should be done with the approval of the department. Such advisory groups would include persons who are not members of the Board, in order to gain added expert advice and counsel on problems, procedures, and programs. These advisory groups can act in an advisory position only; final decisions and actions are reserved to the Board; and only the Board may take action authorizing the expenditure of the funds. The Board has the authority to reimburse advisory group members for travel and other expenses arising from their assignments. Compensation of advisors is also permitted. Additional language was proposed in hearing testimony to require that "if an officer of the Beef Board is also an officer of a private beef group engaged in programs to influence Government policy, he shall disclaim such identity when speaking for the Board." The record fails to show that such a provision is necessary. Accordingly, it is not adopted as an Order provision. Further it appears that if necessary such matters could more appropriately be addressed in bylaws of the Board.

The Act provides that the Beef Board shall appoint from its members an Executive Committee, consisting of seven to eleven members. Hearing testimony indicated that an Executive Committee of 11 members is necessary to effectively represent the varied interests of producers in the various geographic regions. The Beef Board shall divide the United States into six, seven, or eight regions on the basis of cattle population with the approval of the Department. The members of the Beef Board from each of these regions shall select one nominee to serve on the Executive Committee. The remaining members of the Executive Committee will be selected by the Board on an at-large basis, but in no event shall more than two members of the Executive Committee be from one geographic area. The Order specifies that initially there shall be eight geographic regions and each region will provide one member of the Executive Committee. Three members will be chosen on an at-large basis. The Act requires the Executive committee to be broadly representative of the beef industry and it is anticipated that through the selection process this will be accomplished.

Periodic review of the regions established is not specifically provided for in the Order although this should be done at least once every five years, preferably in concert with the realignment of geographic areas for Board membership to assure fair representation on the Executive Committee. To enable it to function more efficiently, the Beef Board shall delegate to the Executive Committee authority to employ staff members, to specify their duties and compensation, and to administer the provisions of the Order under the direction of the Board and within policies established by the Board.

A major duty of the Board is the development of plans and projects to implement the Order. The Board has authority under the Act to initiate contracts or agreements with other organizations to conduct program activities. So that all producers will share evenly in the benefits derived from this assessment program, the Beef Board shall endeavor to provide the widest possible dissemination among producers of any supply, demand, or other economic information which it develops.

The proposal provided that certain information could be kept confidential when required by a contract between the Board and the contracting party which is developing such information. This provision has not been adopted however, because the record fails to establish the need for such authority and because it is not found to be consistent with the policies of the Act. Further, including such a provision in the Order could possibly have an adverse effect on producers resulting from the withholding of information developed through projects funded in whole or in part with assessments collected from producers under authority of the Act.

As required in the Act and in the Order, to assure that assessment funds are properly spent and accounted for, contractors shall be required to develop plans and projects, to outline procedures to be followed in completing the plans and projects, and to prepare a detailed budget of the estimated costs thereof, all of which shall be submitted to the Board. Further, contractors are required to keep adequate records and submit regular reports of their activities on a project showing progress made, disbursement of funds and any other relevant information required by the Board or the Department. Contracts and agreements of the Board may become effective only upon approval of the Department. In addition to contracting with others, the Board has authority to conduct program activites on its own when approved by the Department.

The Board shall prepare a budget of its anticipated income and expenses each fiscal period and submit it to the Department for approval.

The Department should specify the date for submission of the budget for approval, allowing adequate time for review prior to the beginning of the fiscal period. In addition to income and expenses, the budget statement should show program plans, the distribution of anticipated expenses for each major program category, the estimated cost for administration, and detailed justification of the plans. The Board is required by the Act to submit copies of the budget to the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry.

Other duties of the Board which are outlined in the Order are those necessary to assure that it operates in a business-like fashion. They involve requirements for maintaining records and submitting reports of activities as required by the Department, making annual reports of activities to producers and the public accounting for funds received and expended each fiscal period, and initiating an annual audit of its financial status by a certified public accountant. Further, the Board is required to give the Department the same notice of meetings as is given Board members and to provide any other information pertaining to the Order which the Department requests.

Programs and projects. The Board has the authority to determine the type of research, market development, education, producer information, consumer information, promotion, and advertising projects to be undertaken, and it is charged with the responsibility of initiating and recommending to the Department the establishment of such projects as are authorized by the Act. However, it is intended that promotion and/or advertising activities should be

substantially devoted to presenting nutritional or other educational information, including the results of research conducted by the Board. While similar research and information programs for other commodities expend the bulk of funds collected on advertising activities, hearing testimony suggests that a significant share of funds collected under a Beef Research and Information Order could be effectively used in research activities and it is expected that a significant portion of the funds would be used to fund research. The proposal also provided for plans and projects including "public relations," however, it has been determined that the use of the term "public relations" in the Order is not necessary. Accordingly, this language has not been adopted. The plans and projects should be designed to assist, improve, or promote the production, sale, marketing, processing, distribution, and utilization of cattle, beef, and beef products. The Order is broad and flexible to enable the Board with the approval of the Department, to use the most efficient and effective methods of carrying out the purposes of the Act. Finally, since the program under the Order is to be financed by producers in all parts of the nation, the Board shall place emphasis on developing a coordinated national program, with activities designed to compliment the efforts of local, State, and regional groups, organizations, or agencies which are currently engaged in research and promotion activities.

The Board has the authority under the Act to engage in programs designed to expand sales in foreign markets for cattle, beef, and beef products. This area of activity should include steps to increase sales to present overseas customers as well as to develop new outlets and tailor products to their needs.

Programs or projects conducted by the Board shall be periodically reviewed to determine if each such program or project contributes to an effective and coordinated program of research, information, education, and promotion. Such review should also determine if the goals and objectives of the program or project are being accomplished and whether the expenditure of funds is still justified. Upon such review the Board shall terminate any program or project which it determines does not further the proposes of the Act.

As specified in the Act, the Order provides that no advertising or promotion shall make any reference to provate brand names of cattle, beef, or beef products in order to avoid discrimination. The Board, represents all interests in the industry and therefore must be fair to all segments and elememts of the cattle industry. Prohibition of the use of false or unwarranted claims on behalf of cattle, beef, or beef products or false or unwarranted statements with respect to the attributes or uses of competing products is also necessary for proper administration of the Order.

The record shows that an ample and stable supply of beef for consumers is clearly in the public interest. Maintenance and expansion of existing markets and the development of new markets, both at home and abroad, are essential if the cattle industry is to be healthy enough to supply the needs of consumers. Therefore, the Order provides the necessary authorizations for research designed to accomplish this objective. The Board is authorized to undertake production research, marketing research, product development, and other research designed to improve efficiency throughout the production and marketing chain from the earliest stages of production up to the time the product reaches the consumer. The results of such research and other factual information developed or discovered thereby should be made available to both producers and consumers to the greatest extent practicable.

The Board may either perform research within its own organization, or it may contract for such work with public and private research and development agencies which are capable of performing the work needed.

(d) *State beef councils.* Section 16 of the Act states that nothing in the Act shall be construed to preempt or interfere with the workings of any beef board, beef council, or other beef promotion entity organized and operating within and by authority of any of the several States. The stated purpose of the Act is to enable the development of an effective and continuous program of research, consumer information, producer information, and promotion designed to strengthen the cattle and beef industry's position in the market place. A new national program of research and information activities for cattle and beef may be aided through a good working relationship with existing programs operating in many States.

Record evidence shows that 28 States have programs similar to the national program which would be established under this Order. Also, there is a national effort of this nature, currently operating on a voluntary basis, conducted by industry interests through the National Livestock and Meat Board. A portion of the funds collected in connection with several of the State programs presently is being forwarded to the National Livestock and Meat Board. State programs differ widely in several characteristics, but especially with respect to the basis for the assessments, the assessment rate, the method of collection, the mandate under which the State programs operate, the availability of refunds, and the composition of the administrative body of the program.

Many of the representatives of State research and promotion organizations currently being funded through check-off funds that testified at the hearing stated that the implementation of this Order would probably curtail their present source of funding, because cattle producers would resist paying an assessment for both a State and a national program. Thus, the record reflects that the continued existence of some State programs would depend on this Order to provide the funding necessary to continue their work. The record further shows that in some aspects the national program authorized under the Act can achieve its obligations through participation in a coordinated, cooperative effort with many of the State programs currently operating for the benefit of beef producers. Such an approach could provide continuity with ongoing State programs, minimize duplication of effort, encourage uniformity and assure that the total effort was directed toward common goals. However, the Board will be expected to continually analyze the results of cooperative relationships with the various State organizations and select the most effective approach in each case.

Record evidence supports the inclusion of a provision in the Order which permits the Beef Board, upon approval by the Department, to annually allocate to qualified State beef promotion entities either (1) up to ten percent of net assessments paid by producers in a State, or (2) up to an amount equal to the State beef promotion entity's collections for the 12 months preceding approval of the Order. It is recognized that in the future, when taking into consideration rising beef prices and other factors, the maximum allocation allowed for all States under the up to ten percent of net assessments provision would represent a larger amount than the maximum figure authorized based on the State beef promotion entity's collections for the 12 months preceding the approval of this Order. However, it is anticipated that initially the amount based on the State's

past collections, may return more funds to many States than the percentage formula. This phenomenon is expected to result in the eventual transition to the use of the percentage formula for the funding of eligible State programs. This will allow those States which fund their current programs at proportionately higher levels to adjust their expenditures to the amount available, while providing for uniform treatment of all State promotion entities. It was suggested in hearing testimony that instead of basing an allocation on the amount collected by a State beef promotion entity during the 12 months preceding the approval of the Order, that the allocation should be based on the amount collected over a longer period, such as three years, because most States would be experiencing a decline in revenue in the 12-month period preceding the referendum due to declining cattle sales. Although it is recognized that some States may feel that the most recent 12-month period is not an objective base for the calculation, it does not appear that any other period would be more representative for all States concerned when considering such factors as recently increased assessment rates, and increased or decreased participation of producers in the various State programs. For example, a State that recently began a promotion program, or recently increased the level of assessment, would probably be disadvantaged under a formula based on the average of the previous three years' collections. On the other hand, the record shows that the previous 12 months of operation will most likely provide the best estimate of the current level of funding for most State programs. Whether this is influenced by a recent increase or decrease in funding for a particular State, it appears that it should most closely coincide with the current level of expenditures. Accordingly, this suggestion is not adopted.

The Order does not guarantee that the Beef Board will automatically provide funds to State beef promotion entities simply upon request. The State Beef promotion entities must first meet specified qualifications to receive such funds. Further, the Beef Board's authorization is to allocate up to a maximum level as provided in the formula, however a lesser amount can and should be allocated if the recipient fails to demonstrate to the Board that the full amount is warranted. To qualify to receive funds from the Beef Board a State beef promotion entity shall be organized pursuant to legislative authority within the State or be organized pursuant to State charter, and must demonstrate an ability to provide research, information, education, or promotion consistent with the Act and this Order. Since funding more than one beef promotion entity in a State would not contribute to a coordinated national program, in no event shall more than one such entity qualify within a State. Further, as required by the Act, each State promotion entity shall submit to the Board specific plans or projects together with a budget or budgets showing the estimated costs of the plans or projects. A State beef promotion entity shall keep accurate records of its activities, make periodic reports to the Board of activities carried out, and shall account for funds received and expended as required by the Act. In addition such plans or projects shall address the defined objectives of the Board in that funds will be used for advertising, promotion, education, producer information, consumer information, research, market development, and studies with respect to the production, sale, processing, distribution, marketing, or utilization of cattle, beef, and beef products and the creation of new beef products. It is not anticipated that funds allocated to a State beef promotion entity would be used to fund programs which are national in scope and would be more appropriately funded in a direct manner by the Beef Board, through, for example, contributions to the National Livestock and Meat Board. However, State programs must be consistent with the goals and objectives of the national program.

To provide for continuity during the first year of the program's existence, the Beef Board may estimate the net assessments from a State to calculate the appropriate level of funding for a qualifying State beef promotion entity under the percentage formula of allocation. In making this estimate of net assessments, the Beef Board may rely upon the data reflecting the cash receipts from the the sale of cattle by producers in each State, published by the U.S. Department of Agriculture. The data will probably provide the best available estimate of total assessments obtained from each State. The proposal contained an explanation of how net assessments from a State are to be determined. Since it has been determined that this matter can be more appropriately addresed in the rules and regulations, and since the record does not establish that such a provision is essential to the Order, the proposed language has not been adopted.

(e) *Assessments, refunds, expenses.* The Act provides that funding for activities under this Order shall be acquired from assessments levied on producers of cattle, which will be collected from producer-sellers by producer-buyers and slaughterers, and that the slaughterers shall remit the assessments to the Board. As required by the Act assessments levied on producers are based on the value of cattle at the time of sale, normally the sale price. In order for each producer to pay his fair share of the assessment on cattle which change ownership two or more times, a value-added procedure has been employed. Although the producer is obligated to pay the total assessment due on the animal at the time of sale, based on its current value, including all amounts collected from previous owners, the producer would actually be contributing from his or her own pocket only an amount based on the value he or she added to the animal.

Although the rate of assessment will be established by the Board, subject to the approval by the Department, it is limited by statute to a maximum of one-half of one percent of the value of the cattle sold. The Order establishes that the initial assessment level shall not exceed a rate of two-tenths of one percent of the value of cattle sold. An assessment level of two-tenths of one percent should provide sufficient funds to carryout the policy and purposes of the Act, initially, while not creating an undue burden on producers. Section 1260.162 of the Order further specifies that the initial level may not be exceeded during the first two years assessments are collected.

Proponents indicated that the maximum authorized assessment level of five-tenths of one percent could be used effectively in an ongoing program. In considering the long-term needs of the beef industry for beef research and information activities, at some point in the future increasing the assessment to the maximum level of five-tenths of one percent may be justified. However, it is determined that the two-tenths of one percent level will be sufficient to initiate a number of beneficial programs for the industry but will not result in such a large deduction as to unduly burden beef producers. Since initially the Board will be involved in organizing and in seeking proposals for the types of projects to initiate, it is determined that the funding generated by the maximum initial assessment level, $40 million annually, will be sufficient.

The cattle industry includes numerous classes of producers, such as dairy cattle producers, purebred or breeding stock producers, cow-calf producers, stocker-growers, traders, and cattle

feeders. Each represents a segment of the industry or a stage in the production process. Most cattle slaughtered are owned by at least two producers prior to slaughter and some change hands several times.

The evidence indicates that for all producers to pay their fair share of assesssments, each producer should pay an assessment based on the increase in value of cattle under his or her ownership. More specifically, this value-added concept operates as follows:

Assuming an assessment rate of two-tenths of one percent of the sale price, a cow-calf producer who sells a calf to a sticker-grower for $400 would be assessed two-tenths of one percent of the sales price or $.80. The cow-calf producer could pay the stocker-grower $.80 or the stocker-grower could deduct $.80 from the $400 sales price and pay the cow-calf producer $399.20 rather than $400. In either case, the cow-calf producer would have paid an assessment based on the value added to the animal during his ownership. If the stocker-grower sold the animal to a cattle feeder for $600, the stocker-grower would either pay the feeder two-tenths of one percent of the sales price ($1.20) or the feeder would deduct $1.20 from the $600 sales price and pay the stocker-grower $598.80. In either case, the $1.20 assessment would include the $.80 from the $400 increase in value during the cow-calf producer's period of ownership (collected from the cow-calf producer when the stocker-grower purchased the animal) and $.40 from the $200 increase in value during the stocker-grower's period of ownership. If the feeder later sells the animal to a slaughterer for $800, the feeder would pay to the slaughterer or the slaughterer would deduct from the feeder's check, two-tenths of one percent of the sale value or $1.60. The slaughterer would forward the $1.60 to the Beef Board. Each of the producers would have contributed a fair share of the total assessment based on the value added during that producer's period of ownership—$.80 from the cow-calf producer and $.40 each from the stocker-grower and the feeder.

Most cattle increase in value rather consistently from birth to slaughter. Thus, under the value-added system of assessments, the final assessment remitted to the Beef Board by the slaughter will exceed any previous assessment for the bulk of all cattle slaughtered. However, if the value of cattle involved in a sales transaction declines during a producer's period of ownership, the total assessment paid by previous producers would not be passed on in the normal manner established under this value added procedure. A decline in value could be due to factors such as death, weight loss, or decline in market price.

Section 8(e) of the Act authorizes the Board to collect assesments not passed along in the normal manner. Detailed procedures for the collection of assessments under such circumstances should be provided in the rules and regulations.

If no sales transaction occurs at the point of slaughter or other transfer, the Act requires that a fair commercial market value shall be attributed to the cattle for purposes of determining the assessment. For example, packer-owned cattle from feedlots will be assessed at the point of slaughter based on market prices of similar cattle. Cattle traded for other cattle or for merchandise also would be assessed on commercial market value. Similarly, cattle which are custom slaughtered for home consumption would be assigned a fair commercial market value for assessment purposes. However, cattle slaughtered for an individual's own home consumption are exempt from the assessment if the individual has owned the animal from birth to slaughter as provided for in the Act.

Recognizing that many cattle achieve a much higher value for breeding or other purposes such as milk production, than their slaughter value and that the full assessment associated with this high value would not automatically be passed along under the value-added system because the animal's value would be decreasing from its peak productive value, Congress provided in the Act that the Beef Board could exempt from or vary the assessments on transactions involving such animals.

The record indicates that while many breeding animals would be sold for a significant premium in the marketplace, other breeding animals would be sold at or near the commercial market value for slaughter cattle. In addition, the hearing record indicates that exempting from assessment certain breeding animals, until sold for slaughter, which have a significantly higher value for breeding or milk production purposes than for slaughter, appears to be the most workable method of assessing such cattle. Accordingly, the Order specifies that the Beef Board shall, to the extent practical, exempt such cattle from assessment until sold for slaughter.

The proponents proposed that breeding cattle and cattle kept for commercial milk production be exempted from assessment when these animals were validly designated as breeding cattle or as cattle to be used for commercial milk production by the producer-seller. Since the proponents failed to adequately support the need for an workability of such language, the proposal is not adopted. Since the hearing record suggests that the detailed language proposed by proponents concerning the valid designation of breeding animals by producer-sellers could create inequities, it is determined that such detail would be more appropriately delineated in the rules and regulations.

By placing procedures of this type in the rules and regulations instead of the Order, another referendum would not be required if such a provision included in the Order proved to be unworkable. In the unlikely event that no exemption procedure proves to be workable, the evidence suggests that the assessment for "high valued" cattle could be based on the fair commercial market value at the time of sale. (The fair commercial market value in the slaughter market chain would likely be the slaughter value for mature breeding animals. However, for younger animals, especially when grain prices are relatively low, the highest commercial market value in the slaughter market chain could be the value as a feeder animal rather than as a slaughter animal).

The Act requires slaughterers to collect and remit assessments to the Board, including assessments due at time of slaughter on cattle of their own production, in accordance with regulations. Assessments due on cattle slaughtered must be paid to the Board regardless of whether the assessment has been collected from the producer. Similarly, throughout the production chain, collection or deduction of assessments with transfer of ownership will be self-enforcing, since a producer-buyer who fails to collect the assessment on a transaction will be obligated to pay, as a producer-seller, an assessment based on the total commercial value of the transaction rather than only the assessment based on the value added during his ownership. In all transactions in which a slaughterer or producer-buyer has collected or deducted an assessment from a producer, the producer-seller should be given a receipt showing the amount deducted or collected.

The proponents proposed that the Beef Board be authorized to prescribe a standard statement for bills of sale and invoices which would make such documents conclusive evidence that the assessments have been paid.

Proponents testified that under such a provision, a statement could be prescribed for bills of sale at a public market which could read as follows: "In

this transaction two-tenths of one percent was taken into consideration for the Beef Board assessment." They further explain that all buyers and sellers would be advised of this procedure by public notices. This procedure would reduce the paperwork requirement resulting from the assessment for public markets since a statement that the assessment was taken into consideration would be stamped on the bill of sale and the amount of the assessment would not be calculated. If this procedure were used the producer-seller could present the bill of sale or, if appropriate, bills of sale which included the appropriate stamped wording, to the Beef Board when requesting a refund and the Beef Board would determine the amount of refund due. However, while theoretically the selling price might be reduced by an amount equivalent to the assessment, due to all potential buyers knowing that they would be liable for the full assessment when selling the animal at a later date, a question would arise as to whether the producer actually paid the assessment. Further, the producer would not be aware of the amount of assessment for which he or she is responsible. In order to have producer support it is necessary for the producer to be clearly aware of his or her involvement. Therefore, the proposed provision is not included in the Order.

