ADDITIONAL MATTERS: The following items are added to the previously announced agenda:

F. UNCLASSIFIED

2. Conflict-of-Interest Guidelines Implemenation Plan.[1]

3. Proposal to Authorize Use of TVA Vehicles for Transportation between Home and Work for Canine Handlers in the Public Safety Service

CONTACT PERSON FOR MORE INFORMATION: Craven H. Crowell, Jr., Director of Information, or a member of his staff can respond to requests for information about this meeting. Call 615–632–8000, Knoxville, Tennessee. Information is also available at TVA's Washington Office, 202–245–0101.

SUPPLEMENTARY INFORMATION:

TVA Board Action

The TVA Board of Directors has found, the public interest not requiring otherwise, that TVA business requires the subject matter of this meeting be changed to include the additional items shown above and that no earlier announcement of this change was possible.

The members of the TVA Board voted to approve the above findings and their approvals are recorded below:

Dated: April 15, 1987.

Approved:

C.H. Deah, Jr.,

Director and Chairman.

John B. Waters,

Director.

[FR Doc. 87–8838 Filed 4–16–87; 9:20 am]

BILLING CODE 8120–01–M

[1] This item was approved by individual Board members. This would give formal ratification to the Board's action.

Corrections

Federal Register
Vol. 52, No. 75
Monday, April 20, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

International Trade Administration

[A-428-037]

Drycleaning Machinery From West Germany; Final Results of Antidumping Duty Administrative Review

Correction

In notice document 87-7813 beginning on page 11299 in the issue of Wednesday, April 8, 1987, make the following correction:

On page 11300, in the last column, in the third column of the table under "Margin (percent)", the last entry "0.84" should read "0.48".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[HSQ-143-PN]

Medicare Program; End Stage Renal Disease Program; Revised Network Area Designations

Correction

In notice document 87-7927 beginning on page 11550 in the issue of Thursday, April 9, 1987, make the following corrections:

1. On page 11553, in the second column, in the second complete paragraph, in the ninth line, "22 the" should read "22 with the".

2. On page 11554, in the first column, under "Network Area #15", under the entry for "Colorado" insert "Nevada".

BILLING CODE 1505-01-D

POSTAL SERVICE

39 CFR Part 447

Code of Ethical Conduct for Postal Employees; Proposed Amendment To Allow Attendance at Group Functions

Correction

In proposed rule document 87-8424 beginning on page 12196 in the issue of Wednesday, April 15, 1987, make the following correction:

§ 447.24 [Corrected]

On page 12197, in the third column, in § 447.24(b)(7), Example (2), in the eighth line, "may authorize" should read "may not authorize".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CCGD3 87-08]

Regatta; Children's Liver Foundation Trophy Race, Barnegat Bay, Near Toms River, NJ

Correction

In proposed rule document 87-7299 beginning on page 10594 in the issue of Thursday, April 2, 1987, make the following correction:

On page 10595, in the first column, under **FOR FURTHER INFORMATION CONTACT**, the telephone number should read "(212) 668-7974".

BILLING CODE 1505-01-D

federal register

Monday
April 20, 1987

Part II

Department of Health and Human Services

Social Security Administration

20 CFR Parts 404 and 416

Standards for Consultative Examinations and Existing Medical Evidence; Proposed Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Parts 404 and 416

[Regulations Nos. 4 and 16]

Standards for Consultative Examinations and Existing Medical Evidence

AGENCY: Social Security Administration, HHS.

ACTION: Proposed rules.

SUMMARY: Section 9 of Pub. L. 98–460 requires that the Secretary issue regulations to establish standards for consultative examinations. These regulations must include standards for determining when to obtain a consultative examination, the type of consultative examination to be purchased, and monitoring procedures for both the purchase process and the consultative examination reports. Every reasonable effort must be made to obtain from the claimant's medical sources the medical evidence necessary to make a determination before evaluating medical evidence obtained from another source on a consultative basis. Section 9 also requires consideration of all evidence available in a claimant's case record, and development of a complete medical history covering at least the preceding 12 months in any case where a decision is made that the individual is not under a disability. We understand this provision to mean that a 12-month medical history is not required if the disability is alleged to have begun less than 12 months before application. In such cases, no purpose would be served in developing a 12-month medical history.

These proposed rules reflect the statutory requirements.

DATE: We will consider your comments if we receive them no later than June 19, 1987.

ADDRESSES: Send your written comments to the Commissioner of Social Security, Department of Health and Human Sevices, P.O. Box 1585, Baltimore, Maryland 21203, or deliver them to the Office of Regulations, Social Security Administration, 3–A–3 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235 between 8:00 a.m. and 4:30 p.m. on regular business days. Comments received may be inspected during these same hours by making arrangements with the contact person shown below.

FOR FURTHER INFORMATION CONTACT: William J. Ziegler, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone 301–594–7415.

SUPPLEMENTARY INFORMATION:

Evidence From Medical Sources

One of the factors required to establish that an individual is disabled is a medically determinable severe impairment. This severity and the individual's residual functional capacity (i.e., what the individual can still do despite limitations) are established through medical evidence. Objective and complete medical evidence produces quality determinations and prompt decisions. We consider all material facts in the individual's record to determine whether the individual is disabled.

We request and make every reasonable effort to obtain medical evidence from the sources who have treated the individual for the impairment(s) since the alleged disability onset date when the individual is applying for benefits, and during the preceding 12 months when the case of an individual receiving benefits is undergoing review.

The quality of medical examinations has a major impact on the quality of our decisionmaking. We try to make decisions based on evidence from treating sources because of the continuing relationship between the claimant and physician. When the available evidence of record is not sufficient for making a disability decision, a consultative examination is purchased, at government expense, from the treating source whenever possible. Since basing a decision on evidence from a treating or other medical source is not always possible for a variety of reasons, it may be necessary to purchase a consultative examination from an independent source at government expense. In some instances we may order a consultative examination from an independent source while awaiting receipt of treating or other medical source evidence, but the report will not be evaluated until that evidence is received or every reasonable effort has been made to obtain it.

Program Integrity

Since the enactment of the Medicare/Medicaid anti-fraud and abuse amendments of 1977, an escalation in the prosecution of medical service providers for fraud and abuses in those programs has raised the issue of the propriety of using these and other offenders in SSA's disability programs. We are, therefore, proposing rules in §§ 404.1503a and 416.903a barring our use of any individual or entity, for example, as a medical consultant, review physician, consultative examination provider or diagnostic test facility, found guilty of professional misconduct.

Consultative Examinations

Consultative examinations are medical examinations purchased by the State agency from physicians and other qualified health professionals outside the agency.

If an individual's treating or other medical sources cannot provide us with sufficient medical evidence about his or her impairment(s) for us to determine whether the individual is disabled or blind, we may ask the individual to have one or more physical or mental examinations or tests. We will pay for those examinations that we arrange. When we arrange the examination or test, we will give the individual reasonable notice of the date, time, and place the examination or test will be given, indicate the type of examination or test that will be given, and the name of the person who will do it. We will also give the examiner any necessary background information about the individual's condition when the individual's own physician will not be doing the examination or test.

If an individual is applying for benefits and does not have a good reason for failing or refusing to take part in a consultative examination or test which we arrange to get information to determine disability or blindness, we may find that the individual is not disabled or blind. If the individual is already receiving benefits and does not have a good reason for failing or refusing to take part in a consultative examination or test that we have arranged, we may determine that the disability or blindness has stopped.

Standards for Consultative Examinations

While SSA has gone a long way toward stronger management of the consultative examination process, Congress, in enacting section 9 of Pub. L. 98–460, made clear that SSA should reflect this stronger management in regulations. *See* H. Rep. No. 98–618, 98th Cong., 2d Sess. 19–20 (1984).

Under existing regulations, consultative examinations may be obtained to secure additional information necessary to make a disability determination or to resolve conflicting information. Evidence

obtained through a consultative examination is considered in conjunction with all other medical and nonmedical evidence submitted in connection with a disability claim. Until passage of section 9 of Pub. L. 98–460, there was no statutory requirement for regulatory standards specifying particular cases in which consultative examinations would be purchased, identifying the types of consultative examinations to be purchased, or requiring any standard procedures to be followed in establishing and monitoring purchase policies.

Because consultative examinations are purchased at government expense, we have had guidelines which cover the standards to be used in purchasing and monitoring such examinations. For some time, we have had in place in our operating manuals these internal guidelines for managing every aspect of the consultative examination process from deciding when to purchase an examination, to guidance to be provided to the person performing the consultative examination, to monitoring the actual consultative examination delivery process and the reports which it produces. In the House report on section 9 (cited above), Congress expressed satisfaction over our success in better management of the consultative examination process, but believed that our standards should be reflected in regulations. These regulations are being issued to comply with the congressional mandate.

In addition to incorporating our existing operating procedures into this regulation, we are adding further provisions in three areas. First, we have identified certain time periods which we think can serve as a frame of reference for scheduling a consultative examination. These minimum scheduling times are intended to emphasize our intent that sufficient time be made available for thoroughly examining the claimant to obtain a complete picture of the claim. They are meant to ensure sufficient time for a full consultative examination including development of case history. They are not meant as inflexible rules to be applied mechanically and thereby preventing appropriate judgment on the part of the State and professional individuals. Second, standards are included to ensure that laboratory fees paid to consultative examination providers for services are reasonable and do not represent excessive mark-up by the source. Third, we emphasize that State rules must be followed regarding minimum qualification levels for physicians' and psychologists' assistants.

The minimum scheduling times for consultative examinations were developed by a panel of regional office and State agencies physicians and administrators convened to assist us in the preparation of these regulations (among other things). Since many State agencies currently have such standards (some based on the duration of the examination, others on the numbers of patients who can be scheduled for consultative examinations per hour), we are interested in establishing national norms to assure that all claimants receive equitable treatment when attending a consultative examination. We are particularly interested in the reaction of the public and the medical community to these recommendations and encourage widespread comment from interested parties during the period of public comment on the Notice of Proposed Rulemaking.

The proposed policy will carry out the intent of section 9 of Pub. L. 98–460 by including in the regulations all major guidelines contained in existing instructional issuances. This provides better access for the public to SSA standards used for consultative examinations in disability claims.

The regulated consultative examination material will be that which falls under the categories mandated by Congress. Those categories are:

(1) Standards to be utilized by State and Federal personnel in determining when a consultative examination should be obtained in connection with disability determinations.

(2) Standards for the type of referral to be made.

(3) Procedures to monitor the referral process used.

(4) Procedures to monitor the product of health professionals to whom cases are referred.

These standards are being included in Subpart P of Part 404 and Subpart I of Part 416. We are adding new §§ 404.1519 through 404.1519u and new §§ 416.919 through 416.919u. We are also updating the Table of sections for Subpart P and Subpart I.

Definitions

We are proposing to revise §§ 404.1502 and 416.902 to define what we mean by "medical source," "treating source," and "source of record".

The 12-Months Medical History

We are proposing changes in paragraph (b) of 20 CFR 404.1512 and 416.912, and 20 CFR 404.1593 and 416.993, to indicate that we will develop a complete medical history covering at least the preceding 12 months in any case where an unfavorable determination is made, unless the disability is alleged to have begun less than 12 months before application. *See* Sen. Rep. No. 98–466, 98th Cong., 2d Sess., 26 (1984). We are also indicating that we will make every reasonable effort to obtain from the individual's treating and other medical sources the evidence necessary to make a determination before evaluating medical evidence obtained from another source on a consultative basis. Reasonable effort is defined to mean an initial request and, if the evidence is not received within 10 days, one followup request to the treating source for medical evidence. The source will have 20 days from the followup to reply (unless experience indicates a longer period is advisable in a particular case) before we evaluate the evidence that may be obtained on a consultative basis. In some instances we may order a consultative examination while awaiting receipt of treating or other medical source evidence.

In addition, we are proposing to amend paragraph (a) of 20 CFR 404.1520 and 416.920 to more clearly state that we consider all evidence available in the individual's case record when we make a determination. (These regulations pertaining to "Multiple Impairments" were published in the **Federal Register** on March 5, 1985, and appear in their current form at 50 FR 8726.)

We are proposing to revise 20 CFR 404.1593 and 416.993 to recognize that development of medical evidence in continuing disability review cases will be guided by the special requirements of the medical improvement review standard and to affirm that consultative examinations are purchased with only one purpose, to provide information necessary to reach a decision in a case.

Medical Assessment Requirement

We are also proposing to revise §§ 404.1513 (b)(6) and (c), 404.1545(a) and 404.1546 as well as §§ 416.913 (b)(6) and (c), 416.945(a) and 416.946 to delete references to medical assessments and to refer instead to medical source statements as to what a person can still do despite his or her impairment(s). These revisions accomplish two things: they remove all reference to the term "medical assessment," which was not clearly defined and was thus open to various interpretations; and they indicate that we will consider all of the medical and other evidence in determining whether a person is disabled, including medical source statements as to what a person can still

do despite impairment, and that medical source statements alone are not determinative of whether or not the person is disabled. We believe these are important changes. There has been confusion among adjudicators as to what constitutes a "medical assessment." This has resulted in special requests being made to elicit information which was already at hand but not labeled "medical assessment." We have revised the regulations by deleting the term "medical assessment" and indicating what we mean, i.e., medical source statements as to what the person can still do despite impairment(s).

Treating Source Opinions

The Senate Finance Committee, in its consideration of the provision that became section 9, indicated in its report that it did not intend to alter in any way the relative weight that the Secretary places on reports received from treating physicians and from physicians who perform consultative examinations. (S. Rep. No. 466, 98th Cong., 2d. Sess. 26 (1984).) Accordingly, to clarify our existing policy with respect to the weight which we place on opinions of treating sources and in response to certain Federal Circuit Court of Appeals decisions and other statements regarding our policy, we are setting forth our policy with respect to opinions of treating sources. Therefore, we are proposing to revise §§ 404.1527 and 416.927 to clearly indicate those instances when a treating source opinion will be conclusive, when it will be given preference, and when neither conclusiveness nor preference will be granted.

Regulatory Procedures

Executive Order 12291. These regulations have been reviewed under Executive Order 12291 and do not meet any of the criteria for a major rule. The cost of implementing this disability provision of Pub. L. 98–460 (section 9) is negligible. Therefore, a regulatory impact analysis is not required.

Regulatory Flexibility Act. We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they only affect a small number of disability claimants under title II and title XVI of the Social Security Act.

Paperwork Reduction Act. These proposed regulations contain information collection requirements in §§ 404.1512(b), 404.1513 (b) and (c), 404.1519n(c), 404.1593 (b) and (c), 416.912(b), 416.913 (b), and (c), 416.919n(c), and 416.993 (b) and (c).