The Beef Board is authorized to set aside funds in an operating reserve and to budget for such a reserve. The record reflects that such a reserve will be necessary to counter fluctuations in assessment income due to varying refund levels and to provide the Board with flexibility to meet unexpected obligations or to take advantage of opportunities that arise on short notice or were not anticipated in the annual budget. Without available funds the Board might be forced to pass up projects of great benefit to beef producers or be forced to seek to borrow funds. The amount of the reserve fund will be determined by the Board with the approval of the Department. However, since it is not the intent of the Act to allow the Board to amass substantial cash holdings it has been determined that the reserve fund should not exceed approximately the average yearly collections of the Board. This limitation should permit flexibility in establishing a reasonable reserve without diverting excessive amounts of money from use in more productive areas.

Refunds. The Order provides for refunds of assessments paid as required by the Act. Any producer against whose cattle any assessment is made and collected from him or her shall have the right to receive a refund of such assessment from the Beef Board. However, no producer may receive a refund of the portion of the assessment which he collected from other producers. More specifically, each producer is entitled to a refund only for the amount of assessment he or she paid on the increased value of the cattle during his or her period of ownership of such cattle. Regulations will be issued controlling the method of obtaining a refund, including a requirement of proof that the producer-seller paid the assessment for which the refund is claimed. The Act requires that a refund request must be submitted within 60 days after the end of the month in which the transaction occurred.

The proponents proposed that refunds shall be made within 60 days after the submission of proof satisfactory to the Board that the producer-seller paid the assessment for which refund is sought. Such a provision could very well result in the passage of more than 60 days from the Board's receipt of the refund demand before payment, if for any reason the Board was not satisfied with the proof submitted in support of the refund within such period of time. However, the result would be inconsistent with the requirements of the Act which state that all refunds shall be made by the Board within 60 days after demand is received therefor. Further, the record fails to demonstrate that more than 60 days should ever be necessary for the Board to collect and evaluate evidence in support of a refund demand. It is expected that specific regulations will be issued setting forth the refund procedures and notifying potential refunders what evidence they must submit to support their refund demands. It is not intended that an undue amount of paperwork be required for a producer to receive a refund, but only that sufficient information be provided to ascertain that the producer paid the assessment and is entitled to the refund requested. Accordingly, the proposed language is not adopted. Finally, although, it is stated in the Order that such refund shall be made by the Board within a maximum of 60 days after receipt of demand, the Board should strive to provide such refunds as promptly as possible.

No producer shall claim or receive a refund of any portion of an assessment which he collected from other producers. The refund provision is essential to the voluntary concept of the Order, in that no producer is forced to financially support the Order if he does not favor it. The Board should make refund forms readily available to producers. Each producer who asks for a refund must individually request it, i.e., he must submit the refund request. Marketing agencies, cooperatives, brokers, or others shall not be allowed to request refunds on behalf of producers. The success of a national check-off program in an industry as large and diverse as the beef industry will depend on an efficient and effective collection procedure. Critical to this is the establishment of a reasonable number of collection points that are made responsible for remitting the assessments to the Board. Since it is impractical to expect that the Board could collect the assessments from each producer individually, and since each slaughterer has the opportunity to deduct the assessment at the time the cattle are purchased for slaughter, the Order provides that failure of a slaughterer to collect an assessment does not relieve the slaughterer of his obligation to remit an amount equal to the assessment to the Board. Since only producers are eligible to receive refunds under the Act, a slaughterer would not be eligible to receive a refund of such payments. But a slaughterer who is also a producer and has paid the assessment as a producer is entitled to request and receive a refund of such assessment.

Influencing government action. In accordance with the Act, the Order states that no funds collected by the Board shall be used for influencing government policy except for recommending amendments to the Order. The adopted provision in the Order clarifies the proposal submitted by the proponents to specifically state that the only exception to the prohibition against influencing governmental policy is that the Board may propose amendments to the Order.

Expenses. Board expenses shall be paid from assessments received and any other funds which accrue to the Board. The Board may incur expenses which are found by the Department to be reasonable for the functioning and maintenance of the Board and necessary for the Board to exercise its powers and duties.

The Act provides that included in the expenses of the Board will be a reimbursement to the Department for such expenses, excluding salaries, as the Department determines were incurred by the Government in preparation of an original Order and for the conduct of the referendum.

The Act also requires that, after the Order becomes effective, all administrative costs, including salaries, which the Department determines were

incurred by the Government under the Order shall be reimbursed by the Beef Board. Therefore, it is determined that this reimbursement would begin when the Order becomes effective upon publication in the Federal Register following approval of the Order by a majority of those producers voting in a referendum.

(f) *Records and reports.* The Act provides that slaughterers shall keep records and make such reports as necessary for the effectuation, administration, and enforcement of the Act, the Order, and regulations issued pursuant to the Order. The Order provides that regulations may be established requiring slaughterers to keep necessary books and records and to report to the Board periodically as the Board determines is necessary. However, it is intended that requirements imposed upon slaughterers will be held to the minimum necessary for effective administration of the program. Details on the information needed in records and reports and the frequency and timing of reports are to be established by the Board, with the approval of the Department, and shown in the regulations.

All books and records required under the regulations must be made available by slaughterers as required by the Act, for inspection by representatives of the Board or the Department as necessary to verify reports on assessments made and forwarded to the Board. These records are to be retained at least 2 years beyond the marketing year of their applicability. Such a time period is necessary to permit the completion of authorized audits, investigations, or other actions that may be necessary in administering and enforcing the provisons of the Order and the Act.

Representatives of the Board or the Department, while acting in their official capacities, on occasion may have access to records and accounts of slaughterers, which may reveal trade secrets. The Act requires that the confidential nature of such business records be protected. Therefore, the Order provides that information obtained from books, records, and reports required of slaughterers, and information about refunds made to producers, shall be kept confidential by the Board, employees of the Board, and of the Department of Agriculture. Since work involving information of this type would be performed by the staff of the Board, it is anticipated that only in unusual situations would it be necessary for Board members to be provided with such information. Also, any such information which becomes available to contracting parties should be kept confidential by officers and employees of such parties. However, the only exception to the confidentiality requirements is the Secretary's authority to permit disclosure of such information in connection with a suit or administrative hearing relevant to the Order brought at the direction, or upon the request, of the Secretary of Agriculture, or to which any officer of the United States is a party.

It is recognized in the Act that some information about the program may be of interest and benefit to the general public. Accordingly, the Order does not prohibit (1) the issuance of general statements concerning the number of persons subject to the Order or statistical data collected which do not identify the information furnished by any person; (2) the publication, as approved by the Secretary of general statements relating to refunds made by the Beef Board which do not identify any person to whom a refund is made; or (3) the publication by direction of the Secretary of the name of any person violating the Order, together with a statement of the provisions of the Order violated.

(g) *Other terms and conditions.* The Order provides that any patents, copyrights, inventions, or publications developed through the use of funds collected under this Order shall become the property of the Government as represented by the Beef Board, and shall, along with any income from such items, inure to the benefit of the cattle industry. Hearing testimony indicated that this provision may make it difficult for some institutions to contract with the Board because, it may conflict with their procedures in cases of shared funding, i.e., when the Board does not provide 100% of the funding. The witnesses did not, however, develop satisfactorily the extent of these potential conflicts or establish that already existing programs of this nature have experienced such problems on a significant level. Accordingly, this Order provision has been adopted as proposed.

The record shows a need for several other miscellaneous terms and conditions as shown in §§ 1260.182 through 1260.187 of the Order. Each section sets forth certain rights, obligations, privileges, or procedures which are necessary and appropriate for the effective operation of the Order. These provisions are incidental to, and not inconsistent with, the terms and conditions of the Act, are necessary to effectuate the other provisions of the Order, and are supported by the record evidence.

Rulings on Briefs, Proposed Findings, and Conclusions

At the close of the hearing, the Administrative Law Judge fixed July 31, 1979, as the final date for interested parties to file briefs, proposed findings, and conclusions based on the evidence received at the hearing. In response to a request for additional time from the National Farmers Union, the Administrative Law Judge extended the time for filing proposed findings of fact and briefs until August 15, 1979. Briefs were filed on behalf of the following parties: Merlyn Lokensgard, President, Minnesota Farm Bureau Federation, St. Paul, Minnesota; Wayne James, Executive Director, Southwestern Meat Packers Association, Arlington, Texas; Michael R. McLeod and O. R. Armstrong, Attorneys, Beeferendum Advisory Group, Washington, D.C.; Reist R. Mummau, Farmville, Virginia; Robert J. Mullins, Assistant Director of Legislative Services, National Farmers Union, Washington, D.C.; and Richard Ekstrum, President, South Dakota Farm Bureau.

Several of the briefs reiterated points made by witnesses at the hearing. The points in each of the briefs were carefully considered along with the record evidence received at the hearing in making the findings and conclusions set forth herein. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions as set forth herein, requests to make such findings or reach such conclusions are denied.

General Findings

On the basis of the evidence presented at the hearing and the record thereof, it is found that:

1. The Beef Research and Information Order and all of the terms and conditions thereof as hereinafter set forth will tend to effectuate the declared policy of the Act; and

2. The following terms and conditions of the Order are recommended as a detailed means of carrying out the declared policy of the Act with respect to the development of effective, continuous, and coordinated programs of research, consumer information, producer information, and promotion for cattle, beef, and beef products with adequate financing through assessments on the sales of cattle.

Recommended Beef Research and Information Order

The following national Research and Information Order is recommended as the appropriate means by which the

foregoing conclusions may be carried out.

A new subpart is added to Part 1260 of Title 7, CFR as follows:

PART 1260—BEEF RESEARCH AND INFORMATION

Subpart A—Beef Research and Information Order

Definitions

Beef Board

Research, Information, Education, and Promotion

State Beef Councils

Expenses and Assessments

Reports, Books, and Records

Certification of Organizations

Miscellaneous

Authority: Beef Research and Information Act (7 U.S.C. 2901 *et seq.*).

Definitions

§ 1260.101 Secretary.

"Secretary" means the Secretary of Agriculture or any other officer or employee of the Department of Agriculture to whom there has heretofore been delegated, or to whom there may hereafter be delegated the authority to act in his stead.

§ 1260.102 Department.

"Department" means the United States Department of Agriculture, the Secretary of Agriculture or any officer or employee of the Department of Agriculture who has been delegated or may be delegated the authority to act for the Department of Agriculture on a particular matter under this subpart.

§ 1260.103 Act.

"Act" means the Beef Research and Information Act (7 U.S.C. 2901 *et seq.*) and any amendments thereto.

§ 1260.104 Person.

"Person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

§ 1260.105 Cattle.

"Cattle" means live domesticated bovine quadrapeds.

§ 1260.106 Beef.

"Beef" means the flesh of cattle.

§ 1260.107 Beef products.

"Beef products" means products produced in whole or in part from cattle, exclusive of milk and products made therefrom.

§ 1260.108 Fiscal period.

"Fiscal period" is the 12-month budgetary period and means the USDA's fiscal year unless the Beef Board, with the approval of the Department, selects some other 12-month period.

§ 1260.109 Beef Board or Board.

"Beef Board" or "Board" or other designatory term adopted by such Board means the administrative body established pursuant to § 1260.136.

§ 1260.110 Executive Committee.

"Executive Committee" means those members of the Beef Board, eleven in number, who are elected by the Board to administer the provisions of the subpart under the supervision of the Board and within the policies determined by the Board.

§ 1260.111 Producer.

"Producer" means any person who owns or acquires ownership of cattle other than one who acquires cattle solely for the purpose of slaughter: *Provided*, That a person shall not be considered to be a producer if his or her only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee.

§ 1260.112 Producer-buyer.

"Producer-buyer" means a producer who buys cattle.

§ 1260.113 Producer-seller.

"Producer-seller" means a producer who sells cattle.

§ 1260.114 Slaughterer.

"Slaughterer" means any person who slaughters cattle including cattle of his or her own production.

§ 1260.115 United States.

"United States" means the 50 States of the United States of America and the District of Columbia.

§ 1260.116 Marketing.

"Marketing" means the sale or any other disposition of cattle, beef or beef products in any channel of commerce.

§ 1260.117 Commerce.

"Commerce" means interstate, foreign, or intrastate commerce.

§ 1260.118 Producer organization or eligible organization.

"Producer organization" or "eligible organization" means any organization which has been certified pursuant to this subpart.

§ 1260.119 Producer information.

"Producer information" means facts, data, and other information that will assist producers in making decisions that lead to increased efficiency, lower cost of production, a stable supply of cattle, and the development of new markets.

§ 1260.120 Consumer information.

"Consumer information" means facts, data, and other information that will assist consumers and other persons in making evaluations and decisions regarding the purchasing, preparation, and utilization of beef and beef products.

§ 1260.121 Promotion.

"Promotion" means any action, including paid advertising, to advance the image or desirability of beef and beef products.

§ 1260.122 Research.

"Research" means any type of systematic study or investigation, and/or the evaluation of any study or investigation, to advance the desirability, marketability, production, or quality of cattle, beef, and beef products.

§ 1260.123 Transaction.

"Transaction" means any transfer of ownership of cattle or beef through a sale, trade, or other means of exchange.

§ 1260.124 Contracting party.

"Contracting party" means any person, public or private, with which the Beef Board may enter into a contract or agreement pursuant to § 1260.146(e).

§ 1260.125 Marketing year.

"Marketing year" means the calendar year ending on December 31 or any other consecutive 12-month period designated by the Board, with the approval of the Department.

§ 1260.126 Part and subpart.

"Part" means 7 CFR Part 1260, containing rules, regulations, orders, supplemental orders, and similar matters concerning the Beef Research and Information Act. "Subpart" refers to any portion or segment of this part.

Beef Board

§ 1260.136 Establishment and membership.

There is hereby established a Beef Board composed of not more than 68 producers, each of whom shall have an alternate, appointed by the Secretary from nominations submitted by eligible producer organizations certified pursuant to § 1260.176 or by producers in a manner to be prescribed under § 1260.138(a). The Secretary shall appoint to the Board up to five non-voting consumer advisors deemed to be knowledgeable in nutrition and food. The Board may recommend to the Secretary qualified individuals to serve as consumer advisors.

§ 1260.137 Term of office.

The members of the Board and their alternates shall serve for terms of three years, except members of the initial Board shall serve, proportionately, for terms of one, two and three years. Each member and alternate member shall continue to serve until his or her successor is selected and has accepted. No member or alternate member shall serve more than six consecutive years: *Provided,* That those members and alternate members serving the initial terms of one or two years are eligible to serve two additional consecutive terms.

§ 1260.138 Nominations.

All nominations to the Beef Board authorized under § 1260.136 shall be made in the following manner:

(a) Within 90 days of the announcement of approval of this Order, or a longer period if so prescribed by the Department, at least two nominations shall be obtained by the Department for each member and each alternate member to be appointed for each geographic area as specified in paragraph (d) of this section. Nominations shall be submitted by eligible organizations certified pursuant to § 1260.176: *Provided,* That if there is no eligible organization certified for a geographic area, or if the Department determines that a substantial number of producers are not members of, or their interests are not represented by, any such eligible organization, then nomination shall be submitted in a manner authorized by the Department;

(b) After the establishment of the initial Board, the Department shall announce within the affected geographic area or areas that a vacancy does or will exist. Nominations for Board members and alternates shall be submitted by eligible organizations to the Department not less than 60 days prior to the expiration of the terms of the members and alternates whose terms are expiring;

(c) Where there is more than one eligible organization within a geographic area, a caucus shall be held for the purpose of jointly nominating at least two producers for each member and for each alternate member to be appointed. If agreement on a joint nomination is not reached, or if any organization does not agree with the nomination, such eligible organization(s) may submit to the Department nomination(s) for each appointment to be made.

(d) For purposes of nominating members and their alternates to the Board, the United States shall be divided into geographic areas. The number of Board members from each geographic area shall reflect as nearly as practicable the number of cattle in each geographic area proportionate to the total number of cattle in the United States. *Provided, however,* That each designated geographic area shall be entitled to at least one member on the Board and one alternate member;

(e) The initial geographic areas and the number of members and alternates on the Beef Board from each area shall be: Alabama 1, Arizona 1, Arkansas 1, California 2, Colorado 2, Florida 1, Georgia 1, Idaho 1, Illinois 1, Indiana 1, Iowa 3, Kansas 3, Kentucky 1, Louisiana 1, Michigan 1, Minnesota 2, Mississippi 1, Missouri 3, Montana 1, Nebraska 3, New Mexico 1, New York 1, North Carolina 1, North Dakota 1, Ohio 1, Oklahoma 2, Oregon 1, Pennsylvania 1, South Carolina 1, South Dakota 2, Tennessee 1, Texas 6, Utah 1, Virginia 1, West Virginia 1, Wisconsin 2, Wyoming 1. Additional geographic areas, comprised of combined States, shall be: Nevada-Hawaii 1, Washington-Alaska 1, Maryland-Delaware-New Jersey-District of Columbia 1, Maine-Vermont-New Hampshire-Massachusetts-Rhode Island-Connecticut 1; and

(f) After the establishment of the Board, the geographic areas and apportionment of members and alternates provided for in paragraphs (d) and (e) of this section shall be reviewed periodically, and at least every five years. The Board shall redefine the geographic areas and reapportion the membership of the Board, with approval of the Department, if it finds that the existing geographic areas are not properly represented in proportion to cattle numbers: *Provided,* That each such area shall be represented by at least one Board member.

§ 1260.139 Appointment of members and alternates.

From the nominations made pursuant to §§ 1260.136 and 1260.138, the Secretary shall appoint the members of the Board and an alternate for each member on the basis of the representation provided for in §§ 1260.136, 1260.137, and 1260.138.

§ 1260.140 Acceptance.

Any nominee appointed to be a member or an alternate member of the Board shall notify the Department of his or her acceptance in writing.

§ 1260.141 Vacancies.

To fill any vacancies occasioned by the death, removal, or resignation of any member or alternate member of the Board, a successor for the unexpired term of such member or alternate member of the Board shall be nominated and appointed in a manner specified in §§ 1260.136, 1260.137, 1260.138, 1260.139 and 1260.140, except that replacement of a Board member or alternate with an unexpired term of less than six months is not necessary.

§ 1260.142 Alternate members.

An alternate member of the Board, during the absence of the member for whom he or she is the alternate, shall

act in the place and stead of such member at Board meetings and perform such other duties as assigned. In the event of the death, removal, or resignation of a member, the alternate shall act for him or her at Board meetings until a successor for such member is appointed.

§ 1260.143 Procedure.

(a) A majority of the members of the Board, including alternates acting for members of the Board, shall constitute a quorum, and any action of the Board shall require the concurring votes of at least a majority of those present and voting. At assembled meetings all votes shall be cast in person.

(b) For matters which do not require deliberation and the exchange of views, and in matters of an emergency nature when there is not enough time to call an assembled meeting of the Board, the Board may also take action upon the concurring votes of a majority of its members by mail, telegraph, or telephone, but any such telephone vote shall be confirmed promptly in writing.

§ 1260.144 Compensation and reimbursement.

The members of the Board, alternates, and advisors to the Board shall be reimbursed for necessary and reasonable expenses incurred by them in the performance of their duties under this subpart. Members of the Board and alternates shall serve without compensation.

§ 1260.145 Powers of the Board.

The Board shall have the following powers: (a) To supervise the administration of this subpart in accordance with its terms and conditions; (b) To make rules and regulations to effectuate the terms and provisions of this subpart; (c) To receive, investigate, and report to the Department complaints of violations of the provisions of this subpart; and (d) To recommend to the Department amendments to this subpart.

§ 1260.146 Duties of the Board.

The Board shall have the following duties:

(a) To meet and organize and to select from among its members a chairman and such other officers as may be necessary, to select committees and subcommittees of Board members, and to adopt such rules for the conduct of its business as it may deem advisable. The Board also may establish advisory groups of persons other than Board members;

(b) To appoint from its members an Executive Committee, consisting of 11 members, and to delegate to the Committee authority to employ a staff and administer the terms and provisions of this subpart under the direction of the Beef Board and within the policies determined by the Board. For purposes of determining the membership of the Executive Committee, the Board shall, with approval of the Department, divide the United States into six, seven or eight regions on the basis of cattle population, each region to consist of one or more whole States. The members of the Beef Board from each region shall select one nominee for the Executive Committee from among themselves, and such nominee shall become a member of the Executive Committee upon confirmation by the Beef Board. The remaining members of the Executive Committee shall be selected by the Beef Board to serve as at-large members: *Provided,* That there shall be no more than two members of the Executive Committee from a region at any time. Initially, there shall be eight geographic regions with each providing one member to the Executive Committee. In addition, there will be three at-large members of the Executive Committee. The Beef Board shall periodically review the geographic regions and may increase or decrease the number of regions within the limits set forth above;

(c) To develop and submit to the Department plans or projects, together with the Board's recommendations with respect to the approval thereof;

(d) To prepare and submit to the Department for its approval budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable costs of each research, information, advertising, promotion, and developmental plan or project. The Board shall also submit informational copies of such budgets to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition and Forestry;

(e) To enter into contracts or agreements, with the approval of the Department, with appropriate contracting parties, including State beef promotion entities, for the development and carrying out of the projects and programs of the Board as authorized by § 1260.151, and for the payment of the costs thereof with funds accruing pursuant to the administration of this subpart: *Provided,* That nothing in this subpart shall preclude the Board from conducting projects or activities on its own to effectuate the intent and purposes of the Act. Any such contract or agreement shall also provide that such contracting parties shall develop and submit to the Board a plan or project, together with a budget or budgets which shall show the estimated cost to be incurred for such plan or project, and that any such plan or project shall become effective upon approval by the Department. Any such contract or agreement shall also require the contracting parties to keep accurate records of all of their activities with respect to the contract or agreements, to make periodic reports to the Board of activities carried out, to identify funds received from the Beef Board and not to use these funds to finance unrelated activities of the contracting party or its affiliated organizations, to account for funds received and expended, and to report to the Department or Board as required. The Beef Board shall endeavor to provide the widest possible dissemination among producers of any supply, demand or other economic information or analysis if such information or analysis is developed pursuant to such contracts;

(f) To maintain books and records and prepare and submit reports from time to time to the Department as it may prescribe and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(g) To periodically prepare and make public and to make available to producers reports of activities carried out and at least each fiscal period to make public an accounting for funds received and expended;

(h) To cause its books to be audited by a certified public accountant at least once each fiscal period and at such other times as the Department may request and to submit a copy of each audit to the Department;

(i) To give the Department the same notice of meetings of the Board as is given to members in order that Department representatives may attend such meetings; and

(j) To submit to the Department such information pertaining to this subpart as it may request.

Research, Information, Education, and Promotion

§ 1260.151 Research, information, education, and promotion.

(a) The Beef Board shall in the manner prescribed in § 1260.146 provide for:

(1) The establishment, issuance, effectuation, and administration of plans or projects for advertising, promotion, education, producer information, and consumer information with respect to the use of cattle, beef, and beef products and for the disbursement of necessary funds for such purposes;

(2) The establishment and carrying on of research, market development projects, and studies with respect to the production, sale, processing, distribution, marketing, or utilization of cattle, beef, and beef products and the creation of new beef products, in accordance with section 7(b) of the Act, to the end that the production, marketing, and utilization of cattle, beef, or beef products may be encouraged, expanded, improved, or made more efficient and/or acceptable and the data collected by such activities may be disseminated, and for the disbursement of necessary funds for such purposes; and

(3) The development and expansion of foreign markets and uses for cattle, beef, or beef products.

(b) Each program or project authorized under paragraph (a) of this section shall be periodically evaluated by the Board to insure that each plan or project contributes to an effective and coordinated program of research, information, education, and promotion. If the Board finds that a program or project does not further the purposes of the Act, then the Board shall terminate such program or project.

(c) No reference to a private brand or trade name shall be made unless the Department determines that such reference will not result in undue discrimination against the cattle, beef, or beef products of other persons in the United States. No such advertising, consumer education, or sales promotion programs shall make use of false or misleading claims in behalf of cattle, beef, or beef products, or false or misleading statements with respect to quality, value, or use of any competing product.

State Beef Councils

§ 1260.156 Continuity.

The Beef Board shall, with the approval of the Department, annually allocate for use during the next fiscal year by a State beef council, beef board, or other beef promotion entity which makes a request for such funds and which meets the qualifications specified in § 1260.157, (a) up to 10 percent of net assessments from a State, or (b) up to an amount equal to a State beef promotion entity's collections for the 12 months preceding approval of this order: *Provided*, That during the first year the Beef Board may estimate the net assessments from a State for the purpose of funding State proposals under (a) of this section.

§ 1260.157 Qualifications.

(a) A request from a State beef promotion entity for funds pursuant to § 1260.156 shall include specific plans or projects and estimated costs of activities for which the funds will be used, in accordance with the requirements of § 1260.146(e) and § 1260.151. The contract or agreement for such funds shall provide that the State promotion entity shall keep accurate records of all activities with respect to the contract or agreement and make periodic reports to the Board of activities carried out, an accounting for funds received and expended, and such other reports as the Board or the Department may require.

(b) To qualify for the receipt of funds pursuant to § 1260.156, a State beef board, beef council, or other beef promotion entity shall (1) be organized pursuant to legislative authority within the State or be organized by State charter, (2) have goals and purposes complementary to the goals and purposes of the Act, and (3) demonstrate ability to provide research, information, education, or promotion consistent with the Act and this subpart. In no event shall more than one such entity qualify within a State. If more than one entity applies for qualification within a State, the Beef Board shall choose, subject to the approval of the Department, the one most qualified to fulfill the purposes of the Act and this subpart.

Expenses and Assessments

§ 1260.161 Expenses.

(a) The Board is authorized to incur such expenses as the Department finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from assessments received pursuant to § 1260.162 and other funds collected by the Board.

(b) The Board shall reimburse the Department, from producer assessments, for all the expenses and expenditures, excluding salaries, which were incurred by the Government in the preparation of an original order and the conduct of the referendum considering its approval.

(c) The Board shall reimburse the Department, from producer assessments, for administrative costs, including salaries, which are incurred by the Government with respect to this subpart.

§ 1260.162 Assessments.

(a) Each producer-seller, upon sale or transfer of ownership of any cattle, except as provided below, shall pay to the producer-buyer or slaughterer thereof, pursuant to regulations, and such producer-buyer or slaughterer shall collect from the producer-seller an assessment based on the value of the cattle involved in the transaction as follows:

(1) The Beef Board, with the approval of the Department, shall set the amount of assessment, not to exceed five-tenths of 1 percent of the sale price;

(2) The assessment rate for the first two years shall not exceed two-tenths of 1 percent of the sale price;

(3) In the event that no sales transaction occurs at the point of slaughter or other transfer, a fair commercial market value shall be attributed to the cattle for the purpose of determining the assessment;

(4) Cattle slaughtered for his own home consumption for a producer who has been the sole owner of such cattle shall not be subject to assessments provided in this subpart;

(5) In order that assessments be based on commercial market value for beef, the Beef Board shall pursuant to procedures established in the regulations, insofar as practical, exempt until sold for slaughter the collection of assessments on breeding cattle and on cattle used for commercial milk production having a breeding or production value significantly above the commercial market value in the slaughter market chain.

(6) Each slaughterer shall remit assessment(s) collected to the Beef Board at such times and in such manner as prescribed by regulations, including any assessment(s) due at time of slaughter on cattle of his own production;

(7) Failure of the slaughterer to collect the assessment on each animal shall not relieve the slaughterer of his obligation to remit the assessment to the Beef Board as required in this subpart;

(8) The Beef Board may collect directly from any producer any assessment(s) which he collected under the provisions of this subpart or which were otherwise due which were not passed along in the manner set forth in this subpart due to the loss in value of the cattle or due to the export of the cattle or due to other reasons.

(b) The Beef Board may accumulate a reasonable reserve of approximately the average yearly collections to maintain continuity of programs and fulfill other obligations and expenses.

(c) The Secretary may maintain a suit in the several district courts of the United States against any person subject to the Order for the collection of any assessment due pursuant to this section.

§ 1260.163 Producer refunds.

Any producer-seller on whose cattle an assessment is made and collected from him under the authority of the Act shall have the right to demand and receive from the Beef Board a refund of such assessment upon submission of proof satisfactory to the Board that the producer-seller paid the assessment for which refund is sought. Any such demand shall be made by such producer-seller in accordance with regulations and on a form prescribed by the Board and approved by the Department. Such demands shall be made within 60 days after the end of the month in which the transaction occurred upon which the refund is based. Refund shall be made by the Board within 60 days after the demand is received therefor: *Provided,* That no producer shall claim or receive a refund of any portion of an assessment which he collected from other producers.

§ 1260.164 Influencing governmental action.

No funds collected by the Board under this subpart or any other funds collected by the Board shall in any manner be used for the purpose of influencing governmental policy or action except as provided in § 1260.185.

Reports, Books, and Records

§ 1260.171 Reports.

Each slaughterer subject to this subpart shall be required to report to the Beef Board periodically such information as may be required by regulations.

§ 1260.172 Books and records.

Each slaughterer shall maintain and make available for inspection by the Beef Board and the Department such books and records as are necessary to carry out the provisions of this subpart and the regulations issued thereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the marketing year of their applicability.

§ 1260.173 Confidential treatment.

All information obtained from the books, records, or reports required to be maintained under §§ 1260.171 and 1260.172 and all information obtained by the Beef Board pertaining to producer refunds made pursuant to § 1260.163 shall be kept confidential by the Beef Board, all employees of the Beef Board, all employees of the Department, and all officers and employees of contracting parties, and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary, or to which any officer of the United States is a party, and involving this subpart: *Provided, however,* That nothing in this subpart shall be deemed to prohibit (a) the issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person, (b) the publication of general statements relating to refunds made by the Beef Board during any specific period, which statements do not identify any person to whom refunds are made, or (c) the publication by direction of the Secretary of the name of any person violating this subpart, together with a statement of the particular provisions violated by such person.

Certification of Organizations

§ 1260.176 Certification of organizations.

(a) Any organization that represents producers within a geographic area designated pursuant to § 1260.138 may request the Department to certify its eligibility to represent cattle producers to participate in nominating members and alternate members to represent such geographic area on the Beef Board. Such eligibility shall be based, in addition to other available information, upon a factual report submitted by the organization which shall contain information deemed relevant and specified by the Department for the making of such determination, including but not limited to the following:

(1) Geographic area covered by the organization's active membership;

(2) Nature and size of the organization's active, annual dues-paying membership, proportion of total of such active membership accounted for by producers of cattle, and the volume of cattle produced by the organization's active membership in each such State or applicable geographic area(s);

(3) The extent to which the cattle producer membership of such organization is represented in setting the organization's policies;

(4) Evidence of stability and permanency of the organization;

(5) Sources from which the organization's operating funds are derived;

(6) Functions of the organization; and

(7) The organization's ability and willingness to further the aims and objectives of the Act.

(b) The primary consideration in determining the eligibility of an organization shall be whether its producer membership consists of a substantial number of producers who produce a substantial volume of cattle in the geographic area subject to the provisions of this subpart.

(c) The Department shall certify any organization which it finds to be eligible under this section and its determination shall be final. After the original certification of organizations, the Department will require recertification at least once ever five years, and may require recertification at any time.

Miscellaneous

§ 1260.181 Patents, copyrights, inventions, and publications.

Any patents, copyrights, inventions, or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the U.S. Government as represented by the Beef Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications, inure to the benefit of the cattle industry. Upon termination of this subpart § 1260.183 applies to determine disposition of all such property.

§ 1260.182 Suspension and termination.

(a) The Secretary shall, whenever he finds that this subpart or any provisions thereof obstructs or does not tend to effectuate the declared policy of the Act, terminate or suspend the operation of this subpart or such provision.

(b) The Secretary may conduct a referendum at any time, and shall hold a referendum on request of 10 percent or more of the number of cattle producers voting in the referendum approving this subpart, to determine whether cattle producers favor the termination or suspension of this subpart, and the Secretary shall suspend or terminate such subpart six months after he determines that its suspension or termination is approved or favored by a majority of the producers of cattle voting in such referendum who, during a representative period determined by the Department, have been engaged in the production of cattle and who produced more than 50 percent of the volume of the cattle produced by the cattle producers voting in the referendum.

§ 1260.183 Proceedings after terminations.

(a) Upon the termination of this subpart, the Beef Board shall recommend not more than five of its members to serve as trustees for the purpose of liquidating the affairs of the Beef Board. Such persons, upon

designation by the Department, shall become trustees of all of the funds and property then in the possession or under control of the Board, including claims for any funds unpaid or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall: (1) continue in such capacity until discharged by the Department; (2) carry out the obligations of the Beef Board under any contracts or agreements entered into by it pursuant to § 1260.146(e); (3) from time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such person as the Department may direct; and (4) upon the direction of the Department, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligations imposed upon the trustees.

(d) Any residual funds or property not required to defray the necessary expenses of liquidation shall be turned over to the Department to be utilized, to the extent practicable, in the interest of continuing one or more of the beef research or information programs hitherto authorized.

§ 1260.184 Effect of termination or amendment.

Unless otherwise expressly provided by the Department, the termination of this subpart or of any regulation issued pursuant thereto, or the issuance of any amendments to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this subpart or any regulation issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or

(c) Affect or impair any right or remedies of the United States, or of any person, with respect to any such violation.

§ 1260.185 Amendments

Amendments to this subpart may be proposed, from time to time, by the Board or by an organization certified pursuant to Section 15 of the Act, or by any interested person affected by the provisions of the Act, including the Secretary.

§ 1260.186 Personal liability.

No member, alternate member, or employee of the Beef Board shall be held personally responsible, either individually or jointly with others, in any way whatsoever to any person for errors in judgment, mistakes, or other acts, either of commission or omission, of such member, alternate, or employee except for acts of dishonesty or willful misconduct.

§ 1260.187 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

Copies of this recommended decision may be procured from Ralph L. Tapp, Livestock, Poultry, Grain, and Seed Division, Agricultural Marketing Service, Room 2610, South Building, United States Department of Agriculture, Washington, D.C. 20250, or may be inspected at the Office of the Hearing Clerk, Room 1077, South Building, United States Department of Agriculture, Washington, D.C. 20250.

This action was determined significant under the Department's criteria for implementing Executive Order 12044. The impact analysis is incorporated in this document.

Signed at Washington, D.C., on September 18, 1979.

William T. Manley,

Deputy Administrator, Marketing Program Operations.

[FR Doc. 79-29406 Filed 9-20-79; 8:45 am]

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Friday
September 21, 1979

Part VIII

Department of Justice

Attorney General

Nondiscrimination Based on Handicap in Federally Assisted Programs

DEPARTMENT OF JUSTICE

Attorney General

28 CFR Part 42

[A. G. Order No. 853-79]

Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: This subpart establishes procedures and policies to assure nondiscrimination based on handicap in programs and activities receiving Federal financial assistance from the Department of Justice. The subpart is designed to comply with section 504 of the rehabilitation Act of 1973 as amended, and Executive Order 11914, which relate to nondiscrimination against handicapped persons in programs receiving Federal financial assistance.

DATES: Comments are invited from the public and other Federal agencies. Comments should be received by the Department of Justice by December 21, 1979. Comments received after that date will be considered, if feasible, before the proposed rule is prepared in final form. Comments received in response to this notice will be available for public inspection in the Public Reading Room (Room 1266), Department of Justice, Constitution Avenue and 10th Street, N.W., Washington, D.C., between 9:00 a.m. and 5:30 p.m. Monday through Friday, except on Federal holidays, until the proposed rule is published in final form.

Public meeting: November 27, 1979—9:00 a.m. to 5:00 p.m. Requests to speak postmarked by November 9, 1979.

ADDRESS: Comments should be submitted in writing to:

(1) Comments relating to Law Enforcement Assistance Administration programs should be sent to: Office of General Counsel, Law Enforcement Assistance Administration, 633 Indiana Avenue, N.W., Washington, D.C. 20531.

(2) Comments relating to other Department of Justice Federal assistance programs should be sent to: Robert N. Dempsey, Federal Enforcement Section, Civil Rights Division, Department of Justice, Constitution Avenue and 10th Street, N.W., Washington, D.C. 20530

PUBLIC MEETING LOCATION: Auditorium, Department of Health, Education and Welfare, North Building, 330 Independence Ave., S.W., Washington, D.C. 20201.

FOR FURTHER INFORMATION CONTACT: For further information or for tape copies of this proposed rule contact the following:

(1) For LEAA programs: Thomas J. Madden, General Counsel, Law Enforcement Assistance Administration. Telephone: 202/376-3691.

(2) For other Department of Justice Federal assistance programs: Rober N. Dempsey, Federal Enforcement Section, Civil Rights Division, Telephone: (202) 633-2374.

SUPPLEMENTARY INFORMATION:

Public Meeting

The Department will hold a public meeting on this subpart on November 27, 1979 from 9:00 a.m. to 5:00 p.m. in the Auditorium of the Department of Health, Education and Welfare, North Building, 330 Independence Avenue, S.W., Washington, D.C. 20201. The facility scheduled for the public meeting is accessible to wheelchairs, and interpreters for the deaf will be provided.

All interested persons are invited to attend the meeting. Those interested in speaking at the meeting should have their requests postmarked by November 9, 1979, stating name, whether they represent an organization, telephone number during the day, any particular area of interest and the length of time required (to a maximum of 10 minutes).

Persons making an oral statement are encouraged to submit the substance of their remarks in written form either at the hearing or by mail prior to the hearing.

The meeting will be informal and will be conducted by an official representing the Department. Requests to speak at the meeting and written statements for oral presentation at the meeting should be submitted to: Robert N. Dempsey, Federal Enforcement Section, Civil Reights Division, Department of Justice, Constitution Avenue and 10th Street, N.W., Washington, D.C. 20530.

I. Background

The Department of Justice proposes to add Subpart G to Part 42 of the Department regulations to implement section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended by section 111(a) of the Rehabilitation Act Amendments of 1974 (29 U.S.C. 706) (Supp. V 1975), and section 120(a) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955 (1978) (hereafter the Rehabilitation Act Amendments of 1978), with regard to Federal financial assistance administered by this Department. Section 504 provides that "no otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicapped, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The subpart is intended to insure that the Department's Federally assisted programs and activities are operated without discrimination on the basis of handicap. The subpart defines and forbids acts of discrimination against qualified handicapped persons in employment and in the operation of programs and activities receiving assistance from the Department. As employers, recipients would be required to make accommodation to the handicaps of applicants and employees unless the accommodation either would materially impair the safe and efficient operation of the program receiving Federal financial assistance, or would otherwise not be reasonable. As providers of services, recipients would be required to make programs operated in existing facilities readily accessible to and usable by handicapped persons, to insure that new facilities are constructed to be readily accessible to and usable by handicapped persons and to operate their programs in a manner which provides for the full and nondiscriminatory participation of the eligible handicapped.

This proposed rulemaking is, in part, in response to Executive Order 11914 (41 FR 17871, April 28, 1976), which (1) delegates the coordination of government-wide enforcement of section 504 to the Department of Health, Education and Welfare and (2) directs each Federal agency providing Federal financial assistance to "issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education and Welfare." The Secretary has established such standards and procedures, effective January 13, 1978 (43 FR 2132, January 13, 1978). The Department's proposed rulemaking is consistent with the HEW enforcement standards and procedures.