As required by section 3504(h) of the Paperwork Reduction Act of 1980, we have submitted a copy of the proposed rule to the Office of Management and Budget (OMB) for its review of these information collection requirements. Other organizations and individuals desiring to submit comments on these information collections should direct them to the Commissioner of Social Security and to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Room 3208, Washington, DC 20503, Attention: Desk Officer for HHS.

(Catalog of Federal Domestic Program Nos. 13.802, Social Security Disability Insurance; 13.807, Supplemental Security Income Program)

List of Subjects

20 CFR Part 404

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

20 CFR Part 416

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

Dated: February 3, 1987.

Dorcas R. Hardy,

Commissioner of Social Security.

Approval: March 13, 1987.

Otis R. Bowen,

Secretary of Health and Human Services.

PART 404—FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE (1950)

For the reasons set out in the preamble, Part 404, Subpart P, Chapter III of Title 20, Code of Federal Regulations is amended as set forth below.

1. The authority citation for Subpart P is revised to read as follows, and all other authority citations which appear throughout Subpart P are removed.

Authority: Secs. 202, 205, 216, 221, 222, 223, 225 and 1102 of the Social Security Act, as amended; 42 U.S.C. 402, 405, 416, 421, 422, 423, 425 and 1302; Sec. 505 (a) and (c) of Pub. L. 96–265, 94 Stat. 473.

2. The Table of Contents for Subpart P is amended by adding an entry for § 404.1503a, and by adding the following center headings and §§ 404.1519–404.1519u, to follow § 404.1518, to read as follows:

Subpart P—Determining Disability and Blindness

Sec.

* * * * *

404.1503a Program integrity.

* * * * *

Standards To Be Used in Determining When a Consultative Examination Will Be Obtained in Connection With Disability Determinations

404.1519 The consultative examination.
404.1519a When we will purchase a consultative examination and how we will use it.
404.1519b When we will not purchase a consultative examination.
404.1519e Purchase of the consultative examinations at the reconsideration level.
404.1519f Securing medical evidence at the ALJ hearing level.

Standards for the Type of Referral and for Report Content

404.1519g Type of purchased examinations and selection of source.
404.1519h Your treating physician or psychologist.
404.1519i Other sources for consultative examinations
404.1519j Objections to the designated physician or psychologist.
404.1519k Purchase of medical examinations, laboratory tests, and other services.
404.1519l Requesting examination by a specific physician, psychologist or institution—ALJ hearing level.
404.1519m Diagnostic surgical procedures.
404.1519n Informing the examining physician or psychologist of examination scheduling and/or duration, report content and signature requirements.
404.1519o When a properly signed consultative examination report has not been received.
404.1519p Reviewing reports of consultative examinations.
404.1519q Conflict of interest.

Authorizing and Monitoring the Referral Process Used

404.1519s Authorizing and monitoring consultative examinations.

Procedures to Monitor the Consultative Examination

404.1519t Consultative examination oversight.
404.1519u Direct purchase of medical services across State lines.

* * * * *

3. Section 404.1502 is revised to read as follows:

§ 404.1502 General definitions and terms for this subpart.

As used in the subpart—

"Secretary" means the Secretary of Health and Human Services.

"State agency" means that agency of a State which has been designated by

the State to carry out the disability determination function.

"Treating source" means your own physician or psychologist who has provided you with medical treatment or evaluation and who has an ongoing treatment relationship with you. "Source of record" means a hospital, clinic or other source that has provided you with medical treatment or evaluation, as well as a physician or psychologist who has treated or evaluated you but does not have an ongoing treatment relationship with you. "Medical sources" refers to both treating sources and sources of record.

"We" or "us" refers to either the Social Security Administration or the State agency making the disability or blindness determination.

"You" refers to the person who has applied for benefits or for a period of disability or is receiving benefits based on disability or blindness.

4. Section 404.1503a is added to read as follows:

§ 404.1503a Program integrity.

We will not use in our program any individual or entity who is excluded, suspended, or otherwise barred from participation in the Medicare or Medicaid programs, or any other Federal or Federally-assisted program; who has been convicted, under Federal or State law, in connection with the delivery of health care services, of fraud, theft, embezzlement, breach of fiduciary responsibility or financial abuse; who has been convicted under Federal or State law of unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; whose license to provide health care services is revoked or suspended by any State licensing authority for reasons bearing on professional competence, professional conduct, or financial integrity; who has surrendered such a license while formal disciplinary proceedings involving professional conduct were pending; or who has had a civil monetary assessment or penalty imposed on such individual or entity for any activity described in this section or as a result of formal disciplinary proceedings. Also see §§ 404.1519(a) and 404.1519g(b).

§ 404.1508 [Amended]

5. Section 404.1508 is amended by adding the cross-reference "(see § 404.1527)." at the end of the penultimate sentence.

6. Section 404.1512 is amended by revising paragraph (b) to read as follows:

§ 404.1512 Your responsibility to submit evidence.

* * * * *

(b) *Kind of evidence.* You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled. We will consider only impairment(s) you say you have or about which we receive evidence. Before deciding that you are not disabled, we will develop your complete medical history (i.e., evidence from the records of your medical sources) covering at least the preceding 12 months, unless you say that your disability began less than 12 months before you filed your application. We will make every reasonable effort to help you in getting medical reports from your own medical sources when you give us permission to request them. Every reasonable effort means that we will make an initial request and, after 10 days, one followup request to your medical source to obtain the medical evidence necessary to make a determination before we evaluate medical evidence obtained from another source on a consultative basis. The medical source will have 20 days from the followup to reply (unless experience indicates that a longer period is advisable in a particular case). In some instances we may order a consultative examination while awaiting receipt of medical source evidence. If we ask you to do so, you must contact your medical sources to help us get the medical reports. If we ask you, you must also provide evidence about your—

(1) Age;

(2) Education and training;

(3) Work experience;

(4) Daily activities both before and after the date you say that you became disabled;

(5) Efforts to work; and

(6) Any other evidence showing how your impairment(s) affects your ability to work. (In §§ 404.1560 through 404.1569, we discuss in more detail the evidence we need when we consider vocational factors.)

7. Section 404.1513 is amended by revising paragraph (b)(6) and paragraph (c) to read as follows. The heading of paragraph (b) and (b) introductory text are republished.

§ 404.1513 Medical evidence of your impairment.

* * * * *

(b) *Medical reports.* Medical reports should include—

* * * * *

(6) Statements about what you can still do despite your impairment(s) based on the medical source's findings on the factors under paragraph (b) (1) through (5) of this section (except in statutory blindness claims, and disability claims for widows, widowers, and surviving divorced spouses). (See § 404.1527.)

(c) *Statements about what you can still do.* Statements about what you can still do (based on the medical source's findings on the factors under paragraph (b) (1) through (5) of this section) should describe—

(1) The medical source's opinion about your ability, despite your impairment(s), to do work-related activities such as sitting, standing, moving about, lifting, carrying, handling objects, hearing, speaking, and traveling; and

(2) In cases of mental impairment(s), the medical source's opinion about your ability to reason or make occupational, personal, or social adjustments. (See § 404.1527.)

* * * * *

8. The following center headings and new §§ 404.1519 through 404.1519u are added immediately after § 404.1518 to read as follows:

Standards To Be Used in Determining When a Consultative Examination Will Be Obtained in Connection With Disability Determinations

§ 404.1519 The consultative examination.