Executive Order 12044, 43 FR 12661 (March 24, 1978), whose objective is to improve government regulations, requires that "regulations shall be as simple and clear as possible." Following that standard, the subpart departs, where appropriate, from the language (but not the substance) of the HEW section 504 rule where clarification appears desirable to give further

guidance to applicants and recipients of Federal financial assistance administered by the Department. Executive Order 12044 also requires Executive branch agencies to prepare Regulatory Analyses for regulations that may have major economic consequences. The Order defines major economic consequences as (1) an annual effect on the economy of $100 million dollars or more (for example, compliance costs that exceed $100 million dollars) or a stricter requirement if the agency head so determines, or (2) major increases in costs or prices for individual industries, levels of government or geographic regions.

The anticipated costs of recipients of Department of Justice financial assistance appear to be concentrated in three areas: (1) the removal of architectural barriers; (2) the elimination of communications barriers; (3) reasonable modification of employment practices to accommodate the qualified handicapped as employees of recipients. The Department has not made a final determination whether a regulatory analysis is required or advisable and anticipates that the comments received on the proposed subpart will assist in making that determination.

There is a present indication that the compliance costs of the subpart will not result in major economic consequences within the meaning of Executive Order 12044.

Architectural Barriers. Structural changes for program accessiblity are necessary primarily for persons with severe mobility-related handicaps—persons who cannot climb stairs or step over curbs, cannot open heavy doors, cannot travel without wheelchairs, and the like. Almost all these persons use wheelchairs or walkers. With respect to compliance costs associated with structural modifications, it is crucial to keep the following compliance standards in mind. First, under the requirements of the subpart, structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible to handicapped persons. For existing facilities, the key requirement is not a barrier free environment, but program accessibility (see illustrative examples set forth under "C. Program Accessibility" below). Second, not every existing facility or part of a facility in a program receiving Federal financial assistance from the Department must be accessible to the handicapped. The subpart requires only that, when viewed in its entirety, the program is readily accessible to handicapped persons. Where physical access to buildings for the handicapped requires the construction of ramps, HEW has found "after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost." 42 FR 22690 (May 4, 1977). Whether the simple installation of ramps and appropriate restroom facilities in buildings will suffice, depends upon the design of the facility, the nature and location of the program, and the availability of nonstructural modifications to provide program accessibility.

As to new construction, the available evidence indicates that compliance costs directly attributable to this subpart may be modest for the following reasons.

First, all 50 states have architectural barriers statutes covering publicly funded buildings (where most DOJ recipients are located), while at least 22 states additionally cover privately funded public buildings. The statutes of all 50 states cover new construction, while 35 states also cover renovations and alterations.[1] Thus, since the issue is whether the proposed Department regulations will themselves cause a "major" economic impact, it is noteworthy that much of what is required by this subpart in terms of removing architectural barriers for the handicapped already is required by existing state law. Hence, to this extent the incremental Department impact on recipients would appear to be significantly reduced.

Second, this subpart requires that design or construction of new facilities, or alteration of existing facilities, conform with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI). (§ 42.522(b)). At least twenty-seven states have already adopted the ANSI standards in their codes.[2]

Third, the Architectural Barriers Act of 1968, as amended, 42 U.S.C.A., 4151 *et seq.*, requires that all buildings and facilities "financed in whole or in part by a grant or a loan made by the United States after August 12, 1968 are to be accessible to and usable by the physically handicapped," 42 U.S.C.A. 4151, "if the building or facility is subject to standards for design, construction or alteration issued under the law authorizing the grant or loan." 41 CFR 101–19.602(a)(3) (General Services Administration requlations). LEAA has construed the Architectural Barriers Act as covering all its grants for correctional institutions and facilities. See 42 U.S.C. 3750–3750d.

Finally, applicants for Department assistance may have previously received Federal financial assistance from other Federal agencies thereby requiring their compliance with section 504 independent of this subpart. For example, LEAA provides financial assistance to institutions of higher learning which also receive funds from HEW. Also, a substantial portion of Federal revenue sharing money has been annually allocated by State and local units of government to public safety (*i.e.*, police and fire protection). The revenue sharing funds are provided under the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C.A. 1221 *et seq.*, which was amended in 1976 to make section 504 of the Rehabilitation Act applicable to programs funded with revenue sharing monies received by State and local units of government after January 1, 1977.

Communications Barriers. The most obvious example of eliminating communications barriers would be the installation of teletypewrtiers (TTY's) in law enforcement and fire protection agencies to enable the deaf and others with language impairments to communicate effectively with such agencies. The TTY is a telecommunications device that adapts the telephone to the needs of persons with hearing impairments. The cost of a TTY is relatively modest and even less so where a TTY is shared by a number of public agencies hooked up to a central TTY number.

Employment. The subpart prohibits discrimination in employment against the handicapped by recipients of Department financial assistance and, further, requires that recipients make "reasonable accommodation" to the handicaps of otherwise qualified applicants or incumbent employees. A reasonable accommodation in a given employment situation depends upon many variables involving the recipient, the job and the handicapped employee. The Department, like its recipients, will have to deal with this issue on a case-by-case basis. However, HEW's economic impact statement on the compliance costs of section 504 for its recipients concluded that "our analysis strongly suggests that in the large majority of cases enforcement of reasonable accommodation will not result in any significant cost increase for employers." 41 FR 20332 (May 17, 1976).

[1] *Amicus*, pp. 46–47 July/August 1978, National Center for Law and the Handicapped.

[2] *Amicus, Id.*

There is nothing to suggest a different result for employers functioning in programs receiving financial assistance from the Department of Justice.

Those persons interested in commenting on the Department's proposed rulemaking may wish to consider the issues raised and resolved in the HEW rulemaking process (see HEW's Notice of Intent to Issue Proposed rules, 41 FR 20296 (May 17, 1976), Notice of Proposed Rulemaking, 41 FR 29548 (July 16, 1976) and Final Rule, 42 FR 22676 (May 4, 1977) and 45 CFR § 84.1 (1978)).

Those Department programs covered by section 504 are set forth in Appendix A to the subpart.

II. Discussion of the Proposed Rule

A. General Provisions

The proposed subpart prohibits discrimination on the basis of handicap in any program, activity or facility receiving Federal financial assistance (§ 42.501). Section 504 protects not only the ultimate beneficiaries of Federal assistance statutes (*e.g.*, students, prisoners, general public) as identified in the Federal grant statutes directly or by inference, but also nonbeneficiary participants (*e.g.*, employees working in the program receiving Federal financial assistance where a primary objective of the Federal assistance does not include providing employment opportunities). The subpart would apply to all Federal assistance programs administered by the Department and would require all recipients of such assistance to comply with the requirements of the subpart (§ 42.502). The subpart would not only apply to grants, contracts and cooperative agreements entered into after the effective date of the subpart, but would also apply to any Federal financial assistance previously extended which continues at the time the subpart becomes effective.

The subpart sets forth a variety of illustrative examples to identify conduct which is unlawfully discriminatory and affirmative requirements to maintain Federally assisted programs free of unlawful discrimination (§ 42.503). Prohibited conduct includes arbitrary acts of exclusion or other invidious discrimination (§ 42.503(b)(1)(i)), refusal to provide specialized assistance to the qualified handicapped (§ 42.503(b)(1)(ii)), refusal to permit the qualified handicapped to participate in a Federal assistance program through the provision of services (*e.g.*, excluding the qualified handicapped as members of planning or advisory bodies (§ 42.503(b)(1)(iv)). The subpart also includes a prohibition against permitting the participation in a Federal assistance program of any agency, organization or person which discriminates against the handicapped beneficiaries of the program (§ 42.503(b)(1)(v)). A recipient may not discriminate against the handicapped in its non-Federally funded programs if such action would discriminate against handicapped beneficiaries and participants in the recipient's Federally supported programs. (§ 42.503(b)(5)). Further, no program conducted in a facility provided with Federal aid can discriminate on the basis of handicap (§ 42.503(b)(6)).

The primary thrust of these illustrative examples is to emphasize the Federal policy that handicapped qualified beneficiaries and participants (*e.g.*, employees) in Federally assisted programs are to be treated no differently than nonhandicapped beneficiaries and participants where such different treatment would materially impair the handicapped persons' ability to receive benefits or participate on an equal footing with the nonhandicapped. Thus "a recipient may not, directly or through contractual, licensing, or other arrangements, utilize criteria or methods of administration that either purposely or in effect discriminate on the basis of handicap" (§ 42.503(b)(3)). This provision gives notice that, ordinarily, a recipient's obligation under section 504 is broader than the mere avoidance of direct discrimination and encompasses an obligation to assure that second-tier recipients (*i.e.*, organizations receiving Federal financial assistance through the primary recipient) also adhere to the requirements of section 504. Accordingly, State Planning Agencies (SPA's) established under Part B of Title I of the Omnibus Crime Control and Safe Streets Act have a continuing obligation to insure that second-tier recipients receiving Federal financial assistance through the SPA's comply with section 504 and this subpart.

While recipients are encouraged to provide communications to their applicants, employees and beneficiaries in the appropriate medium (*e.g.*, Braille, tapes), the subpart requires only that communications be effectively conveyed to those with impaired vision and hearing (§ 42.503(e)).

The subpart requires an applicant for Federal financial assistance to execute an assurance of compliance with section 504 and this subpart and leaves it to the appropriate Department official to determine the extent to which a recipient may be required to obtain similar assurance from second-tier recipients and monitor their fidelity to the assurances (§ 42.504(a)–(c)). Under certain circumstances it may be necessary to obtain assurances not only from second-tier recipients but also from vendors of services participating in a program receiving Federal financial assistance where such services affect the ultimate beneficiaries (*e.g.*, community-based facilities operating under Federal assistance contracts to provide services to beneficiaries).

Assurances from state or local recipient government agencies shall extend to other agencies of the same governmental unit if the policies or practices of the other agency affect the Federal assistance program of the recipient agency (§ 42.504(b)). Assurances from institutions or facilities (*e.g.*, schools, prisons, court systems) shall cover the entire institution or facility (§ 42.504(c)). It is the responsibility of the applicant for Federal financial assistance to advise the Department at the time the assurance is signed whether the applicant intends any program or part of the institution or facility to be excepted from the assurance.

The subpart specifies the duration of the recipient's section 504 obligation (§ 42.504(d)) and notes that the failure to secure an assurance from a recipient does not impair the right of the Department to enforce the requirements of section 504 and this subpart because a recipient's obligation is statutory as well as contractual (§ 42.504(f)).

Each recipient is required to evaluate and modify any of its policies which does not meet the requirements of the subpart (§ 42.505(c)(1)), and each recipient employing a minimum of fifty employees and receiving Federal financial assistance from the Department of more than $25,000 must maintain a record of the self-evaluation (§ 42.505(c)(2)), designate an employee to coordinate compliance with the subpart (§ 42.505(d)), adopt grievance procedures which incorporate due process standards (§ 42.505(e)) and provide notice on a continuing basis that it does not discriminate on the basis of handicap (§ 42.505(f)). A recipient's obligation to comply with the subpart is not affected by inconsistent state and local laws or the limited employment opportunities for the handicapped in any occupation or profession (§ 42.505(h)).

B. Employment

HEW has construed section 504 to prohibit employment discrimination against the handicapped in all programs receiving Federal financial assistance. See HEW's section 504 regulations, 42 FR 22680 (May 4, 1977) and 45 CFR § 84.11 (1978). Several courts have construed section 504 to cover

employment discrimination. See, *e.g.*, *Duran* v. *City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977), *Drennon* v. *Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa. 1977), *Granet* v. *Los Angeles Community College District*, No. CV 78–1823–ALS (Kx) (C.D. Cal., Dec. 29, 1978) (order granting dismissal). To date, one court of appeals has taken a narrower view. In *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F. 2d 87 (4th Cir. 1978), *cert. den.*, 47 U.S.L.W. 3811 (June 18, 1979) the court held that employment discrimination is prohibited by section 504 only to the extent that it is prohibited by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (1970). Title VI, which prohibits racial discrimination in programs receiving Federal financial assistance, covers employment discrimination only (1) "where a primary objective of the Federal financial assistance is to provide employment" (section 604 of Title VI, 42 U.S.C. 2000–3 (1970)), or (2) when the recipient's employment discrimination results in discrimination against the ultimate beneficiaries of the program receiving Federal financial assistance (see *Caulfield* v. *Board of Education*, 583 F. 2d 605 (2d Cir. 1978)). Neither of these factors was present in *Trageser*.

The court's decision appears to rest solely on the language of section 120(a) of the Rehabilitation Act Amendments of 1978, which provides that "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available" to persons aggrieved because of section 504 violations. Accordingly, "in the absence of legislative history to the contrary," the court held that section 120(a) of the Rehabilitation Act Amendments of 1978 incorporated the limitations of Title VI coverage as to employment discrimination. *Id.*, at 89.

The court, in its analysis, did not focus on the remedial purpose of section 504 to provide broad protections to the handicapped. Nor did the court consider the legislative history of the Rehabilitation Act of 1973 and its subsequent amendments which reflect the continuing congressional concern for the employment problems of the handicapped. See, *e.g.*, S. Rep. No. 93–318, 93rd Cong., 1st Sess. 18–19, 70 (1973); S. Rep. No. 93–319, 93rd Cong., 1st Sess. 2, 8 (1973; H.R. Rep. No. 95–1149, 95th Cong., 2d Sess. 16, 18, 23–29, 34, 38, 42–43 (1978); S. Rep. No. 95–890, 95th Cong., 2d Sess. 8, 13, 20–21, 27, 36 (1978); H.R. Conf. Rep. No. 95–1780, 95th Cong., 2d Sess. 80–81, 94–96, 98, 102 (1978). Further, the legislative history of section 120(a), which apparently was not brought to the attention of the court, indicates that the provision was not intended to limit the scope of section 504 but was merely a legislative ratification of HEW's enforcement procedures under section 504.

Section 120(a) was originally a provision in S. 2600 (95th Cong., 2d Sess., Section 118(a) (1978)), the Senate version of the Rehabilitation Amendments of 1978 reported by the Senate Committee on Human Resources on May 15, 1978. The Committee stated, with respect to section 120(a):

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, *this amendment codifies existing practice as a specific statutory requirement.* (Sen. Rep. No. 95–890, 95th Cong., 2d Sess. 19 (1978)). (Emphasis added)

In view of the legislative history of the Rehabilitation Act of 1973 and its amendments, HEW's administrative construction, the remedial nature of section 504 and the legislative history of section 120(a), the Department believes that the employment practices of recipients of Federal financial assistance are covered by section 504 regardless of the purpose of the assistance, and the Department's proposed regulations reflect this view (§§ 42.510–42.513).

The subpart requires that recipients make a reasonable accommodation for the known physical or mental limitations of an otherwise qualified handicapped applicant or employee. If a qualified handicapped applicant or employee is denied a job or is terminated, the burden is on the employer to show "by a preponderance of the evidence, based on the individual assessment of the applicant or employee, that the accommodation would materially impair the safe and efficient operation of the program or would otherwise not be reasonable" (§ 42.511). The subpart suggests examples of reasonable accommodations (*e.g.*, job restructuring, modified work schedules, acquisition or modification of equipment or devices) (§ 42.511(b)) but recognizes that the determination of whether an accommodation is reasonable depends on a case-by-case analysis weighing factors such as the safe operation of the program, the nature and economic cost of the accommodation, the ability of the recipient to absorb the cost, the degree to which an accommodation can be made without materially impairing the operation of the program when viewed as a whole and the ability of the handicapped individual to perform the essential duties of the job with the accommodation (§ 42.511(c)(1)–(5)). The Department believes that the fact that an accommodation cost would be more than nominal does not by itself justify refusal of the accommodation.

The proposed rule places an obligation on the recipient to use job-related tests or other job-related selection criteria which screen out the fewest qualified handicapped persons and to "administer tests using procedures which accommodate the special problems of the handicapped to the fullest extent, consistent with the objectives of the test" (§ 42.512). Thus an oral test given to an applicant with a speech impediment would be improper where the essential functions of the job do not require clear speech. Where physical agility and visual acuity are necessary to perform the essential functions of a job, tests measuring those factors are permitted.

A recipient is prohibited from making pre-employment inquiry regarding an applicant's physical or mental handicaps except where the recipient is taking remedial or voluntary action under §§ 42.505(a) or (b) of this subpart, or affirmative action under section 503 of the Act. Under such circumstances certain safeguards (*e.g.*, confidentiality) must be maintained by the employer (§ 42.513(b)). Recipients may, of course, inquire about an applicant's ability to perform job-related functions. Accordingly, for example, questions regarding the ability to drive a car or shoot a gun, or to work steadily over long periods of time or in situations of emergency or stress, are proper questions for the job of police officer while questions as to whether the applicant has epilepsy or a heart condition are not permitted. However, an employer may ask whether the applicant can perform a particular job without endangering the applicant or others. Further, an application form containing a checklist of diseases and conditions is not permitted. An offer of a job contingent on passing a medical examination is permitted if the examinations are administered to all entering employees in a nondiscriminatory manner and the results are treated on a confidential basis (§§ 42.513(a) and (b)). An applicant can only be considered to have failed a medical examination if the applicant's medical condition, even with reasonable accommodation, would prevent the applicant from performing the essential functions of the job.

The ban on pre-employment inquiry regarding physical or mental handicaps

is required under the HEW standards for the development of Federal agency section 504 regulations. See 45 CFR 85.55, 43 FR 2132, 2138 (January 13, 1978). Its purpose is to insure that job decisions are not infected with non-job related considerations. For example, an applicant for the position of police officer completes the application process, the written examination, and the oral interview satisfactorily and is offered the position conditioned on the successful completion of a medical examination. The medical exam reveals that the applicant has a history of epilepsy. At this point the police department must make a decision whether the behavioral manifestations of the applicant's particular handicap would prevent the applicant from performing the essential functions of the job.

One virtue of this standard is that it makes it possible to determine whether the reason for not hiring a handicapped person is because of handicap. We also believe that legitimate purposes for obtaining such information are fulfilled as well at this later stage in the hiring process.

The misunderstanding of this section apparent in many comments makes it important to emphasize again that this provision does not prohibit taking job-related conditions into account in making employment decisions, nor does it preclude a recipient from obtaining information as to such conditions. It merely affects the time at which and the manner in which the information may be obtained. (HEW Final Rule, Implementation of Executive Order 11914, 43 FR 2132, 2135, January 13, 1978).

Of course, where pre-employment job-related questions disclose a disqualifying handicap, a decision not to employ may be made on that basis.

C. Program Accessibility

The subpart prohibits the exclusion of qualified handicapped persons from Federally assisted programs because a recipient's facilities are not readily accessible or usable. The recipient is not required to have each of its existing facilities or every part of a facility accessible to and usable by handicapped persons. The requirement is that the program, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Structural changes may be unnecessary where other less costly or burdensome methods may be equally effective. Whatever method is chosen to meet accessibility and usability requirements, it is essential that Federally assisted programs be offered to qualified handicapped persons in the most integrated setting appropriate to obtain the full benefits of the program (§ 42.521). (As used below, the term "program accessibility" incorporates program usability.)

Having stated the general standards for program accessibility, it remains to apply these standards to the categories of programs receiving assistance from the Department. The program categories which are set forth below are not exhaustive but only illustrative. Furthermore, the following specific applications of the subpart's general standards represent only preliminary views which are offered to elicit public comment to assist in assessing their consistency with the requirements of section 504. While program accessibility is a broader concept than the absence of architectural barriers, the following illustrations of program accessibility place emphasis on physical accessibility for two reasons. First, it is probably the area of greatest concern to recipients because of the perceived economic cost associated with the elimination of such barriers. Second, it has been HEW's experience that its recipients have erroneously exaggerated the actual cost of compliance due, in part, to a misunderstanding of the extent to which structural changes are required under section 504.[3] The following illustrations may serve to underscore the options available to recipients for moderating the costs of compliance while providing full program accessibility to the qualified handicapped.