(a) *General.* A consultative examination is a physical or mental examination or test purchased for you at our request and expense from a treating physician or psychologist, another source of record, or an independent source. The decision to purchase a consultative examination will be made on an individual case basis in accordance with the provisions of § 404.1519a through § 404.1519f. Selection of the source for the examination will be consistent with the provisions of § 404.1503a.

(b) *Recontacting medical sources.* When evidence received from your treating physician or other medical sources is inadequate to allow us to determine whether you are disabled, additional information may be readily available from your treating physician or other medical sources in your record (that is, your case file) and must be obtained when significant to the disability determination. Whenever possible, this contact will be made by a physician since a direct doctor-to-doctor contact is very productive. Before purchasing an examination, therefore, every consideration will be given to whether the additional information needed is readily available from the

records of your medical treatment sources. (See § 404.1517(b) for reasons why more evidence may be needed and § 404.1593 for your obligation to have a consultative examination when we request it.)

§ 404.1519a When we will purchase a consultative examination and how we will use it.

(a)(1) *General.* The decision to purchase a consultative examination for you will be made after full consideration is given to whether the additional information needed (e.g., clinical findings, laboratory tests, diagnosis, and prognosis, etc.) is readily available from the records of your medical sources. We will seek clarification from a medical source who has provided a report when that report contains a conflict or ambiguity, or does not contain all necessary information or when the information supplied is not based on objective evidence. We will not, however, seek clarification from a medical source when it is clear that the source either cannot or will not provide the necessary findings, or cannot reconcile a conflict or ambiguity in the findings provided from the source's records. Therefore, before purchasing a consultative examination, we will consider not only existing medical reports, but also the background report containing your allegations and information about your vocational background, as well as other pertinent evidence in your file.

(2) When we purchase a consultative examination, we will use the report from the consultative examination to try to resolve a conflict or ambiguity if one exists. We will do this by comparing the persuasiveness and value of the evidence. We will also use a consultative examination to secure needed medical evidence the file does not contain such as clinical findings, laboratory tests, a diagnosis or prognosis necessary for decision.

(b) *Situations requiring a consultative examination.* A consultative examination may be purchased when the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on your claim. In addition, other situations, such as one or more of the following, will normally require a consultative examination (these situations are not all-inclusive):

(1) The specific additional evidence needed for adjudication has been pinpointed and high probability exists for obtaining it through purchase.

(2) The additional evidence needed is not contained in the records of your treating sources.

(3) Evidence that may be needed from your treating or other medical sources cannot be obtained for reasons beyond your control, such as death or noncooperation of the medical source.

(4) Highly technical or specialized medical evidence which is needed is not available from your treating sources.

(5) A conflict, inconsistency, ambiguity or insufficiency in the evidence must be resolved.

(6) There is an indication of a change in your condition that is likely to affect your ability to function, but current severity is not documented.

(7) Information provided by any source appears not to be supported by objective evidence.

§ 404.1519b When we will not purchase a consultative examination.

A consultative examination will not be purchased in the following situations (these situations are not all-inclusive):

(a) In disability insurance benefit claims, when you do not meet the insured status requirement in the calendar quarter you allege you became disabled or later and there is no possibility of establishing an earlier onset.

(b) In disabled widow(er) benefit claims, when the alleged month of disability is after the end of the 7-year period specified in § 404.335(c)(1) and there is no possibility of establishing an earlier onset, or when the 7-year period expired in the past and all the medical evidence in your file establishes that you were not disabled on or before the expiration date.

(c) In disability insurance benefit claims, when insured status expired in the past and the medical evidence in your file establishes that you were not disabled on or before the expiration date.

(d) When any issues about the actual performance of substantial gainful activity or gainful activity have not been resolved.

(e) In childhood disability claims, when it is determined that your alleged childhood disability did not begin before the month of attainment of age 22. In this situation, you could not be entitled to benefits as a disabled child unless found disabled before age 22.

(f) When, on the basis of your allegations and all available medical reports in your case file, it is apparent that you do not have an impairment(s) which will have more than a minimal effect on your capacity to work.

(g) When you either have no medical source or your medical source refuses to provide a medical report and, in the adjudicator's judgment based on your allegations and observations, there is no reasonable likelihood of disability.

(h) Childhood disability claims filed concurrently with the number holder's claim and entitlement cannot be established for the number holder.

(i) Survivors childhood disability claims where entitlement is precluded based on nondisability factors.

§ 404.1519e Purchase of consultative examinations at the reconsideration level.

(a) When you request a review of our initial determination at the reconsideration level of review, consultative medical examinations will be obtained when needed, but not routinely. A consultative examination will not, if possible, be performed by the same physician or psychologist used in the initial claim.

(b) Where the evidence tends to substantiate an affirmation of the initial denial but you state that the treating physician or psychologist considers you disabled, we will consider obtaining a consultative examination from your physician or psychologist. This is to ensure that all relevant evidence has been obtained and that we have thoroughly reconsidered your claim.

§ 404.1519f Securing medical evidence at the ALJ hearing level.

(a) Where there is a conflict in the medical evidence at the hearing level of review before an administrative law judge (ALJ), the ALJ will try to resolve it by comparing the persuasiveness and value of the conflicting evidence. The ALJ's reasoning will be explained in the decision rationale. Where such resolution is not possible, the ALJ will secure additional medical evidence (e.g., clinical findings, laboratory tests, diagnosis, prognosis, etc.) to resolve the conflict. Even in the absence of a conflict, the ALJ will also secure additional medical evidence when the file does not contain clinical findings, laboratory tests, a diagnosis, or a prognosis necessary for a decision.

(b) Before requesting a consultative examination, the ALJ will ascertain whether the information is available as a result of a recent examination by any of your medical sources. If it is, the ALJ will request the evidence from that medical practitioner. If contact with the medical source is not productive for any reason, or if there is no recent examination by a medical source, the ALJ will obtain a consultative examination.

Standards for the Type of Referral and for Report Content

§ 404.1519g Type of purchased examinations and selection of source.

(a) The types of examinations and tests we purchase depend upon the additional evidence needed for the disability determination. We will purchase only the specific evidence needed. For example, if special tests (such as X-rays, blood studies, or EKG) will furnish the additional evidence needed for the disability determination, a more comprehensive medical examination will not be authorized.

(b) The physician or psychologist selected to do the examination or test must be qualified. The physician's or psychologist's qualifications must indicate that the physician or psychologist is currently licensed in the State and has the training and experience to perform the type of examination or test requested. The physician or psychologist may use support staff to help perform the examination. Any such support staff must meet appropriate licensing or certification requirements of the State. See also § 404.1503a.

§ 404.1519h Your treating physician or psychologist.

When in our judgment your treating physician or psychologist is qualified, equipped, and willing to perform the additional examination or tests for the fee schedule payment, and furnishes complete and timely reports, your treating physician or psychologist will be selected to do the purchased examination. Even if only a supplemental test is required, your treating physician or psychologist is ordinarily the preferred source.

§ 404.1519i Other sources for consultative examinations.

In the following situations, a source other than your treating physician or psychologist will be used for a purchased examination or test (these situations are not all-inclusive):

(a) Your treating physician or psychologist prefers not to perform such an examination or does not have the equipment to provide the specific data needed, e.g., ventilatory studies are needed, and your physician does not wish to make arrangements to obtain these tests.