1. *Law Enforcement Agencies.* These agencies include municipal police departments, sheriffs' offices, state highway patrols, regional law enforcement agencies, campus police and fire protection agencies. Such agencies, as recipients of Department assistance, must make the programs they operate readily accessible to the handicapped beneficiaries of the programs (*e.g.*, the general public the law enforcement agency is required to serve). With respect to members of the general public who require police assistance, the initial question regarding program accessibility is whether, for example, a wheelchair user requires physical accessibility to the law enforcement agency to obtain the benefits of the agency's programs. Frequently, requests for assistance are initiated by telephone, and law enforcement assistance is often provided away from the agency's facility. Some law enforcement operations ordinarily require citizens to appear at the law enforcement agency's facility (*e.g.*, obtained a gun license; viewing a line-up; examining physical evidence). However, with respect to wheelchair users or others having severe mobility-related handicaps, law enforcement agencies could accommodate the physical limitations of such persons by making home visits or visits to alternate accessible sites. Whether such special accommodations in all cases would enable those with severe mobility-related handicaps to participate effectively in the benefits of a law enforcement agency's programs would depend upon the nature of the benefit provided. While the subpart requires that services be provided in the most integrated setting appropriate, that standard has no apparent application where the service provided is essentially personal (one-on-one) rather than general (*e.g.*, educational programs).

2. *Detention and Correctional Agencies and Facilities.* These agencies include jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities. Where local or State policy prohibits the detention or incarceration of wheelchair users, no structural modification to detention or correctional facilities to accommodate wheelchair users is required. Where there is no such exclusionary policy, structural modifications may be unnecessary where alternate accessible facilities are available (*e.g.*, short term detention in the prisoner's home or at a medical facility). Where local policy precludes alternate detention facilities, a detention agency would be required to make structural modifications to accommodate detainees or prisoners in wheelchairs. In such circumstances, however, not every detention facility of the agency would have to become accessible. Only a sufficient number of detention cells need be accessible to wheelchair users as can be reasonably expected to be detained based on the agency's prior experience. A different problem arises, however, when accessibility requirements are imposed on small, independently operated community based facilities used, for example, for the placement of juveniles in a home setting. A metropolitan area may have a number of such homes. Should each such home receiving assistance from the Department be required to be accessible to the handicapped or should this subpart require only that a sufficient number of homes be accessible? How would this work in practice where a metropolitan area has ten such homes, only one of which is a recipient of Department assistance?

[3] *A Summary of Information On The Costs To All HEW Grantees of Achieving Program Accessibility Under Section 504 Of The Rehabilitation Act*, Office of the Secretary, Department of Health, Education and Welfare (July 11, 1979).

All detention and correctional agencies must provide accessibility for handicapped visitors (*e.g.*, accessible visiting rooms, restrooms) since the prisoner's right to receive visitors is an element of the program administered by the agencies. Where a facility's visitation area is inaccessible to the handicapped, a detention or correctional agency has the option to (a) house the prisoner in a facility which is accessible to handicapped visitors, (b) move the prisoner to an alternate, accessible area either within or outside the facility for visits from wheelchair users, (c) make structural modifications to make the visitation area accessible. It should be kept in mind that the benefit provided is the right to visit rather than the right to visit in any particular area.

Facilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility.

Correctional officials should take into account any handicaps which inmates may have in classifying them. In making housing and program assignments, such officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmate.

3. *Court Agencies.* These agencies include State and local court systems. Wheelchair users may participate in court trials as judges, jurors, plaintiffs, defendants, witnesses or be present as spectators. Full program accessibility is required for such participants.

Where a county has but one courtroom situated on the third floor of a county courthouse having no elevator, and where one of the participants in a trial is a wheelchair user, the court has the following options: (a) moving the court, for the duration of the trial, to accessible quarters in or outside of the courthouse; (b) moving the court permanently to existing accessible quarters; (c) making those structural modifications in the existing courtroom necessary to provide accessibility to the handicapped participant.

In a large court system, where there are numerous courtrooms, cases involving wheelchair users can be assigned to a courtroom which has been made accessible. There is no requirement that all courtrooms be made fully accessible, although it would appear that areas of all courtrooms set aside for the general public should be readily accessible to wheelchair users.

4. *Prosecution and Defense Agencies.* Prosecution agencies include State attorneys general and district, county and city attorneys. The programs administered by such agencies must be readily accessible to the handicapped. As with other programs assisted by the Department, such agencies need not make structural changes in the facilities where there are feasible options (*e.g.*, home visits, delivery of services at alternate accessible sites) for providing the full benefits of the program to handicapped beneficiaries.

New facilities and altered portions of existing facilities must be designed and constructed in such manner as to make them readily accessible to handicapped persons if groundbreaking begins after the effective date of this subpart (§ 42.522). It is not necessary that all cells or housing units in new detention and correctional facilities be constructed to accommodate handicapped detainees or inmates. Only a sufficient percentage of the cells or housing units need be accessible and usable by handicapped persons as can reasonably be expected to be incarcerated based on the history of the handicapped detainee or inmate population in the recipient's jurisdiction. If there is a local or State policy not to incarcerate wheelchair users in its institutions, this subpart would not require construction of prison cells accessible to wheelchair users. If, however, a sufficient number of cells or housing units is not available at any particular time to house all handicapped inmates or detainees, it would be a violation of this subpart to place a handicapped person in a cell which is not accessible to such person.

Of course, program accessibility means more than the removal of architectural barriers. This subpart also prohibits the discriminatory refusal to provide auxiliary aids (*e.g.*, readers for the blind, interpreters for the deaf) to the qualified handicapped (§ 42.523). The subpart, however, does not require the provision of attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature. Thus, while handicapped participants in trials may require appropriate auxiliary aids depending on the nature of the handicap, courts would not be required to provide such aids to participants for purposes unconnected with the trial proceedings. For example, where medically necessary, a defendant with a severe heart condition would have the right to have a qualified attendant provided by the court during his appearance in court but not at home. Further, a deaf defendant would have the right to have an interpreter provided by the court for his testimony, but would not have the right to have an interpreter provided for the preparation of that testimony.

D. Southeastern Community College v. Davis, 47 U.S.L.W. 4689 (June 11, 1979).

This subpart requires that (1) employers make reasonable accommodation to the handicaps of qualified handicapped applicants or employees, and that (2) programs be readily accessible to and usable by the qualified handicapped. These requirements must be read in the light of *Southeastern Community College* v. *Davis*, 47 U.S.L.W. 4689 (June 11, 1979) where the Supreme Court first considered the reach of section 504 of the Rehabilitation Act.

Davis held that section 504 did not require the petitioner college to make fundamental alterations to its registered nurses' training program in order to accommodate the severe hearing loss of respondent who had applied for admission to the program as a student. The Court held that the respondent failed to meet the legitimate and necessary physical requirements of the program, established by petitioner, and, hence, was not qualified to participate in the program. The Court noted that the section 504 regulations of the Department of Health, Education and Welfare (45 CFR § 84.3(k)(3) (1978)) reinforced the Court's conclusion that the respondent was not qualified to be a student in petitioner's training program. *Id.*, at 4691. Section 84.3(k)(3) of Title 45 provides that, as to postsecondary and vocational services, a "qualified handicapped person" means "a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's educational program or activity." An explanatory note to the HEW regulations defines "technical standards" as "all nonacademic admissions criteria * * * essential to participation in the program in question." 45 CFR pt. 84, App. A, at p. 405.

While the HEW section 504 regulations relating to postsecondary education require recipients to modify any academic requirements that might discriminate against the qualified handicap and, further, require the provision of educational "auxiliary aids" (*e.g.*, taped texts, interpreters, classroom equipment, readers in libraries) (45 CFR §§ 84.44(a), (d)) where

necessary to avoid discrimination, the Court noted these regulatory provisions did not require fundamental programmatic and personal service adjustments needed by the respondent.

First, the Court noted that petitioner's training program required "the ability to understand speech without reliance on lipreading" to ensure "patient safety during the clinical phase of the program," and that the respondent would require the "close individual attention by a nursing instructor" in order to participate effectively in clinical work. *Id.*, at 4691–92. However, the HEW regulation requiring auxiliary aids specifically excludes "attendants, individually prescribed devices, readers for personal use or other study, or other devices or services of a personal nature." 45 CFR 84.44(d)(2). Accordingly, in the Court's view, the law did not require the petitioner to provide respondent with an attendant nursing instructor since, in the context of a clinical program where each student would be required to deal individually with patients, this would have constituted "services of a personal nature." Hence the respondent could not qualify for the clinical segment of the training program and would be confined to taking academic courses only.

Second, academic "modifications" set forth in the HEW regulation include (but are not necessarily limited to):

> Changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted (45 CFR 84.44).

However, as the Court saw it, such required modifications did not encompass a curricular change which waived effective participation in a critical component of a degree program in registered nursing. "Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.*, at 4692

While rejecting respondent's gloss on section 504 and HEW's implementing regulations, the Court inferentially upheld the HEW regulation mandating modification in admission criteria for the qualified handicapped by noting that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." *Id.*, at 4693.

This subpart is consistent with the holding in *Davis* for it prohibits discrimination only against the qualified handicapped in the Department's Federally assisted programs and activities. Section 42.540(l) defines "qualified handicapped person" as follows:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to the Law Enforcement Education Program (LEEP), a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(3) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

The "technical standards" mentioned in section 42.540(1)(2), refer to all nonacademic admissions criteria that are essential to participation in the program in question.

The critical consideration in determining whether a handicapped person qualifies for participation in a program or activity receiving assistance from the Department, is whether a particular physical or mental ability is a necessary prerequisite for effective participation, or whether that ability is only said to be necessary because a recipient of Federal funds has not given adequate consideration to the ways in which stated requirements may be modified in order to permit participation by the handicapped.

E. Procedures

The Department has adopted the Title VI complaint and enforcement procedures for use in implementing section 504 except that LEAA will not be required to obtain the Attorney General's approval before the imposition of any sanctions against a recipient. this is consistent with LEAA's practice in enforcing the civil rights provisions of the Omnibus Crime Control and Safe Streets Act, as amended (42 U.S.C. 3766(c)).

In conformity with HEW's Policy Interpretations 1 and 2 (43 FR 18631 (May 1, 1978)), the 180 day time limitation for filing complaints (§ 42.107 of this Title) will not be applied to discriminatory acts which occurred prior to the effective date of this subpart (§ 42.530(d)). Further, the Department will investigate alleged discriminatory acts which occurred and ended prior to the effective date of this subpart where it is shown that the language of section 504 and HEW's interagency guidelines (43 FR 2132, January 13, 1978) implementing Executive Order 11914 (41 FR 17871, April 28, 1976) provided sufficient notice that the challenged activity was unlawful (§ 43.530(e)).

As to remedies, section 120(a) of the Rehabilitation Act Amendments of 1978 authorizes the payment of attorneys' fees to the prevailing party "in any action or proceeding to enforce or charge a violation of this title" [Title V]. Accordingly, it is clear that there is a private right of action under section 504. "The availability of attorneys' fees should assist in vindicating private rights of action * * * arising under section * * * 504." Sen. Rep. No. 95–890, 95th Cong., 2d Sess. (1978). *Cf., Cannon v. University of Chicago*, 47 U.S.L.W. 4549 (May 14, 1979). Nothing in this subpart requires the referral of a complaint against a recipient to the Department for action as a legal prerequisite for filing a law suit against the recipient.

The term "recipient" (§ 42.540 (e)) in LEAA programs includes State and local governments, State planning agencies, regional planning units, criminal justice coordinating councils, nonprofit institutions, and any other recipient of LEAA funds. However, Law Enforcement Education Program (LEEP) recipients are ultimate beneficiaries of assistance and, as such, are not recipients for the purposes of this regulation; for definitions of "ultimate beneficiary" and "recipient" see 42.540(e) and (i)). Recipients in Federal Bureau of Investigation programs include law enforcement agencies serving municipalities, counties or States. Recipients in Federal assistance programs of the National Institute of Corrections of the Bureau of Prisons include States, general units of local government, as well as public and private agencies, educational institutions and organizations and individuals involved in the development, implementation or operation of correctional programs and services. Recipients in Drug Enforcement Administration programs include State and local governments, officials of law enforcement agencies and forensic laboratories. Recipients in the programs of the antitrust Division include State Attorney General offices. A recipient not only includes a primary recipient (*i.e.*, a recipient which receives Federal financial assistance from a Federal agency directly) but also a second-tier recipient (*i.e.*, a recipient which receives Federal financial assistance through the primary recipient). The term recipient includes any vendor of services purchased or otherwise obtained by a recipient for beneficiaries of the recipient program. The term does not include the ultimate beneficiaries of the

program (*i.e.*, those for whom the Federal financial assistance is designed to benefit).

The term "Federal financial assistance" (§ 42.540(f)) includes any arrangement by which the Department provides or makes available funds, property, services, or anything of value by way of grants, contracts, loans or cooperative agreements including subgrants and contracts under grants. It does not include direct Federal procurement contracts. Procurement contracts are generally used whenever the principal purpose of the transaction is the acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government. Federal assistance contracts, grants, loans and cooperative agreements are used whenever the principal purpose of the transaction is to accomplish a public purpose authorized by Federal statute.

A "program" (§ 42.540(h)) includes any activity or facility receiving Federal financial assistance whether such benefits are provided directly with the aid of Federal financial assistance or with the aid of any non-Federal assistance required to meet the conditions of Federal financial assistance. The term "program" includes activities where payments are made by a Federal agency to ultimate beneficiaries on condition of their participation in a program conducted by a recipient.

Drug and alcohol abuse are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended. Accordingly, drug and alcohol abusers are handicapped under section 504 if their impairment substantially limits one of their major life activities (§ 42.540(k)(2)(i)(C)). "Drug abuse" in this subpart is defined as (1) the *use* of any drug or substance listed by the Department (21 CFR 1308.11) under authority of the Controlled Substances Act (21 U.S.C. 801), as a controlled substance unavailable for prescription, or (2) the *misuse* of any drug or substance listed by the Department (21 CFR 1308.12–15) as a controlled substance available for prescription. Examples of (1) include certain opiates and opiate derivatives (*e.g.*, heroin) and hallucinogenic substances (*e.g.*, marihuana, mescaline, peyote) and depressants (*e.g.*, mecloqualone). Examples of (2) include opium, coca leaves, methadone, amphetamines and barbiturates.

While Congress did not specifically address the problems of drug and alcohol abuse in enacting section 504, the committees which considered the Rehabilitation Act of 1973 were made aware of HEW's long-standing practice of treating drug and alcohol abusers as eligible for rehabilitation services under the Vocational Rehabilitation Act. Further, Congress has expressed its concern regarding discrimination against drug and alcohol abusers by providing that a person may not be denied Federal civilian employment or a Federal license solely on the ground of prior drug abuse (21 U.S.C. 1180(c)(1)) or prior alcohol abuse or alcoholism (42 U.S.C. 4561(c)(1)). These nondiscrimination provisions cover the employment practices of all Federal law enforcement agencies with the exception of the national security agencies (*i.e.*, the Federal Bureau of Investigation, the Central Intelligence Agency and the National Security Agency). Of course, section 504 covers present drug and alcohol use as well (*e.g.*, legal methadone maintenance). Recently, in section 122(a)(6) of the Rehabilitation Act Amendments of 1978, Congress specifically provided that, with respect to employment covered by section 504, the term handicapped individual "does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." Accordingly, this subpart does not require employers or program administrators to ignore drug and alcohol abuse in making determinations whether a handicapped individual is qualified for employment or other participation in a Federal assistance program. The subpart merely holds that handicapped persons, as well as others, should be assessed on the basis of their behavior. A recipient employer may consider for all applicants, including drug and alcohol abusers, past personnel records, absenteeism, disruptive, abusive or dangerous behavior, violations of the law or work rules, or unsatisfactory work performance.

This subpart does not preclude a recipient employer from rejecting a handicapped applicant for legitimate reasons other than his or her handicap. For example, a recipient employer is not required to hire as a law enforcement officer a drug abuser who continues to violate laws prohibiting the use, possession or sale of drugs if the rejection is based on the violation of the law and not the handicap.

In the case of past drug abuse, each case must be judged on its own merits. With respect to employment, employers may weigh the following:

(1) Patterns of use;

(2) How the drug was obtained;

(3) Kind of drug used;

(4) For each kind of drug used, the date started and the last date used;

(5) Circumstances at the start of drug use;

(6) Circumstances at the time of discontinuance of drug use;

(7) Nature of treatment and prognosis;

(8) Social behavior and attitude since discontinuance of drug use;

(9) History of previous rehabilitation efforts. Many of these same factors would be relevant in assessing the employability of those with records of past alcohol abuse.

Even though an applicant might exhibit no behavioral manifestations which would interfere with performing the essential functions of a job, employers could weigh as a relevant factor a competent medical prognosis (based on individual examination) of the likelihood of an applicant's developing alcohol or drug related behavioral characteristics which would interfere with the applicant's job

F. Request for Comments

The Department encourages the submission of comments on this subpart from all interested parties. The Department is concerned that the provisions be clear and provide for a workable program that will achieve the objectives of section 504. The Department is particularly interested in receiving comments that explain the operations of the numerous programs funded by LEAA through its block grant program and the various ways in which this subpart would affect such programs. Additionally, it would be helpful to have comments directed to the following matters.

1. Section 42.513 would prohibit a recipient from requiring applicants to take medical examinations prior to an offer of employment conditioned on the results of such examinations. This is consistent with the HEW section 504 regulations (45 CFR 84.14(a)). Under § 42.513, components of the criminal justice system requiring extensive background checks for prospective employees, would effectively have to complete such investigations prior to having the applicant undergo a medical examination. Does the provision's objective—*i.e.*, eliminating a nonobservable handicap as a factor in the initial hiring stage—outweigh the administrative costs involved?

2. The HEW section 504 regulations provide the following exemptions:

> If a recipient with fewer than fifteen employees that provides health, welfare, or other social service finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) [program accessibility] of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible. (45 CFR § 84.22(c)

Further, with respect to health, welfare and other social services, the HEW regulations do not require recipients with fewer than fifteen employees to provide auxiliary aids. (45 CFR 84.52(d)(1)). Are there "small providers" in the programs receiving assistance from the Department which would qualify for similar considerations?

3. HEW's Policy Interpretation No. 4 under its section 504 regulation, says the following:

> Carrying is an unacceptable method for achieving program accessibility for mobility impaired persons except in two cases. First, when program accessibility can be achieved only through structural changes, carrying may serve as an expedient until construction is completed. Second, carrying will be permitted in manifestly exceptional cases if carriers are formally instructed on the safest and least humiliating means of carrying and the service is provided in a reliable manner. (43 FR 36035 (August 14, 1978)).

Are there any "manifestly exceptional cases" in programs receiving financial assistance from the Department which would qualify for the application of Policy Interpretation No. 4?

4. What application does this subpart have to the service of the blind and deaf on State and local juries? Is this a policy question which is appropriately left to State and local jurisdictions to decide?

5. Are there any considerations besides those set forth in § 42.511(c) for determining reasonable accommodation in employing the handicapped? For example, is the monetary value of the assistance received from the Department a relevant consideration?

6. The subpart makes no specific reference to differential treatment of handicapped employees with respect to insurance benefits. What are the factors the Department should consider in determining the appropriate application of section 504 to this matter?

7. Section 42.505(h) states that the obligation to comply with the subpart "is not affected by any State or local law or requirement or limited employment opportunities for the handicapped in any occupation or profession." What impact does *Southeastern Community College* v. *Davis, supra,* have on this standard?

8. In addition to educational programs, employment, housing, and group activities, are there other applications of § 42.503(d)'s requirement that "recipients shall administer programs in the most integrated setting appropriate so that qualified handicapped persons receive the full benefits of the program"?

9. What are examples of auxiliary aids (§ 42.523) which are (a) required under the subpart, (b) not required under the subpart?

10. Does section 504 require correctional institutions to develop specialized programs for (1) physically disabled and infirm inmates, (2) inmates with severe emotional disturbances, and (3) retarded and developmentally disabled inmates, who require close medical, psychiatric, psychological, or habilitative supervision? What would be the required content of such programs?

11. Are the subpart's definitions for "drug abuse" and "alcohol abuse" (§ 42.540(n) and (o)) consistent with the requirements of section 504?

12. The Department would appreciate the submission of (a) cost studies regarding structural and nonstructural modifications to provide for the participation of the handicapped in programs relevant to this subpart, and (b) statistical studies showing the incidence of incarceration of the physically and mentally handicapped in institutions eligible for assistance from the Department.

Accordingly, Part 42 of Title 28 of CFR is proposed to be amended by adding a new Subpart G reading as set forth below.

Dated: September 14, 1979.

Benjamin R. Civiletti,

Attorney General.

PART 42—NONDISCRIMINATION; EQUAL EMPLOYMENT OPPORTUNITY; POLICIES AND PROCEDURES

* * * * *

Subpart G—Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914

General Provisions

Sec.

Employment

Program Accessibility

Procedures

Definitions

Authority: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794); Sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 88 Stat. 1619 (29 U.S.C. 706); Sec. 120(a) Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95–602, 92 Stat. 2955 (1978); Executive Order 11914, April 28, 1976 and 42 CFR Part 85.

§ 42.501 Purpose.

The purpose of this subpart is to implement section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in any program receiving Federal financial assistance.

§ 42.502 Application.

This subpart applies to each recipient of Federal financial assistance from the Department of Justice and to each program receiving such assistance. The requirements of this subpart do not apply to the ultimate beneficiaries of Federal financial assistance in the program receiving Federal financial assistance.

§ 42.503 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, solely on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to

discrimination under any program receiving Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient may not discriminate on the basis of handicap in the following ways directly or through contractual, licensing, or other arrangements under any program receiving Federal financial assistance:

(i) Deny a qualified handicapped person the opportunity accorded others to participate in the program receiving Federal financial assistance;

(ii) Deny a qualified handicapped person assistance necessary to provide that person with an equal opportunity to achieve the same benefits that others achieve in the program receiving Federal financial assistance;

(iii) Deny a qualified handicapped person an equal opportunity to participate in the program through the provision of services to the program;

(iv) Deny a qualified handicapped person an adequate opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(v) Permit the participation in the program of agencies, organizations or person which discriminate against the handicapped beneficiaries of the recipient's program;

(vi) Intimidate or retaliate against any individual, whether handicapped or not, for the purpose of interfering with any right secured by section 504 or this subpart.

(2) A recipient may not deny a qualified handicapped person the opportunity to participate in any program receiving Federal financial assistance on the ground that other specialized programs for handicapped persons are available.

(3) A recipient may not, directly or through contractual, licensing, or other arrangements, utilize criteria or methods of administration that either purposely or in effect discriminate on the basis of handicap or that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(4) A recipient may not, in determining the location or design of a facility, make selections that either purposely or in effect discriminate on the basis of handicap.

(5) A recipient is prohibited from discriminating on the basis of handicap in a program operating without Federal financial assistance where such action would discriminate against the handicapped beneficiaries or participants in any program of the recipient receiving Federal financial assistance.

(6) Any program not otherwise receiving Federal financial assistance but using a facility provided with the aid of Federal financial assistance is prohibited from discriminating on the basis of handicap.

(c) The exclusion of nonhandicapped persons from programs limited by Federal statute or executive order to handicapped persons is not prohibited by this subpart.

(d) Recipients shall administer programs in the most integrated setting appropriate so that qualified handicapped persons receive the full benefits of the program.

(e) Recipients shall insure that communications with their applicants, employees and beneficiaries are effectively conveyed to those having impaired vision and hearing.

(f) The enumeration of specific forms of prohibited discrimination in this subpart is not exhaustive but only illustrative.

§ 42.504 Assurances required.

(a) *Assurances.* Every application for Federal financial assistance covered by this subpart shall contain an assurance that the program will be conducted in compliance with the requirements of section 504 and this subpart. The responsible Department official shall specify (1) the form of the foregoing assurance for each program, (2) the extent to which the applicant may be required to seek like assurances from subgrantees, contractors and subcontractors, transferees, successors in interest and others connected with the program, and (3) the extent to which the applicant will be required to confirm that the assurances provided in conformance with paragraph (a)(2) of this section are being honored. Each assurance shall include provisions giving notice that the United States has a right to seek judicial enforcement.

(b) *Assurances from government agencies.* Assurances from agencies of State and local governments shall extent to any other agency of the same governmental unit if the policies of the other agency will affect the program for which Federal financial assistance is requested.

(c) *Assurances from institutions.* The assurances required with respect to any institution or facility shall be applicable to the entire institution or facility.

(d) *Duration of obligation.* Where the Federal financial assistance is to provide or is in the form of real or personal property, the assurance will obligate the recipient and any transferee for the period during which the property is being used for the purpose for which the Federal financial assistance is extended or for another purpose involving the provisions of similar benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(e) *Covenants.* With respect to any transfer of real property, the transfer document shall contain a covenant running with the land assuring nondiscrimination on the condition described in paragraph (d). Where the property is obtained from the Federal government, the covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant.

(f) *Remedies.* The failure to secure either an assurance or a sufficient assurance from a recipient shall not impair the right of the Department to enforce the requirements of section 504 and this subpart.

§ 42.505 Administrative requirements for recipients.

(a) *Remedial action.* If the Department finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this subpart, the recipient shall take the remedial action the Department considers necessary to overcome the effects of the discrimination. This may include remedial action with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred, or with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take affirmative steps, in addition to the requirements of this subpart, to increase the participation of qualified handicapped persons in the recipient's program.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this subpart, evalute and modify its policies and practices that do not meet the requirements of this subpart. During this process the recipient shall seek the advice and assistance of interested persons, including handicapped persons or organizations representing handicapped persons. The recipient shall take any necessary remedial steps to eliminate the effects of discrimination that resulted from adherence to these policies and practices.

(2) A recipient employing fifty or more persons and receiving Federal financial

assistance from the Department of more than $25,000 shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Department on request: (i) a list of the interested persons consulted, (ii) a description of areas examined and problems identified, and (iii) a description of modifications made and remedial steps taken.

(d) *Designation of responsible employee.* A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of more than $25,000 shall designate at least one person to coordinate compliance with this subpart.

(e) *Adoption of grievance procedures.* A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of more than $25,000 shall adopt grievance procedures which incorporate due process standards and provide for the prompt and equitable resolution of complaints alleging any action prohibited by this subpart. Such procedures need not be established with respect to complaints from applicants for employment.

(f) *Notice.* (1) A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of more than $25,000 shall, on a continuing basis, notify participants, beneficiaries, applicants, employees and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this subpart. The notification shall also include identification of the person responsible for coordinating compliance with this subpart. A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this subpart.

(2) Recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees shall include a policy statement of nondiscrimination on the basis of handicap.

(g) The Department may require any recipient with fewer than fifty employees and receiving less than $25,000 in Federal financial assistance to comply with paragraphs (c)(2)-(f) of this section.

(h) The obligation to comply with this subpart is not affected by any State or local law or requirement or limited employment opportunities for the handicapped in any occupation or profession.

Employment

§ 42.510 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall on the basis of handicap be subjected to discrimination in employment under any program receiving Federal financial assistance.

(2) A recipient shall make all decisions concerning employment under any program receiving Federal financial assistance in a manner which insures that discrimination on the basis of handicap does not occur so as to limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this section. the relationships referred to in this paragraph include relationships with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

(b) *Specific activities.* The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising, and application processing;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Pay and any other form of compensation including fringe benefits available by virtue of employment, whether or not administered by the recipient;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Selection and financial support for training including apprenticeship, professional meetings, conferences, and selection for leaves of absence to pursue training;

(7) Employer-sponsored activities, including social or recreational programs; and

(8) Any other term, condition, or privilege of employment.

(c) In offering employment or promotions to handicapped individuals, recipients may not reduce the amount of compensation offered because of any disability income, pension or other benefit the applicant or employee receives from another source.

(d) A recipient's obligation to comply with this section is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

(e) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with Civil Service Agencies in State or local units of government.

§ 42.511 Reasonable accommodation.

(a) A recipient shall make an accommodation for the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate by a preponderance of the evidence, based on the individual assessment of the applicant or employee, that the accommodation would materially impair the safe and efficient operation of the program receiving Federal financial assistance or would otherwise not be reasonable.

(b) In determining what is a reasonable accommodation, consideration should be given to making facilities used by employees readily accessible to and usable by handicapped persons, job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) Whether an accommodation is reasonable depends upon a case-by-case analysis weighing factors which include:

(1) the safe operation of the program;

(2) the nature and economic cost of the accommodation;

(3) the ability of the recipient to absorb the cost of the accommodation;

(4) the degree to which an accommodation can be made without materially impairing the operation of the program when viewed as a whole;

(5) the ability of the handicapped individual to perform the essential duties of the job with the accommodation.

A reasonable accommodation may require a recipient to bear more than a *de minimis* economic cost in making allowance for the handicap of a qualified applicant or employee and

accept minor inconvenience which does not bear on the ability of the handicapped individual to perform the essential duties of the job.

§ 42.512 Employment criteria.

(a) A recipient may not use any employment test or other selection criterion that tends to screen out handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that tend to screen out fewer handicapped persons are not shown by the appropriate Department officials to be available.

(b) A recipient shall administer tests using procedures which accommodate the special problems of the handicapped to the fullest extent, consistent with the objectives of the test.

§ 42.513 Preemployment inquiries.

(a) A recipient may condition an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty if all entering employees are required to undergo such an examination regardless of handicap and the results of the examination are used in a manner consistent with this subpart.

(b) A recipient may make preemployment inquiry into an applicant's ability to perform job-related functions. A recipient may not make preemployment inquiry of an applicant regarding any handicap covered by this subpart except where the recipient is taking remedial or voluntary action under §§ 42.505(a) or (b) of this subpart, or affirmative action under section 503 of the Act. Under those circumstances the recipient may inquire about an applicant's handicaps, if:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (c) of this section, that refusal to provide it will not subject the applicant or employee to adverse treatment, and that it will be used only in accordance with this subpart.

(c) The applicant's medical record shall be collected and maintained on separate forms and kept confidential, except that the following persons may be informed:

(1) Supervisors and managers regarding restrictions on the work of handicapped persons and necessary accommodations;

(2) First aid and safety personnel if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act upon request for relevant information.

Program Accessibility

§ 42.520 Discrimination prohbited.

Recipients shalll insure that no qualified handicapped person is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program receiving Federal financial assistance because the recipient's facilities are inaccessible to or unusable by handicapped persons.

§ 42.521 Existing facilities.

(a) *Program accessibility.* A recipient shall operate each program to which this subpart applies so that the program, when reviewed in its entirety, is readily accessible to and usable by handicapped persons. This section does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Compliance procedures.* A recipient may comply with the requirement of paragraph (a) of this section through redesign of equipment, reassignment of services to accessible buildings, assignment of aids to beneficiaries, (*e.g.*, interpreters for the deaf, readers for the blind), delivery of services at alternate accessible sites, alteration of existing facilities, or any other methods that result in making its program accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among methods for meeting the requirement of paragraph (a), a recipient shall give priority to those methods that offer programs to handicapped persons in the most integrated setting appropriate to obtain the full benefits of the program.

(c) *Time period.* A recipient shall comply with the requirement of paragraph (a) within ninety days of the effective date of this subpart. However, where structural changes in facilities are necessary, such changes shall be made expeditiously and shall be completed within three years of the effective date of this subpart. If structural changes to facilities are necessary, a recipient shall, within six months of the effective date of this subpart, develop a written plan available for public inspection setting forth the steps that will be taken to complete the changes together with a schedule for making the changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons.

(d) *Notice.* The recipient shall adopt and implement procedures to insure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 42.522 New construction.

(a) *Design and construction.* Each new or altered facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such a manner that the facility or altered portion thereof is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this subpart.

(b) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically handicapped" published by the American National Standards Institute, Inc. (ANSI A117.1–1961 (R1971)), [1] which is incorporated by reference in this subpart shall constitute compliance with paragraph (a) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility is provided.

§ 42.523 Auxiliary aids.

A recipient shall provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons in a program receiving Federal financial assistance. Attendants, indivudually prescribed devices, readers for personal use or study, or other devices or services of a personal nature are not required under this section.

[1] Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

§ 42.524 Postsecondary education.

This subpart incorporates by reference the provisions of HEW's section 504 regulations (relating to postsecondary education) for educational programs receiving assistance from the Department (45 CFR 84.41–84.47). (See Appendix B).

Procedures

§ 42.530 Procedures.

(a) The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 (28 CFR 42.106–42.110) apply to this subpart except that the provision contained in § 42.110(e) and § 42.108(c)(3) which requires the Attorney General's approval before the imposition of any sanction against a recipient does not apply to programs funded by LEAA. The applicable provisions contain requirements for compliance information (§ 42.106), conduct of investigations (§ 42.107), procedure for effecting compliance (§ 42.108), hearings (§ 42.109), and decisions and notices (§ 42.110). (See Appendix C).

(b) In the case of programs funded by LEAA, the timetables and standards for investigation of compliants and for the conduct of compliance reviews contained in § 42.205 and § 42.206 are applicable to this subpart except that any finding of noncompliance shall be enforced as provided in paragraph (a) of this section. (See Appendix D).

(c) In the case of programs funded by LEAA, the refusal to provide requested information under paragraph (a) above and § 42.106 will be enforced pursuant to the provisions of section 509 of Title I of the Ominibus Crime Control and Safe Streets Act, as amended (42 U.S.C. § 3701, *et seq.*).

(d) The 180-day limitation period for filing of complaints (§ 42.107 of this Title) will not be applied to acts of discrimination occurring prior to the effective date of this subpart.

(e) The Department will investigate complaints alleging discrimination in violation of section 504 occurring prior to the effective date of this subpart where the language of the statute and HEW's interagency guidelines (43 FR 2132, January 13, 1978) implementing Executive Order 11974 (41 FR 17871, April 28, 1976) provided notice that the challenged policy or practice was unlawful.

Definitions

§ 42.540 Definitions.

As used in this subpart the term:

(a) "The Act" means the Rehabilitation Act of 1972, Pub. L. 93–112, as amended (29 U.S.C. § 701 *et seq.*).

(b) "Section 504" means section 504 of the Act (29 U.S.C. § 794).

(c) "Department" means the Department of Justice.

(d) "LEAA" means the Law Enforcement Assistance Administration of the Department of Justice.

(e) "Recipient" means any State or unit of local government, any instrumentality of a State or unit of local government, any public or private agency, institution, organization, or other public or private entity, or any person to which Federal financial assistance is extended receiving Federal financial assistance directly or through another recipient including any successor, assignee, or transferee of a recipient but excluding the ultimate beneficiary of the assistance. The term includes any vendor of services purchased or otherwise obtained by a recipient for beneficiaries of the program.

(f) "Federal financial assistance" means any grant, cooperative agreement, loan, contract (other than a direct Federal procurement contract or a contract of insurance or guaranty), subgrant, contract under a grant or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel;

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government;

(4) Any other thing of value.

(g) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(h) the term "program" means the operations of the agency or organizational unit of government receiving or substantially benefitting from the Federal assistance awarded, *e.g.*, a police department or department of corrections.

(i) "Ultimate beneficiary" is one among a class of persons who are entitled to benefit from, or otherwise participate in, programs receiving Federal financial assistance and to whom the protections of this subpart extend. The ultimate beneficiary class may be the general public or some narrower group of persons.

(j) "Benefit" includes provision of services, financial aid or disposition (*i.e.*, treatment, handling, decision, sentencing, confinement, or other prescription of conduct).

(k) "Handicapped Person". (1) "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in this subpart the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genitourinary; hemic and lymphatic; skin; and endocrine; (B) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; (C) drug and alcohol abuse resulting in conditions described in (A) or (B) of paragraph (k)(2)(i) of this section. For purposes of employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reaons of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

(ii) "major life activities" mean functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.

(l) "Qualified handicapped person" means: (1) With respect to employment, a handicapped person who, with

reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to the Law Enforcement Education Program (LEEP), a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(3) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(m) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (k) of this section.

(n) "Drug abuse" means (1) the use of any drug or substance listed by the Department of Justice in 21 CFR 1308.11, under authority of the Controlled Substances Act, 21 U.S.C. 801, as a controlled substance unavailable for prescription because (i) the drug or substance has a high potential for abuse, (ii) the drug or other substance has no currently accepted medical use in treatment in the United States, (iii) there is a lack of accepted safety for use of the drug or other substance under medical supervision; (2) the misuse of any drug or substance listed by the Department of Justice in 21 CFR §§ 1308.12–15 under authority of the Controlled Substances Act as a controlled substance available for prescription. Examples of (1) include certain opiates and opiate derivatives (*e.g.*, heroin) and hallucinogenic substances (*e.g.*, marihuana, mescaline, peyote) and depressants (*e.g.*, meclolqualone). Examples of (2) include opium, coca leaves, methadone, amphetamines and barbituates.

(o) "alcohol abuse" include alcoholism but also means any misuse of alcohol which demonstrably interferes with a person's health, interpersonal relations or working.

Appendix A—Federal Financial Assistance of the Department of Justice to Which This Subpart Applies

1. Assistance provided by the Law Enforcement Assistance Administration under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701, *et seq.*, as amended, and the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601 *et seq.*, as amended.

2. Assistance provided by the Federal Bureau of Investigation through its National Academy and law enforcement training activities and laboratory facilities under the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

3. Assistance provided by the Bureau of Prisons through its National Institute of Corrections for training programs under the Juvenile Justice and Delinquency Prevention Act, as amended, 18 U.S.C. 4351–4353.

4. Assistance provided by the Drug Enforcement Administration under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*

5. Assistance provided by the Attorney General for antitrust enforcement under section 116 of the Crime Control Act of 1976, 42 U.S.C. 3739.

Appendix B—HEW Regulations Under Section 504 of the Rehabilitation Act of 1973, as Amended (45 CFR 84.41–84.47) Which Apply to This Subpart

§ 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure; (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 84.44 Academic adjustment.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are esssential to the program of instruction being pursued by such student or to any directly

related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaulation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 84.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A Recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 84.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education course and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

Appendix C—Department regulations under Title VI of the Civil Rights Act of 1964 (28 CFR 42.106–42.110) Which Apply to This Subpart

§ 42.106 Compliance information.

(a) *Cooperation and assistance.* Each responsible Department official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this subpart and shall provide assistance and guidance to recipients to help them comply voluntarily with this subpart.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this subpart. In general, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient or subcontracts with any other person or group, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this subpart.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities, as may be pertinent to ascertain compliance with this subpart. Whenever any information required of a recipient is in the exclusive possession of any other agency, institution, or person and that agency, institution, or person fails or refuses to furnish that information, the recipient shall so certify in its report and set forth the efforts which it has made to obtain the information.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this subpart and its applicability to the program under which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this subpart.

[Order No. 365–66, 31 FR 10265, July 29, 1966, as amended by Order No. 519–73, 38 FR 17955, July 5, 1973]

§ 42. Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this subpart.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this subpart may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this subpart. The investigation should include, whenever appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this subpart occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this subpart.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this subpart, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 42.108.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this subpart, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subpart. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purpose of this subpart, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

[Order No. 365–66, 31 FR 10265, July 29, 1966, as amended by Order No. 519–73, 38 FR 17955, July 5, 1973]

§ 42.108 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this subpart and if the noncompliance or threatened noncompliance cannot be corrected by informal means, the responsible Department official may suspend or terminate, or refuse to grant or continue, Federal financial assistance, or use any other means authorized by law, to induce compliance with this subpart. Such other means include, but are not limited to, (1) appropriate proceedings brought by the Department to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with assurance requirement.* If an applicant or recipient fails or refuses to furnish an assurance required under § 42.105, or fails or refuses to comply with the provisions of the assurance it has furnished, or otherwise fails or refuses to comply with any requirement imposed by or pursuant to Title VI or this subpart, Federal financial assistance may be suspended, terminated, or refused in accordance with the procedures of Title VI and this subpart. The Department shall not be required to provide assistance in such a case during the pendency of administrative proceedings under this subpart, except that the Department will continue assistance during the pendency of such proceedings whenever such assistance is due and payable pursuant to a final commitment made or an application finally approved prior to the effective date of this subpart.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this subpart, (3) the action has been approved by the Attorney General pursuant to § 42.110, and (4) the expiration of 30 days after the Attorney General has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the action has been approved by the Attorney General, and (3) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance.