(b) There are conflicts or inconsistencies in your file which cannot be resolved by going back to your treating physician or psychologist.

(c) You prefer a source other than your treating physician or psychologist and have a good reason for your preference.

(d) We know from experience through previous purchase of evidence that your treating physician or psychologist may not be a productive source, e.g., does not provide complete or timely reports.

§ 404.1519j Objections to the designated physician or psychologist.

You or your representative may object to your being examined by a designated physician or psychologist. If there is a good reason for the objection, we will schedule the examination with another physician or psychologist. A good reason may be where the consultative examination physician or psychologist had previously represented an interest adverse to you. For example, the physician or psychologist may have represented your employer in a workers' compensation case or may have been involved in an insurance claim or legal action adverse to you. Other things we will consider are: language barrier, office location of consultative examination physician or psychologist (2nd floor, no elevator, etc.), travel restrictions, and examination by the physician or psychologist in connection with a previous unfavorable determination. If the objection is because a physician or psychologist allegedly "lacks objectivity" (in general, but not in relation to you personally) we will review the allegations (see § 404.1519s). To avoid a delay in processing your claim, the consultative examination in your case will be changed to another physician or psychologist while a review is being conducted. Any objection to use of the substitute physician or psychologist will be handled in the same manner. However, if we previously conducted such a review and found that the reports of the consultative physician or psychologist in question conform to our guidelines, then we will not change your examination.

§ 404.1519k Purchase of medical examinations, laboratory tests, and other services.

We may purchase medical examinations, X-rays and laboratory tests (including specialized tests such as pulmonary functions, EKGs, stress tests, etc.) from a licensed physician or psychologist, hospital or clinic. Psychiatric evaluations and psychological evaluations and tests are also included in this category.

(a) The rates of payment to be used for purchasing medical or other services necessary to make determinations of disability may not exceed the highest rate paid by Federal or other agencies in the State for the same or similar types of service. The State will determine the rates of payment to be used for purchasing such services. The amount of reimbursement to the physician provider will be the amount billed for the services or the rates of payment which the State uses for purchasing such services, whichever is lower.

(b) If a physician's bill, or a request for payment for a physician's services includes a charge for a laboratory test for which payment may be made under this part, the amount payable with respect to the test shall be determined as follows:

(1) If the bill or request for payment indicates that the test was personally performed or supervised by the physician who submitted the bill (or for whose services the request for payment was made) or by another physician with whom that physician shares his or her practice, the payment will be based on the physician's usual and customary charge for the test or the rates of payment which the State uses for purchasing such services, whichever is the lesser amount.

(2) If the bill or request for payment indicates that the test was performed by an independent laboratory, the amount of reimbursement will not exceed the billed cost of the service or the rates of payment which the State uses for purchasing such services, whichever is the lesser amount. A nominal payment may be made to the physician for collecting, handling and shipping the specimen to the laboratory if the physician bills for such a service. The total reimbursement may not exceed the rates of payment which the State uses for purchasing such services.

(c) The State will assure that it can support the rates of payment it uses. The State shall also be responsible for monitoring and overseeing the rates of payment it uses to ensure compliance with paragraphs (a) and (b) of this section.

§ 404.1519l Requesting examination by a specific physician, psychologist or institution—ALJ hearing level.

In an unusual case, an ALJ may have reason to request an examination by a particular physician, psychologist or institution. Some examples include the following:

(a) Conflicts in the existing medical evidence require resolution by a recognized authority in a particular specialty;

(b) The impairment requires hospitalization for diagnostic purposes; or

(c) Your treating physician or psychologist is in the best position to submit a meaningful report.

§ 404.1519m Diagnostic surgical procedures.

We will not order diagnostic surgical procedures such as myelograms and arteriograms for the evaluation of disability under the Social Security program. In addition, we will not order procedures such as cardiac catheterization and surgical biopsy. However, if any of these procedures have been performed as part of a workup by your treating physician or other medical source, the results may be secured and used to help evaluate an impairment(s)'s severity.

§ 404.1519n Informing the examining physician or psychologist of examination scheduling and/or duration, report content and signature requirements.

The physicians or psychologists who perform consultative examinations will have a good understanding of the Social Security disability program and their evidentiary role. They will be made fully aware of their responsibilities and obligations regarding confidentiality as described in § 401.105(e). Consulting physicians or psychologists will be fully informed at the time we first contact them, and at subsequent appropriate intervals, of the following obligations:

(a) In scheduling full consultative examinations, sufficient time should be allowed to permit the examining physician to take a case history and perform the examination (including any needed tests). The following scheduling intervals should be applied for examinations.

(1) General medical examination—at least 20 minutes;

(2) Comprehensive general medical examination—at least 30 minutes;

(3) Comprehensive musculoskeletal or neurological examination—at least 20 minutes;

(4) Comprehensive psychiatric examination—at least 40 minutes;

(5) Psychological examination—at least 60 minutes (Additional time may be required depending on types of psychological tests administered); and

(6) All others—at least 30 minutes or in accordance with accepted medical practices.

We recognize that actual practice will dictate that some examinations may be scheduled with greater or less frequency, depending on the circumstances in a particular situation. The purpose of these scheduling time frames is to ensure that such examinations are complete and that sufficient time is made available to obtain the information needed to make an accurate determination in your case. State agencies will monitor the scheduling of examinations to ensure that any overscheduling is avoided, as overscheduling may lead to examinations of so short a duration as to preclude the possibility of a thorough examination.

(b) *Report content.* The reported results of your medical history, examination, pertinent requested laboratory findings, discussions and conclusions must conform to accepted professional standards and practices in the medical field for a complete and competent examination. The facts in a particular case and the information and findings already reported in the medical and other evidence of record will dictate the extent of detail needed in the consultative examination report for that case. Thus, the detail and format for reporting the results of a purchased examination will vary depending upon the type of examination or testing requested. The reporting of information will differ from one type of examination to another when the requested examination relates to the performance of tests such as ventilatory function tests, treadmill exercise tests, or audiological tests. The medical report must be complete enough to help us determine the nature, severity, duration of the impairment and residual functional capacity. Pertinent points in your medical history, such as a description of chest pain, will reflect your statements of your symptoms, not simply the physician's or psychologist's statements or conclusions. The examining physician's or psychologist's report of the consultative examination will include the objective medical facts.

(c) *Elements of a complete examination.* A complete examination is one which involves all the elements of a standard examination in the applicable medical specialty. When a complete examination is involved, the report will include the following elements:

(1) Your major or chief complaint(s).

(2) A detailed description, within the area of specialty of the examination, of the history of your major complaint(s).

(3) A description, and disposition, of pertinent "positive," as well as "negative," detailed findings based on the history, examination and laboratory test related to the major complaint(s) and any other abnormalities reported or found during examination or laboratory testing.

(4) The results of laboratory and other tests (e.g., x-rays) performed according to the requirements stated in the Listing of Impairments (see Appendix 1 of this Subpart P).

(5) The diagnosis and prognosis for your impairment(s).

(6) A statement as to what you can still do despite your impairment(s) (except in statutory blindness claims, and disability claims for widows, widowers, and surviving divorced spouses). This statement must describe the consultative physician's or psychologist's opinion concerning your ability, despite your impairment(s), to do basic work activities such as sitting, standing, lifting, carrying, handling objects, hearing, speaking, and traveling; and, in cases of mental impairment(s), the consultative physician's or psychologist's opinion as to your ability to reason or make occupational, personal, or social adjustments.