§ 42.109 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 42.108(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. That notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for that action. The notice shall (1) fix a date, not less than 20 days after the date of such notice, within which the applicant or recipient may request that the responsible Department official schedule the matter for hearing, or (2) advise the applicant or recipient that a hearing concerning the matter in question has been scheduled and advise the applicant or recipient of the place and time of that hearing. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing afforded by section 602 of the Act and § 42.108(c) and consent to the making of a decision on the basis of such information as is available.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official, unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before the responsible Department official or, at his discretion, before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554–557 (sections 5–8 of the Administrative Procedure Act), and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied whenever reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the

parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this subpart with respect to two or more programs to which this subpart applies, or noncompliance with this supbart and the regulations of one or more other Federal Departments or agencies issued under Title VI of the Act, the Attorney General may, by agreement with such other departments or agencies, whenever appropriate, provide for the conduct of consoldiated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this subpart. Final decisions in such cases, insofar as this subpart is concerned, shall be made in accordance with § 42.110.

[order No. 365–66, 31 FR 10265, July 29, 1966, as amended by Order No. 519–73, 38 FR 17955, July 5, 1973]

§ 42.110 Decisions and notices.

(a) *Decisions by person other than the responsible Department official.* If the hearing is held by a hearing examiner, such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record, including his recommended findings and proposed decision, to the responsible Department official for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient. Whenever the initial decision is made by the hearing examiner, the applicant of recipient may, within 30 days of the mailing of such notice of initial decision, file with the responsible Department official his exceptions to the initial decision, with his reaons therefor. In the absence of exceptions, the responsible Department official may on his own motion, within 45 days after the initial decision, serve on the applicant or recipient a notice that he will review the decision. Upon filing of such exceptions, or of such notice of review the responsible Department official shall review the initial decision and issue his own decision thereon including the reasons therefor. In the absence of either exceptions or a notice of review the initial decision shall constitute the final decision of the responsible Department official.

(b) *Decisions on the record or on review by the responsible Department official.* Whenever a record is certified to the responsible Department official for decision or he reviews the decision of a hearing examiner pursuant to paragraph (a) of this section, or whenever the responsible Department official conducts the hearing the applicant or recipient shall be given a reasonable opportunity to file with him briefs or other written statements of its contentions, and a copy of the final decision of the responsible Department official shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on the record whenever a hearing is waived.* Whenever a hearing is waived pursuant to § 42.109(a), a decision shall be made by the responsible Department official on the record and a copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing officer or responsible Department official shall set forth his ruling on each findings, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this subpart with which it is found that the applicant or recipient has failed to comply.

(e) *Approval by Attorney General.* Any final decision of a responsible Department official (other than the Attorney General) which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this subpart or the Act, shall promptly be transmitted to the Attorney General, who may approve such decision, vacate it, or remit or mitigate any sanction imposed.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue, Federal financial assistance, in whole or in part, under the program involved, and may contain such terms, conditions, and other provisions as are consistent with, and will effectuate the purposes of, the Act and this subpart, including provisions designed to assure that no Federal financial assistance will thereafter be extended under such program to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this subpart, or to have otherwise failed to comply with this subpart, unless and until, it corrects its noncompliance and satisifies the responsible Department official that it will fully comply with this subpart.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this subpart and provides reasonable assurance that it will fully comply with this subpart.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

[Order No. 365–66, 31 FR 10265, July 29, 1966, as amended by Order No. 519–73, 38 FR 17956, July 5, 1973]

Appendix D—LEAA Regulations Under the Omnibus Crime Control and Safe Streets Act, as Amended Which Apply to This Subpart (28 CFR 42.205 and 42.206)

§ 42.205 Complaint investigation.

(a) The Administration shall investigate complaints that allege a violation of:

(1) Section 518(c)(1) of the Crime Control Act;

(2) Section 262(b) of the Juvenile Justice Act; or

(3) This subpart.

(b) No complaint will be investigated if it is received more than one year after the date of the alleged discrimination, unless the time for filing is extended by the Administrator for good cause shown.

(c) The Administration shall conduct investigations of complaints as follows:

(1) Within 21 days of receipt of a complaint, the Administration shall:

(i) Ascertain whether it has jurisdiction under paragraphs (a) and (b) of this section;

(ii) If jurisdiction if found, notify the recipient alleged to be discriminating of its receipt of the complaint; and

(iii) Initiate the investigation.

(2) The investigation will ordinarily be initiated by a letter requesting data pertinent to the complaint and advising the recipient of:

(i) The nature of the complaint, and, with the written consent of the complainant, the identity of the complainant;

(ii) The programs or activities affected by the complaint;

(iii) The opportunity to make, at any time prior to receipt of the Administration's findings, a documentary submission, responding to, rebutting, or denying the allegations made in the complaint; and

(iv) The schedule under which the complaint will be investigated and a determination of compliance or noncompliance made.

Copies of this letter will also be sent to the chief executive of the appropriate unit(s) of government, and to the appropriate SPA.

(3) Within 150 days or, where an onsite investigation is required, within 175 days after the initiation of the investigation, the Administration shall advise the complainant, the recipient, the chief executive(s) of the appropriate unit(s) of government, and the appropriate SPA, of:

(i) Its preliminary findings;

(ii) Where appropriate, its recommendations for compliance, and

(iii) If it is likely that satisfactory resolution of the complaint can be obtained, the opportunity to request the Administration to engage in voluntary compliance negotiations prior to the Administrator's determination of compliance or noncompliance.

(4) If, within 30 days, the Administration's recommendations for compliance are not met, or voluntary compliance is not secured, the matter will be forwarded to the Administrator for a determination of compliance or noncompliance. The

determination shall be made no later than 14 days after the conclusion of the 30-day period. If the Administrator makes a determination of noncompliance with section 518(c) of the Crime Control Act, or section 262(b) of the Juvenile Justice Act, the Administration shall institute administrative proceedings pursuant to § 42.210, et seq.

(5) If the complainant or another party, other than the Attorney General, has filed suit in Federal or State court alleging the same discrimination alleged in a complaint to LEAA, and, during LEAA's investigation, the trial of that suit would be in progress, LEAA will suspend its investigation and monitor the litigation through the court docket and contacts with the complainant. Upon receipt of notice that the court has made a finding of discrimination within the meaning of § 42.210, the Administration will institute administrative proceedings pursuant to § 42.210, et seq.

(6) The time limits listed in paragraphs (c)(1) through (c)(5) of this section shall be appropriately adjusted where LEAA requests another Federal agency or another branch of the Department of Justice to act on the complaint. LEAA will monitor the progress of the matter through liaison with the other agency. Where the request to act does not result in timely resolution of the matter, LEAA will institute appropriate proceedings pursuant to this section.

§ 42.206 Compliance reviews.

(a) The Administration shall periodically conduct compliance reviews of selected recipients of LEAA assistance.

(b) The Administration shall seek to review those recipients which appear to have the most serious equal employment opportunity problems, or the greatest disparity in the delivery of services to the white and non-white, or male and female communities they serve. Selection for review shall be made on the basis of:

(1) The relative disparity between the percentage of minorities, or women, in the relevant labor market, and the percentage of minorities, or women employed by the recipient;

(2) The percentage of women and minorities in the population receiving project benefits;

(3) The number and nature of discrimination complaints filed against a recipient with LEAA or other Federal agencies;

(4) The scope of the problems revealed by an investigation commenced on the basis of a complaint filed with the Administration against a recipient; and

(5) The amount of assistance provided to the recipient.

(c) Within 15 days after selection of a recipient for review, the Administration shall inform the recipient that it has been selected and will initiate the review. The review will ordinarily be initiated by a letter requesting data pertinent to the review and advising the recipient of:

(1) The practices to be reviewed;

(2) The programs or activities affected by the review;

(3) The opportunity to make, at any time prior to receipt of the Administration's findings, a documentary submission responding to the Administration, explaining, validating, or otherwise addressing the practices under review; and

(4) The schedule under which the review will be conducted and a determination of compliance or non-compliance made.

Copies of this letter will also be sent to the chief executive of the appropriate unit(s) of government, and to the appropriate SPA.

(d) Within 150 days or, where an onsite investigation is required within 175 days after the initiation of the review, the Administration shall advise the recipient, the chief executives of the appropriate unit(s) of government, and the appropriate SPA, of:

(1) Its preliminary findings;

(2) Where appropriate, its recommendations for compliance; and

(3) The opportunity to request the Administration to engage in voluntary compliance negotiations prior to the Administrator's determination of compliance or non-compliance.

(e) If, within 30 days, the Administration's recommendations for compliance are not met, or voluntary compliance is not secured, the matter will be forwarded to the Administrator for a determination of compliance or non-compliance. The determination shall be made no later than 14 days after the conclusion of the 30-day negotiation period. If the Administrator makes a determination of non-compliance with section 518(c) of the Crime Control Act, or section 262(b) of the Juvenile Justice Act, the Administration shall institute administrative proceedings pursuant to § 42.210, et seq.

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Part IX

Environmental Protection Agency

Proposal To Limit Emissions of Particulate Matter From New, Modified, and Reconstructed Phosphate Rock Plants and Announcement of Public Hearing

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Part 60]

[FRL-1282-2]

Standards of Performance for New Stationary Sources; Phosphate Rock Plants

AGENCY: Environmental Protection Agency.

ACTION: Proposed Rule and Announcement of Public Hearing.

SUMMARY: This action is being proposed to limit emissions of particulate matter from new, modified, and reconstructed phosphate rock plants. Reference Method 5 would be used for determining compliance with these standards. The standards implement the Clean Air Act and result from the Administrator's determination on August 21, 1979 (44 FR 49222) that phosphate rock plant emissions contribute significantly to air pollution. The intended effect is to require new, modified, and reconstructed phosphate rock plants to use the best demonstrated system of emission reduction, considering costs, nonair quality health and environmental impact and energy impacts.

DATES: *Comments.* Deadline for comments is November 26, 1979.

Public hearing. A public hearing will be held on October 25, 1979.

Requests to speak at hearing. Persons wishing to speak at the hearing must contact Shirley Tabler, Emission Standards and Engineering Division (MD-13), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5421 by October 18, 1979.

ADDRESSES: *Comments.* Comments should be submitted to the Central Docket Section (A-130), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460, Attention: Docket No. OAQPS-79-6.

Background Information. The Background Information Document for the proposed standards may be obtained from the U.S. EPA Library (MD-35), Research Triangle Park, North Carolina 27711, telephone number: (919) 541-2777. Please refer to "Phosphate Rock Plants, Background Information: Proposed Standards of Performance" (EPA-450/3-79-017).

Docket. A docket (number OAQPS-79-6) containing information used by EPA in development of the proposed standard is available for public inspection between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, Room 2903B, Waterside Mall, 401 M Street, SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Don Goodwin, Director, Emission Standards and Engineering Division, Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541-5271.

SUPPLEMENTARY INFORMATION:

Summary of Proposed Standards

The proposed standards would apply to new, modified, or reconstructed phosphate rock dryers, calciners, grinders, and ground rock handling and storage facilities. The proposed standards would limit emissions of particulate matter to 0.02 kilogram (kg) per megagram (Mg) of rock feed (0.04 lb/ton) from phosphate rock dryers, 0.055 kg/Mg (0.11 lb/ton) from phosphate rock calciners, and 0.006 kg/Mg (0.012 lb/ton) from phosphate rock grinders. An opacity standard of zero percent opacity is proposed for ground rock handling system, dryers, calciners, and grinders.

The use of continuous opacity monitoring systems would be required for each affected facility. However, when scrubbers are used for emission control, continuous opacity monitoring would not be required. Instead, the pressure drop of the scrubber and the liquid supply pressure would be monitored as indicators of the scrubber performance.

Summary of Environmental and Economic Impacts

The proposed standards would impact an estimated 110 teragrams (122 million tons) of annual phosphate rock production by 1995. About one half of that would be due to construction of new phosphate rock processing plants and the remainder due to expansion of industry capacity at existing plants.

The proposed standards would reduce the particulate emissions from new phosphate rock plants by about 99 percent below the levels that would occur with no control and by about 85 to 98 percent below the levels allowed by typical State standards, depending on the type of facility. These emission reductions would reduce nationwide particulate emissions by about 19 gigagrams (21,000 tons) per year in 1985. The maximum 24-hour average ambient air concentration of particulate matter due to emissions from a typical dryer controlled to the level required by the proposed standard would be about 88 $\mu g/m^3$. Similarly, for a typical calciner, imposition of the proposed emission standard would result in a maximum ambient level of 14 $\mu g/m^3$, and for a typical grinder the ambient level could reach a maximum of 1 $\mu g/m^3$.

The annualized costs of operating control equipment that would be needed to attain the proposed standards were estimated using model plants. Because typical Florida phosphate rock plants are larger than Western plants, the control costs per ton of production are lower.

The annualized cost of installing and operating prevailing controls used to meet existing State standards at typical Florida phosphate rock plants is estimated at $0.35 per metric ton. The additional cost of employing control technology to meet the proposed standards at a new Florida plant is estimated at $0.02/metric ton when using baghouses and $0.07/metric ton for scrubbers.

The annualized cost of using prevailing controls to meet existing State standards in a typical new Western plant is $0.87/metric ton. The additional cost of using control technology to meet the proposed standards at new Western plants is estimated at $0.06/metric ton for baghouse control and $0.21/metric ton for scrubbers.

The additional costs of meeting the proposed standards are relatively minor when scrubbers or baghouses are used. Electrostatic precipitators (ESP) could also be used to meet the proposed standards, but their use is not anticipated because of their higher annualized costs of operation. The difference in cost between using the best system of emission reduction to meet the proposed standards level and using prevailing controls to meet the State Implementation Plan (SIP) levels would have negligible impact on the profitability of the plant and the future growth of the phosphate rock industry if the proposed standards were implemented. By the year 1985, compliance with the proposed standards would increase the industry cost of production of phosphate rock by 0.1 percent (baghouse controls) to 0.2 percent (scrubber controls) above the cost to meet existing State Implementation Plan regulations. A more detailed discussion of the economic analysis is discussed in the Background Information Document.

Assuming baghouses are used to meet the proposed standards, the total industry capital cost for the first five years after imposition of the proposed standards would be about $8.5 million greater than the capital costs incurred meeting typical State standards. The total industry annualized cost increase to meet the proposed standards by the fifth year would be about $0.8 million.

The incremental energy required to meet the proposed standards depends on the control utilized. If baghouses are employed, total industry energy consumption in the fifth year after imposition of the proposed standards will increase by about 1.7 percent over the levels projected to occur under State regulations. Total industry consumption in the fifth year will increase by 2.6 percent when scrubbers are employed, and about 0.1 percent should electrostatic precipitators be used. This corresponds to a fifth year total increase in industry energy consumpton of 39×10^6 kWh/yr when baghouses are used, 60×10^6 kWh/yr when high energy scrubbers are used, and $.009 \times 10^6$ kWh/yr when electrostatic precipitators are used.

Utilization of any of the alternative control technologies (baghouse, scrubber, or ESP) would result in minimal adverse environmental impacts. If high energy scrubbers or wet ESPs are used to achieve the standards, this would result in adverse impacts on solid waste disposal, water pollution, and energy consumption. However, the incremental increase (over the prevailing controls) of solid materials and wastewaters produced during control of emissions from phosphate rock facilities is minor in comparison with (1) the large volumes of process wastewaters and solid wastes, and (2) the total amounts of wastewaters and solid waste already collected by prevailing controls to meet existing State standards. Utilization of baghouse technology is marginally more environmentally acceptable than other control alternatives because no water pollution and less solid waste is produced.

Rationale for the Proposed Standards

Selection of Source for Control

Section 111 of the Act requires establishment of standards of performance for new, modified, or reconstructed stationary sources that cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. The EPA has determined that sources which cause ambient suspended particulate matter may cause adverse health and welfare effects. Accordingly, under the authority of Section 109 of the Act, the Administrator has designated particulate matter as a criteria pollutant and has established national ambient air quality standards for this pollutant.

Phosphate rock processing plants have been shown to be a significant source of particulate matter emissions. The Priority List of sources for New Source Performance Standards (40 CFR 60.16, 44 FR 49222, dated August 21, 1979) identified various sources of emissions on a nationwide basis in terms of the potential improvement in emission reduction that could result from their imposition. The sources on this list are ranked based on decreasing order of potential emission reduction. Phosphate rock plants currently rank 16th of 59 sources on the list, and are, therefore, of considerable importance nationwide. In addition, a study performed for EPA in 1975 by the Argonne National Laboratory showed phosphate rock dryers ranked 4th of the nation's highest 18 particulate source categories which require control systems with moderate energy consumption. The same study showed phosphate rock grinders as ranking fifteenth of the nation's 56 largest particulate source categories. Finally, results of dispersion modeling analysis indicate that particulate emission sources at phosphate rock plants contribute significantly to the deterioration of air quality.

Additional factors leading to the selection of the phosphate rock industry for the development of standards of performance include the expected growth rate of the industry and the signficant reductions in particulate matter emissions achievable with application of available emissions control technology. The United States is the largest producer and consumer of phosphate rock in the world. From 1959 to 1973, the production of phosphate rock increased at an annual rate of about six percent and production is expected to increase at an annual rate of about three percent per year through the year 2000. By the year 1985 new and modified phosphate rock plants would cause an increase in nationwide emissions of particulate matter of about 19 gigagrams per pear (21,000 tons/year) above the level expected with implementation of the proposed standards. At most plants, the degree of emissions control (imposed by State Implementation plans) is considerably less than that achievable with application of the best technology for emission control.

Selection of Affected Facility and Pollutants

At phosphate rock installations, the normal sequence of operation is: Mining, beneficiation, conveying of wet rock to and from storage, drying or calcining or nodulizing, conveying and storage of dry rock, grinding, and conveying and storage of ground rock. Mining and beneficiation are a minor source of particulate emissions. Nodulizing, and elemental phosphorous production are not selected as affected facilities as these sources are not expected to exhibit growth potential. Dryers, calciners, grinders and ground rock handling systems account for nearly all of the particulate matter emissions from phosphate rock plants. Accordingly, the proposed standards have been developed for these sources.

Phosphate rock processing plants are sources of emissions of particulates, fluorides, sulfur dioxide (SO_2) and certain radioactive substances. Standards are being proposed only for the control of particulate matter emissions at this time. Based on Tennessee Valley Authority research, and emission measurements of fluorides in calciner exhaust gases, it is unlikely that significant quantities of fluorine will be volatized at temperatures experienced in dryers or calciners. Emission of sulfur oxides generated by oil-firing in dryers and calciners is minimized by reaction with alkaline materials naturally occurring in the phosphate rock ore. Additional studies of the radioactive materials in the emissions are planned and EPA could, if warranted, take additional action under Section 112 of the Clean Air Act at a future date.

Potential particulate emissions from typical uncontrolled phosphate rock facilities would amount to about 2.9 kg/Mg (5.8 lb/ton) of rock feed from the dryer, 7.7 kg/Mg (15.4 lb/ton) of rock feed from the calciner, and about 0.8 kg/Mg (1.6 lb/ton) of rock feed from the grinder. The typical State emission limit for dryers is 0.13 kg/Mg (0.26 lb/ton), and the limit for calciners and grinders is about 0.44 kg/Mg (0.88 lb/ton). Through application of alternative control technology (e.g., the baghouse, or high energy scrubber), the emissions from these facilities could be further reduced to 0.02 kg/Mg (0.04 lb/ton) for dryers, 0.055 kg/Mg (0.11 lb/ton) for calciners, and 0.006 kg/Mg (0.012 lb/ton) for grinders. Control limits for ground rock handling and storage operations are difficult to define owing to wide variations in system equipment and the numerous fugitive emission sources contained in these systems. At most installations, particulate emissions are collected by an evacuation system and vented through a baghouse. Greater assurance that such control system are installed, operated and maintained in accordance with good practice can be achieved by enforcing stringent opacity standards.

Selection of Best System of Emission Reduction Considering Costs

Based on potential environmental, economic and energy impacts, EPA has concluded that either a fabric filitration system or a high energy venturi scrubber system is the best technological system of continuous particulate emissions reduction from each of the affected facilities. The fabric filtration system, high energy scrubber and high efficiency electrostatic precipitator are judged to be equally effective in terms of emissions reduction capability. The proposed standards are, therefore, based on the use of any of the three alternative control methods, although cost considerations would favor the use of the baghouse or high energy scrubber over the ESP.