(i) In addition, the consultative physician or psychologist will consider, and provide some explanation or comment on, the major complaint(s) and any other abnormalities found during the history and examination or reported from the laboratory tests. The history, examination, evaluation of laboratory test results, and the conclusions will represent the information provided by the physician or psychologist who signs the report.

(ii) When less than a complete examination is required (for example, a specific test or study is needed), not every element is required.

(d) *Signature requirements.* All consultative examination reports will be personally reviewed and signed by the physician or psychologist who actually performed the examination. This attests to the fact that the physician or psychologist doing the examination or testing is solely responsible for the report contents and for the conclusions, explanations or comments provided with respect to the history, examination and evaluation of laboratory test results. The examining physician's or psychologist's signature on a report annotated "not proofed" or "dictated but not read" is not acceptable. The physician's or psychologist's rubber stamp signature or the physician's or psychologist's signature entered by any other person is not acceptable.

§ 404.1519o When a properly signed consultative examination report has not been received.

The following explains what adjudicative action we take if a consultative examination report is received unsigned or improperly signed.

(a) *Adjudication without a properly signed report.* Cases involving only the types of determinations specified in paragraphs (a) (1) and (2) of this section will be adjudicated without waiting for a properly signed consultative examination report. A properly signed consultative examination report will be obtained after the disability

determination is made by us and included in the file. However, if the signature of the physician or psychologist who performed the original examination cannot be obtained because that physician or psychologist is deceased, the consultative examination will be rescheduled with another physician or psychologist.

(1) Continuous period of disability allowance with an onset date as alleged or earlier than alleged; or

(2) Continuance of disability.

(b) *Adjudication with a properly signed report.* We will not use an unsigned or improperly signed consultative examination report to make the types of determinations specified in paragraphs (b) (1), (2), (3), and (4) of this section. When needed for adjudication, a properly signed consultative examination report (including any supplement) must be obtained. If the signature of the physician or psychologist who performed the original examination cannot be obtained because that physician or psychologist is out of the country for an extended period of time, on an extended vacation, seriously ill, deceased, or cannot be contacted for any other reason, the consultative examination will be rescheduled with another physician or psychologist.

(1) Denial; or

(2) Cessation; or

(3) Period of disability allowance which has ended; or

(4) Allowance with an onset date later than alleged.

§ 404.1519p Reviewing reports of consultative examinations.

(a) We will review the report of the consultative examination to determine whether the specific information requested has been furnished. We will consider these factors in reviewing the report:

(1) Whether the report provides evidence which serves as an adequate basis for decisionmaking in terms of the impairment it assesses.

(2) Whether the report is internally consistent. Whether all the diseases, impairments and complaints described in the history are adequately assessed and reported in the physical findings. Whether the conclusions correlate the findings from your medical history, physical examination and laboratory tests and explain all abnormalities.

(3) Whether the report is consistent with the other information available to us within the specialty of the examination requested. Whether the report fails to mention an important or relevant complaint within that specialty that is noted on other evidence in the file (e.g., your blindness in one eye, amputations, flail limbs or claw hands, etc.).

(4) Whether this is an adequate report of examination as compared to standards set out in the course of a medical education.

(5) Whether the report is properly signed.

(b) If the report is inadequate or incomplete, we will contact the examining consultative physician or psychologist, give an explanation of our evidentiary needs, and ask that the physician or psychologist furnish the missing information or prepare a revised report.

(c) Where the examination discloses new diagnostic information or test results which are significant to your treatment, we will consider referral of the consultative examination report to your treating physician or psychologist.

(d) We will perform ongoing special management studies on the quality of consultative examinations purchased from major medical sources and the appropriateness of the examinations authorized.

(e) We will take steps to ensure that consultative examinations are scheduled only with medical sources who have the equipment required to provide an adequate assessment and record of the level of severity of your alleged impairments.

§ 404.1519q Conflict of interest.

All implications of possible conflict of interest between SSA medical consultants and their medical practices will be avoided. SSA medical consultants are not only those who work for us directly but also those who do review and adjudication work for us in the State agencies that make disability decisions for us. Our review physicians and psychologists will not perform consultative examinations for the Social Security disability programs without prior approval. In addition, they will not acquire or maintain, directly or indirectly, including any member of their families, any financial interest in a medical partnership or similar relationship in which consultative examinations are provided. Sometimes one of our review physicians or psychologists will have prior knowledge of a case (e.g., the claimant was a patient). Where this is so, the physician or psychologist will not participate in the review or determination of the case. This does not preclude the physician or psychologist from submitting medical evidence based on prior treatment or examination of the claimant.

Authorizing and Monitoring the Referral Process Used

§ 404.1519s Authorizing and monitoring consultative examinations.

We will ensure that referral for consultative examinations and the purchase of consultative examinations are made in accordance with our policies. We will also monitor both the referral process and the product of the consultative examinations obtained. This monitoring will include reviews by independent medical specialists under direct contract with SSA. The following rules apply:

(a) Day-to-day responsibility for the consultative examination process rests with the State agencies that make disability determinations for us.

(b) The State agency will maintain a good working relationship with the medical community in order to recruit sufficient physicians and other providers of medical services to ensure ready availability of consultative examination providers.

(c) The State agency administrator will work consistent with Federal and State laws to achieve appropriate rates of payment for purchased medical services.

Procedures To Monitor the Consultative Examination

§ 404.1519t Consultative examination oversight.

(a) Each State agency will be responsible for comprehensive oversight management of its consultative examination program with special emphasis on key providers.

(b) A key consultative examination provider is a provider meeting at least one of the following conditions:

(1) Any consultative examination provider with an estimated annual billing to the Social Security disability programs of at least $100,000; or

(2) Any consultative examination provider where the practice of medicine (or osteopathy) is primarily directed towards evaluation examinations rather than the treatment of patients; or

(3) Any consultative examination provider that does not meet the above criteria, but is one of the top five consultative examination providers, by dollar volume, in the State as evidenced by prior year data.

(c) State agencies have flexibility in managing their consultative examination programs but at a minimum will provide:

(1) An ongoing active recruitment program for consultative examination providers;

(2) A process for orientation, training, and review of new consultative examination providers:

(3) Procedures for control of scheduling consultative examinations;

(4) Procedures to ensure that close attention is given to specific evaluation issues involved in each case. Medical or supervisory approval will be required for the authorization or purchase of a consultative examination. The agency will encourage active participation by physicians in the consultative examination oversight program;

(5) Procedures to ensure that only required examination and tests are authorized in accordance with the standards set forth in this subpart. No open-ended authorizations will be issued. Additional tests or studies at the request of the consulting physician must be authorized in the same way as described in paragraph (c)(4) of this section;

(6) Ongoing review of consultative examination results to ensure that written guidelines are met;

(7) Procedures for handling complaints;

(8) A systematic onsite review program of key providers that will include annual onsite reviews of such providers when claimants are present for examinations. This provision does not contemplate that such reviews will involve participation in the actual examination but rather offer an opportunity to talk with claimants at the provider's site before and after the examination and review the provider's overall on-line operation;

(9) Procedures for evaluating claimant reactions to key providers;

(d) We, through our regional offices, will undertake at least one comprehensive review of each State agency annually to evaluate the State's management of the consultative examination process. The review team will include our regional medical advisor or his regional physician delegate. The review will involve visits to key providers, with State staff participating, including a program physician when the visit will deal with medical techniques, judgment, or factors that go to the core of medical professionalism;

(e) The State agencies will cooperate with us and our regional offices when we conduct monitoring activities in connection with their oversight management of their consultative examination programs.

§ 404.1519u Direct purchase of medical services across State lines.

Where necessary, a State agency may use a medical source in a neighboring State for a consultative examination. In such cases, the State agency will notify the neighboring State agency. The State agency requesting the examination will use its fee schedule in determining the fee to be paid to the source unless the neighboring State agency objects. Where such situations arise, the State agency desiring the examination will ask the neighboring State agency to make the arrangements using the fee schedule of the neighboring State agency.

9. Section 404.1520 is amended by revising paragraph (a) to read as follows:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all evidence in your case record when we make a determination whether you are disabled. When you file a claim for disability benefits, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further. Finally, it is possible for you to be found disabled for a period of time in the past although you are not now disabled. (Once you have been found eligible to receive disability benefits, we follow a somewhat different order of evaluation to determine whether your eligibility continues, as explained in § 404.1594(f)(6).)

* * * * *

10. Section 404.1527 is revised to read as follows:

§ 404.1527 Medical opinions about your impairment or disability by physicians, psychologists or other acceptable medical sources.

(a) *General.* Under the statute, we are responsible for making the decision about whether you meet the statutory definition of disability. You can only be found disabled if you are unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. (See § 404.1505.) Your impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. (See § 404.1508.) Except in cases of widows, widowers, and surviving divorced spouses, the decision as to whether you are disabled may involve more than medical considerations and we may have to consider such factors as age, education, and past work experience. Such vocational factors are not within the expertise of medical sources.

(b) *Medical opinions that are conclusive.* A medical opinion by a treating source will be conclusive as to the medical issues of the nature and severity of your impairment(s) where we find that (1) it is fully supported by medically acceptable clinical and laboratory diagnostic techniques and (2) it is not inconsistent with the other substantial medical evidence of record. A medical opinion that is not fully supported will not be conclusive.

(c) *Medical opinions that are not fully supported.* If an opinion by a treating source(s) is not fully supported, we will make every reasonable effort (i.e., an initial request and, after 10 days, one followup request) to obtain from your treating source(s) the relevant evidence that supports the medical opinion(s) before we make a determination as to whether you are disabled.

(d) *Inconsistent medical opinions.* Where we find that the opinion of a treating source regarding medical issues is inconsistent with the evidence of record including opinions of other sources that are supported by medically acceptable clinical and laboratory diagnostic techniques, we must resolve the inconsistency. If necessary to resolve the inconsistency, we will secure additional independent evidence and/or further interpretation or explanation from the treating source(s) and/or the consultative physician or psychologist. Our determination will be based on all the evidence in your case record, including the opinions of the medical sources. In resolving an inconsistency, we will give some extra weight to the treating source's supported opinion(s) which interprets the medical findings about the nature and severity of the impairment(s).

Example.—In a case involving arthritis of the shoulder, where the X-rays confirm bony destruction, the examinations indicate minimal swelling and inflammation, but the treating source supplies evidence of greater restriction in the range of motion than found by the consultative physician, we will ask the treating source for further interpretation of

the range of motion studies. If the treating source supplies a reasonable explanation, e.g., that the individual's condition is subject to periods of exacerbation, the treating source's explanation will be given some extra weight over that of the consultative physician.

(e) *Medical opinions that will not be considered conclusive nor given extra weight.* We will not consider as conclusive nor give extra weight to medical opinions which are not in accord with the statutory or regulatory standards for establishing disability. Thus, opinions that the individual's impairment meets the Listing of Impairments in Appendix 1 of this Subpart, where the medical findings which are the basis for that conclusion would not meet the specific criteria applicable to the particular impairment as set out in the Listing, will not be conclusive nor given extra weight. Likewise, an opinion(s) as to the individual's residual functional capacity which is not in accord with regulatory requirements set forth in §§ 404.1545 and 404.1546 will not be conclusive nor given extra weight.

Example 1.—A medical opinion that an impairment meets listing 2.02, but the medical findings show that the individual's visual acuity in the better eye after best correction is 20/100, would not be conclusive nor would it be given extra weight since listing 2.02 requires that the remaining vision in the better eye after best correction be 20/200 or less.

Example 2. A medical opinion that the individual is limited to light work when the evidence shows that he or she can lift a maximum of 50 pounds and lift 25 pounds frequently will not be considered as conclusive nor given extra weight. This is because the individual's exertional capacity exceeds the criteria set forth in the regulations for light work.

11. Section 404.1545 is amended by revising paragraph (a) to read as follows:

§ 404.1545 Your residual functional capacity.

(a) *General.* Your impairments may cause physical and mental limitations that affect what you can do in a work setting. Your residual functional capacity is what you can still do despite your limitations. If you have more than one impairment, we will consider all of your impairments of which we are aware. We consider your capacity for various functions as described in the following paragraphs: (b) physical abilities; (c) mental impairments, and (d) other impairments. A residual functional capacity assessment may include descriptions (even your own) of limitations that go beyond the symptoms that are important in the diagnosis and treatment of your medical condition. Observations of your work limitations in addition to those usually made during formal medical examinations may also be used. These descriptions and observations, when used, must be considered along with the rest of your medical record to enable us to decide to what extent your impairment(s) keeps you from performing particular work activities. This assessment of your remaining capacity for work is not a decision on whether you are disabled, but is used as the basis for determining the particular types of work you may be able to do despite your impairment(s). Then, using the guidelines in §§ 404.1560 through 404.1569, your vocational background is considered along with your residual functional capacity in arriving at a disability decision. In deciding whether disability continues or ends, the residual functional capacity assessment may also be used to determine whether any medical improvement you have experienced is related to your ability to work as discussed in § 404.1594.

* * * * *

12. Section 404.1546 is revised to read as follows:

§ 404.1546 Responsibility for assessing and determining residual functional capacity.

The State agency medical consultants or other medical consultants designated by the Secretary are responsible for ensuring that the agency makes a decision about your residual functional capacity. In cases where the State agency makes the disability determination, a State agency medical consultant must assess residual functional capacity where it is required. This assessment is based on all of the evidence we have, including any statements regarding what you can still do that have been provided by treating or examining physicians, consultative physicians, or any other medical consultant designated by the Secretary (see § 404.1545). For cases in the disability hearing process, the responsibility for deciding your residual functional capacity rests with either the disability hearing officer or, if the disability hearing officer's reconsidered determination is changed under § 404.918, with the Director of the Office of Disability Hearings or his or her delegate. For cases at the Administrative Law Judge hearing or Appeals Council level, the responsibility for deciding your residual functional capacity rests with the Administrative Law Judge or Appeals Council.

13. Section 404.1593 is revised to read as follows:

§ 404.1593 Medical evidence in continuing disability review cases.

(a) *General.* If you are entitled to cash benefits or if a period of disability has been established for you because you are disabled, we will have your case file with the supporting medical evidence previously used to establish or continue your entitlement. Generally, therefore, the medical evidence needed will be that required to make a current determination as to whether you are still disabled, as defined under the medical improvement review standard (see §§ 404.1579 and 404.1594).