The economic and environmental adverse impacts associated with the alternative controls would favor the use of the baghouse controls. The eonomic and environmental advantages of the baghouse are most apparent at grinding and material handling/storage facilities, where baghouses are already the prevailing control employed. In contrast to the baghouse, wet collection systems produce water pollution and more solid waste, although the incremental adverse environmental impact produced by these systems is small in comparison with adverse effects presently produced by phosphate rock plant processes, and would not preclude the use of these systems as environmentally acceptable control alternatives.

Selection of Format for Standard

The format of the proposed standard could be either a concentration standard or a mass-per-unit-of-feed standard. A control efficiency format could not be selected because of limited scope in the data base and practical considerations involving the complexity of performance test requirements. An equipment standard was not considered because Section 111 of the Act requires application of emission limits when feasible. The mass-emission-per-unit-feed standard was selected over the concentration standard format because this format: (1) Is related directly to the total quantity of emissions discharged to the atmosphere, (2) is more equitable in that the degree of emissions permitted is related to the amount of product processed, (3) is consistent with the format of existing applicable State standards, (4) does not discourage use of more efficient process systems which reduce exhaust gas volumes, and (5) provides that the standard is not circumvented by dilution or high volume flows in the exhaust system. The mass emissions format is appropriate for the dryers, calciners, and grinder facilities. However, because of wide variations in the designs of ground rock handling systems, and because a substantial portion of the potential emissions are fugitive and difficult to measure, a visible emission standard is the only format appropriate for ground rock handling systems.

Emission Standards for Dryers

Source tests were conducted on dryers at two phosphate rock plants processing pebble rock. The pebble rock is considered to present the most adverse conditions for control of emissions from dryers because it receives relatively little washing and enters the dryer containing a substantial percentage of clay. Hence, any control level limit for dryers processing pebble rock should also be capable of meeting the limit for all other dryers as well.

Particulate emissions from the dryer controlled by a venturi scrubber operating at about 4.4 kilopascals pressure drop (18 inches of water) averaged 0.020 and 0.019 kg/Mg (0.039 and 0.038 lb/ton) for separate EPA tests. Particulate emissions from the dryer controlled by an ESP averaged 0.012 and 0.027 kg/Mg (0.024 and 0.054 lb/ton) for EPA and operator tests, respectively. The test results show that the venturi scrubber was capable of achieving emission levels of 0.02 kg/Mg or better from phosphate rock dryers emitting high levels of particulates. The tests also revealed that the venturi scrubber was achieving a control efficiency of 99.2 percent. This is nearly equivalent to that estimated to be attainable by the best system of emission reduction (99.4 percent by a baghouse) when treating the same emission loading and particle size distribution. Based on analysis using a programmable EPA scrubber model (the model is described in EPA report No. EPA–600/7–78–026), it was estimated that increasing the scrubber energy to a pressure drop of 6.2 kilopascals (25 inches of water) would achieve the degree of control equivalent to the best system of emission reduction, reducing emission levels only marginally (about 20 percent) below that measured. It is concluded, therefore, that an emission limit of 0.02 kg/Mg (0.04 lb/ton) represents the emission level attainable by the best system of emission reduction.

Opacity data were gathered during particulate tests at the two dryers. Approximately fourteen hours of measurements on four separate dates were obtained as specified in EPA Reference Method 9. At one facility where emissions were controlled by a medium-energy venturi scrubber, the observations revealed zero percent opacity throughout the test periods. At the other facility, where emissions were controlled by an ESP, opacity observations ranged from zero percent to 7.7 percent. The difference between the opacity levels observed for the two types of control systems primarily reflected differences in diameters of discharge stacks rather than significant differences in control performance. ESPs typically require larger stacks due to higher volumes of flow required during operation. Setting separate opacity standards for the two control systems was rejected because ESPs are not expected to be used in meeting the proposed standards. Thus the proposed opacity standard is based on the performance of the scrubber-controlled facility and is set at zero percent opacity. Control systems reflecting best emissions control capability (the high energy scrubber or baghouse) which meets the proposed emissions limit should experience no difficulty meeting the proposed opacity standard. Should any affected dryer facility be controlled with an ESP and comply with the particulate limit of 0.02 kg/Mg but not the opacity limits, a separate opacity limit may be established for the facility under 40 CFR 60.11(e). The provisions of 40 CFR 60.11(e) allow owners or operators of sources which exceed the opacity standard while concurrently achieving the performance emissions limit to request establishment of a specific opacity standard for that facility.

Emission Standards for Calciners

Source tests were conducted on calciners at two phosphate rock plants processing western phosphate rock. The western rock is considered to present the most adverse conditions for emissions control from calciners because it receives less cleaning during beneficiation than other ore types. In addition one of the calciners selected for test also processes a mix of both beneficiated and unbeneficiated rock, leading to a still more adverse control problem. Presumably, any control system demonstrating an emissions level for these facilities should also be capable of meeting this level for all other calciners as well.

Particulate emissions from a calciner controlled by a high-energy scrubber operating in the range of 4.9 to 7.4 kilopascals pressure drop (twenty to thirty inches of water) averaged 0.04 and 0.05 kg/Mg (0.08 and 0.10 lb/ton) for two different tests by the operator.

Particulate emissions from a calciner controlled by a venturi scrubber

operating at 3.0 kilopascals pressure drop (12 inches of water) averaged 0.07 kg/Mg (0.14 lb/ton) for EPA tests and 0.12 and 0.068 kg/Mg (0.24 amd 0.136 lb/ton) for different operator tests. The emission level which would have been attained had best technology been used by this facility is estimated by adjusting the test results to reflect the venturi scrubber performance at 6.8 kilopascals (27 inches water) pressure drop using the EPA programmable scrubber model. Section 8.5 of the Background Information Document for Phosphate Rock Plants summarizes the expected emission levels when the scrubber energy is increased from medium to high level. The adjusted level of control is equivalent to that which would be expected if baghouses were employed to control calciner emissions, or 0.055 kg/Mg (0.11 lb/ton). Accordingly, this control level is proposed as the emission limit for calciners.

Opacity data were obtained during the performance testing of the two calciners. Zero percent opacity was recorded at both facilities throughout the 13.75 hours of observations. Based on these test data, plus the fact that better control technology must be installed to comply with the performance limits, it is proposed that the opacity limit for calciner facilities be set at zero percent opacity.

Emission Standards for Grinders

Source tests were conducted on four separate grinders representing a wide variation of exhaust air rates, grinder designs, capacities, and product feeds. Emissions from each of the facilities are controlled with baghouses. Emissions averaged 0.0044, 0.002, 0.0005, and 0.0005 kg/Mg for EPA tests and 0.0022 kg/Mg for operator tests. The emission tests demonstrate that an emission level of 0.005 kg/Mg (0.01 lb/ton) can be achieved by fabric filters for a variety of grinder applications. Installation of baghouse controls for grinders is motivated by the recovery value of the product collected as much as by existing emission standards. Hence, it is expected that baghouses will remain the predominant means of compliances with emission standards for grinder facilities.

Nearly 17 hours of opacity observations were gathered during particulate tests at two of the grinder facilities. The average opacity level recorded throughout the measurement periods was zero percent. The use of baghouses as control devices on these two facilities represents demonstrated best technology, therefore, the Administrator believes that the opacity standard for phosphate rock grinding processes should be zero percent opacity.

Emission Standards for Ground Rock Handling and Storage Systems

Particulate emissions from handling and storage of ground rock are very difficult to characterize due to the fact that these systems vary greatly from plant to plant. A substantial portion of the potential emissions from handling and storage operations is fugitive emissions. Normal industrial practice is to control dust from the various sources by utilizing enclosures and air evacuation or pressure systems ducted to baghouses. Baghouses provide recovery of the rock dust which is subsequently returned to the rock inventory. Emissions from the enclosures have zero percent opacity when the process equipment is properly maintained. Consequently, emissions from the ground rock transfer system are manifested and monitored at the overall collection device (e.g., the baghouse). Because of wide variations in handling and storage facilities, an opacity standard is the only standard appropriate for these facilities.

Source tests were conducted on three pneumatic systems employed in the transfer of ground phosphate rock. The exhaust from the baghouses of each of the transfer systems was witnessed to determine the opacity of emissions during normal transfer operations for two hours at one system, and one hour at the others. The opacity level of the baghouse emissions was observed to be zero percent throughout the test period. Based on these results, an opacity limit of zero percent opacity is proposed for ground phosphate rock handling systems.

Testing, Monitoring, and Recordkeeping

Performance tests to determine compliance with the proposed standards would be required. Reference Method 5 (40 CFR Part 60, Appendix A) would be used to measure the amount of particulate emissions.

The proposed standards would require continuous monitoring of the opacity of emissions discharged from phosphate rock dryers, calciners, grinders and ground rock handling systems. When a scrubber is used to control the emissions, entrained water droplets prevent the accurate measurement of opacity; therefore, in this case the proposed standard would require monitoring the pressure drop across the scrubber and the scrubbing fluid supply pressure to the scrubber rather than opacity. If other controls are employed which would also preclude the use of a continuous monitoring system for measuring opacity as specified by the standard, the operator may request establishment of alternative monitoring requirements under the provisions of 40 CFR 60.13(i).

Excess emissions for affected facilities using opacity monitoring equipment are defined as all six-minute periods in which the average opacity of the stack plume exceeds zero percent. Reporting of any excess emissions is required under 40 CFR 60 on a quarterly basis. For those facilities which use a wet scrubber as the particulate control device, the owner or operator is instead required to submit reports each calendar quarter for all measurements of scrubber pressure drops and liquid supply pressures less than 90 percent of the average levels maintained during the most recent performance test in which compliance with the proposed standards was demonstrated.

Public Hearing

A public hearing will be held to discuss these proposed standards in accordance with Section 307(d)(5) of the Clean Air Act. Persons wishing to make oral presentations should contact EPA at the address given in the ADDRESSES Section of this preamble. Oral presentations will be limited to 15 minutes each. Any member of the public may file a written statement with EPA before, during, or within 30 days after the hearing.

A verbatim transcript of the hearing and written statements will be available for public inspection and copying during normal working hours at the address of the Docket (see ADDRESSES Section).

Docket

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The principal purposes of the docket are (1) to allow interested persons to identify and locate documents so that they can intelligently and effectively participate in the rulemaking process, and (2) to serve as the record for judicial review.

Miscellaneous

As prescribed by Section 111 of the Act, this proposal of standards was preceded by the Administrator's determination that emissions from phosphate rock plants contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare. In accordance with Section 117 of the Act, publication of this proposal was preceded by consultation with appropriate advisory committees, independent experts, and Federal

departments and agencies. The Administrator will welcome comments on all aspects of the proposed regulation.

Under EPA's sunset policy for reporting requirements in regulations, the reporting requirements in this regulation will automatically expire 5 years from the date of promulgation unless EPA takes affirmative action to extend them. To accomplish this, a provision automatically terminating the reporting requirements at that time will be included in the text of the final regulations.

It should be noted that standards of performance for new sources established under Section 111 of the Clean Air Act reflect the degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

Although there may be emission control technology available that can reduce emissions below those levels required to comply with the standards of performance, this technology might not be selected as the basis of standards of performance because of costs associated with its use. Accordingly, standards of performance should not be viewed as the ultimate in achievable emission control. In fact, the Act requires (or has the potential for requiring) the imposition of a more stringent emission standard in several situations. For example, applicable costs do not play as prominent a role in determining the "lowest achievable emission rate" for new or modified sources locating in nonattainment areas; i.e., those areas where statutorily-mandated health and welfare standards are being violated. In this respect, Section 173 of the Act requires that new or modified sources constructed in an area which violates the National Ambient Air Quality Standards (NAAQS) must reduce emissions to the level which reflects the "lowest achievable emission rate" (LAER), as defined in Section 171(3), for such category of source. The statute defines LAER as that rate of emissions based on the following, whichever is more stringent:

(A) The most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable; or,

(B) The most stringent emission limitation which is achieved in practice by such class or category of source.

In no event can the emission rate exceed any applicable new source performance standard (Section 171(3)).

A similar situation may arise under the prevention of significant deterioration of air quality provisions of the Act (Part C). These provisions require that certain sources (referred to in Section 169(1)) employ "best available control technology" (as defined in Section 169(3)) for all pollutants regulated under the Act. Best available control technology (BACT) must be determined on a case-by-case basis, taking energy, environmental and economic impacts and other costs into account. In no event may the application of BACT result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to Section 111 (or 112) of the Act.

In all events, State Implementation Plans approved or promulgated under Section 110 of the Act must provide for the attainment and maintenance of National Ambient Air Quality Standards (NAAQS) designed to protect public health and welfare. For this purpose, SIPs must in some cases require greater emission reductions than those required by standards of performance for new sources.

Finally, States are free under Section 116 of the Act to establish even more stringent emission limits than those established under Section 111 or those necessary to attain or maintain the NAAQS under Section 110. Accordingly, new sources may in some cases be subject to limitations more stringent than EPA's standards of performance under Section 111, and prospective owners and operators of new sources should be aware of this possibility in planning for such facilities.

EPA will review this regulation 4 years from the date of promulgation. This review will include an assessment of such factors as the need for integration with other programs, the existence of alternative methods, enforceability, and improvements in emission control technology.

Executive Order 12044, dated March 24, 1978, whose objective is to improve government regulations, requires executive branch agencies to prepare regulatory analyses for regulations that may have major economic consequences. The screening criteria used by EPA to determine if a proposal requires a regulatory analysis under Executive Order 12044 are: (1) Additional national annualized compliance costs, including capital charges, which total $100 million within any calendar year by the attainment date, if applicable, or within five years, (2) a major increase in prices or production costs.

The impacts associated with the proposal of performance standards for phosphate rock plants do not exceed the EPA screening criteria. Therefore, promulgation of the proposed standard does not constitute a major action requiring preparation of a regulatory analysis under Executive Order 12044. However, an economic impact assessment of alternative control technologies capable of meeting the proposed NSPS has been prepared as required under Section 317 of the Clean Air Act and is included in the Background Information Document for Phosphate Rock Plants. EPA considered all the information in the economic impact assessment in determining the cost of the proposed standard.

Dated: September 14, 1979.

Douglas M. Costle,

Administrator.

It is proposed to amend Part 60 of Chapter I of Title 40 of the Code of Federal Regulations as follows:

1. By adding Subpart NN to the Table of Sections as follows:

Subpart NN—Standards of Performance for Phosphate Rock Plants

Sec.

Authority. Sec. 111 and 301(a), Clean Air Act, as amended, (42 U.S.C. 7411, 7601(a)), and additional authority as noted below:

2. By adding subpart NN as follows:

Subpart NN—Standards of Performance for Phosphate Rock Plants

§ 60.400 Applicability and designation of affected facility.

(a) The provisions of this subpart are applicable to the following affected facilities used in phosphate rock plants: dryers, calciners, grinders, and ground rock handling and storage facilities.

(b) Any facility under paragraph (a) of this section which commences construction, modification, or reconstruction after September 21, 1979, is subject to the requirements of this part.

§ 60.401 Definitions.

(a) "Phosphate rock plant" means any plant which produces or prepares phosphate rock product by any or all of the following processes: mining, beneficiation, crushing, screening, cleaning, drying, calcining, and grinding.

(b) "Phosphate rock feed" means the ore which is fed to phosphate rock facilities, including, but not limited to the following minerals: Fluorapatite, hydroxylapatite, chlorapatite and carbonate-apatite.

(c) "Dryer" means a unit in which the moisture content of phosphate rock is reduced by contact with a heated gas stream.

(d) "Calciner" means a unit in which the moisture and organic matter of phosphate rock is reduced within a combustion chamber.

(e) "Grinder" means a unit which is used to reduce the size of dry phosphate rock.

(f) "Ground phosphate rock handling and storage system" means a system which is used for the conveyance and storage of ground phosphate rock.

§ 60.402 Standard for particulate matter.

(a) On and after the date on which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere:

(1) From any phosphate rock dryer any gases which:

(i) Contain particulate matter in excess of 0.020 kilogram per megagram of phosphate rock feed (0.04 lb/ton), or

(ii) Exhibit greater than 0 percent opacity.

(2) From any phosphate rock calciner any gases which:

(i) Contain particulate matter in excess of 0.055 kilogram per megagram of phosphate rock feed (0.11 lb/ton), or

(ii) Exhibit greater than 0 percent opacity.

(3) From any phosphate rock grinder any gases which:

(i) Contain particulate matter in excess of 0.006 kilogram per megagram of phosphate rock feed (0.012 lb/ton), or

(ii) Exhibit greater than 0 percent opacity.

(4) From any phosphate rock handling and storage system any gases which exhibit greater than 0 percent opacity.

§ 60.403 Monitoring of emissions and operations

(a) Any owner or operator subject to the provisions of this subpart shall install, calibrate, maintain, and operate a continuous monitoring system, except as provided in paragraph (b) of this section, to monitor and record the opacity of the gases discharged into the atmosphere from any phosphate rock dryer, calciner, grinder or ground rock handling system. The span of this system shall be set at 40 percent opacity.

(b) The owner or operator of any affected phosphate rock facility using a wet scrubbing emission control device shall not be subject to the requirements in paragraph (a) of this section, but shall install, calibrate, maintain, and operate the following continuous monitoring devices:

(1) A monitoring device for the continuous measurement of the pressure loss of the gas stream through the scrubber. The monitoring device must be certified by the manufacturer to be accurate within ±250 pascals (±1 inch water) gauge pressure.

(2) A monitoring device for the continuous measurement of the scrubbing liquid supply pressure to the control device. The monitoring device must be accurate within ±5 percent of design scrubbing liquid supply pressure.

(c) For the purpose of conducting a performance test under § 60.8, the owner or operator of any phosphate rock plant subject to the provisions of this subpart shall install, calibrate, maintain, and operate a device for measuring the phosphate rock feed to any affected dryer, calciner, grinder, or ground rock handling system. The measuring device used must be accurate to within ±5 percent of the mass rate over its operating range.

(d) For the purpose of reports required under § 60.7(c), periods of excess emissions that shall be reported are defined as all six-minute periods during which the average opacity of the plume from any phosphate rock dryer, calciner, grinder or ground rock handling system subject to paragraph (a) of this section exceeds 0 percent.

(e) Any owner or operator subject to requirements under paragraph (b) of this section shall report for each calendar quarter all measurement results that are less than 90 percent of the average levels maintained during the most recent performance test conducted under § 60.8 in which the affected facility demonstrated compliance with the standard under § 60.402.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

§ 60.404 Test methods and procedures

(a) Reference methods in Appendix A of this part, except as provided under § 60.8(b) shall be used to determine compliance with § 60.402 as follows:

(1) Method 5 for the measurement of particulate matter and associated moisture content,

(2) Method 1 for sample and velocity traverses,

(3) Method 2 for velocity and volumetric flow rates,

(4) Method 3 for gas analysis, and

(5) Method 9 for the measurement of the opacity of emissions.

(b) For Method 5, the sampling time for each run shall be at least 60 minutes and the minimum sampled volume of 0.84 dscm (30 dscf) except that shorter sampling times and smaller sample volumes, when necessitated by process variables or other factors, may be approved by the Administrator.

(c) For each run, average phosphate rock feed rate in megagrams per hour shall be determined using a device meeting the requirements of § 60.403(c).

(d) For each run, emissions expressed in kilograms per megagram of phosphate rock feed shall be determined using the following equation:

$$E = \frac{(C_s Q_s) 10^{-6}}{M}$$

Where:

E = Emissions of particulates in kilograms per megagrams of phosphate rock feed.

C_s = Concentration of particulates in mg/dscm as measured by Method 5.

Q_s = Volumetric flow rate in dscm/hr as determined by Method 2.

10^{-6} = Conversion factor for milligrams to kilograms.

M = Average phosphate rock feed rate in megagrams per hour.

(Sec. 114, Clean Air Act, as amended, (42 U.S.C. 7414))

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