(b) *Obtaining evidence from your medical sources.* You must give us reports from your physician, psychologist, or others who have treated or evaluated you, as well as any other evidence that will help us determine if you are still disabled (see § 404.1512). You must have a good reason for not giving us this information or we may find that your disability has ended (see § 404.1594(e)(2)). If we ask you, you must contact your medical sources to help us get the medical reports. We will make every reasonable effort to help you in getting medical reports when you give us permission to request them from your physician, psychologist, or other medical sources. Every reasonable effort means that we will make an initial request and, after 10 days, one followup request to your medical source to obtain the medical evidence necessary to make a determination before we evaluate medical evidence obtained from another source on a consultative basis. The medical source will have 20 days from the followup to reply (unless experience indicates that a longer period is advisable in a particular case). In some instances we may order a consultative examination while awaiting receipt of medical source evidence. Before deciding that your disability has ended, we will develop a complete medical history covering at least the preceding 12 months (see § 404.1512(b)).

(c) *When we will purchase a consultative examination.* A consultative examination may be purchased when we need additional evidence to determine whether or not your disability continues. As a result, we may ask you, upon our request and reasonable notice, to undergo consultative examinations and tests to help us determine if you are still disabled (see § 404.1517). We will decide whether or not to purchase a consultative examination in accordance with the standards in §§ 404 1519a through 404 1519f.

PART 416—[AMENDED]

For the reasons set out in the preamble, Part 416, Subpart I, Chapter III of Title 20, Code of Federal Regulations, is amended as set forth below.

1. The authority citation for Subpart I is revised to read as follows, and all other authority citations which appear throughout Subpart I are removed.

Authority: Secs. 1102, 1614, and 1631, of the Social Security Act, as amended, 42 U.S.C. 1302, 1382c, and 1383.

2. The Table of Contents for Subpart I is amended by adding an entry for § 416.903a, and by adding the following center headings and §§ 416.919 through 416.919u, to follow: § 416.918, to read as follows:

Subpart I—Determining Disability and Blindness

Sec.

* * * * *

416.903a Program integrity.

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Standards to be Used in Determining when a Consultative Examination will be obtained in Connection with Disability Determinations

416.919 The consultative examination.
416.919a When we will purchase a consultative examination and how we will use it.
416.919b When we will not purchase a consultative examination.
416.919c Purchase of title XVI slight impairment examinations.
416.919e Purchase of the consultative examinations at the reconsideration level.
416.919f Securing medical evidence at the ALJ hearing level.

Standards For the Type of Referral and For Report Content

416.919g Type of purchased examinations and selection of source.
416.919h Your treating physician or psychologist.
416.919i Other sources for consultative examinations
416.919j Objections to the designated physician or psychologist.
416.919k Purchase of medical examinations, laboratory tests, and other services.
416.919l Requesting examination by a specific physician, psychologist or institution—ALJ hearing level.
416.919m Diagnostic surgical procedures.
416.919n Informing the examining physician or psychologist of examination scheduling and/or duration, report content and signature requirements.
416.919o When a properly signed consultative examination report has not been received.
416.919p Reviewing reports of consultative examinations.
416.919q Conflict of interest.

Authorizing and Monitoring the Referral Process Used

416.919s Authorizing and monitoring consultative examinations.

Procedures to Monitor the Consultative Examination

416.919t Consultative examination oversight.
416.919u Direct purchase of medical services across State lines.

* * * * *

3. Section 416.902 is revised to read as follows:

§ 416.902 General definitions and terms for this subpart.

As used in the subpart—

"Secretary" means the Secretary of Health and Human Services.

"State agency" means that agency of a State which has been designated by the State to carry out the disability determination function.

"Treating source" means your own physician or psychologist who has provided you with medical treatment or evaluation and who has an ongoing treatment relationship with you. "Source or record" means a hospital, clinic or other source that has provided you with medical treatment or evaluation, as well as a physician or psychologist who has treated or evaluated you but does not have an ongoing treatment relationship with you. "Medical sources" refers to both treating sources and sources of record.

"We" or "us" refers to either the Social Security Administration or the State agency making the disability or blindness determination.

"You" refers to the person who has applied for benefits or is receiving benefits based on disability or blindness.

4. Section 416.903a is added to read as follows:

§ 416.903a Program integrity.

We will not use in our program any individual or entity who is excluded, suspended, or otherwise barred from participation in the Medicare or Medicaid programs, or any other Federal or Federally-assisted program; who has been convicted, under Federal or State law, in connection with the delivery of health care services, of fraud, theft, embezzlement, breach of fiduciary responsibility or financial abuse; who has been convicted under Federal or State law of unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; whose license to provide health care services is revoked or suspended by any State licensing authority for reasons bearing on professional competence, professional conduct, or financial integrity; who has surrendered such a license while formal disciplinary proceedings involving professional conduct were pending; or who has had a civil monetary assessment or penalty imposed on such individual or entity for any activity described in this section or as a result of formal disciplinary proceedings. Also see §§ 416.919(a) and 416.919g(b).

§ 416.908 [Amended]

5. Section 416.908 is amended by adding the cross-reference "(see § 416.927)". at the end of the penultimate sentence.

6. Section 416.912 is amended by revising paragraph (b) to read as follows:

§ 416.912 Your responsibility to submit evidence.

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(b) *Kind of evidence.* You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled. We will consider only impairment(s) you say you have or about which we receive evidence. Before deciding that you are not disabled, we will develop your complete medical history (i.e., evidence from the records of your medical sources) covering at least the preceding 12 months, unless you say that your disability began less than 12 months before you filed your application. We will make every reasonable effort to help you in getting medical reports from your own medical sources when you give us permission to request them. Every reasonable effort means that we will make an initial request and, after 10 days, one followup request to your medical source to obtain the medical evidence necessary to make a determination before we evaluate medical evidence obtained from another source on a consultative basis. The medical source will have 20 days from the followup to reply (unless experience indicates that a longer period is advisable in a particular case). In some instances we may order a consultative examination while awaiting receipt of medical source evidence. If we ask you to do so, you must contact your medical sources to help us get the medical reports. If we ask you, you must also provide evidence about your—

(1) Age;

(2) Education and training;

(3) Work experience;

(4) Daily activities both before and after the date you say that you became disabled;

(5) Efforts to work; and

(6) Any other evidence showing how your impairment(s) affects your ability to work. (In §§ 416.960 through 416.969, we discuss in more detail the evidence we need when we consider vocational factors.)

7. Section 416.913 is amended by revising paragraph (b)(6) and paragraph (c) to read as follows the heading of paragraph (b) and (b) introductory text are republished.

§ 416.913 Medical evidence of your impairment.

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(b) *Medical reports.* Medical reports should include—

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(6) Statements about what you can still do despite your impairment(s) based on the medical source's findings on the factors under paragraph (b) (1) through (5) of this section (except in statutory blindness claims). (See § 416.927.)

(c) *Statements about what you can still do.* Statements about what you can still do (based on the medical source's findings on the factors under paragraph (b) (1) through (5) of this section) should describe—

(1) The medical source's opinion about your ability, despite your impairment(s), to do work-related activities such as sitting, standing, moving about, lifting, carrying, handling objects, hearing, speaking, and traveling; and

(2) In cases of mental impairment(s), the medical source's opinion about your ability to reason or make occupational, personal, or social adjustments. (See § 416.927.)

* * * * *

8. The following center headings and new §§ 416.919 through 416.919u are added immediately after § 416.918, to read as follows:

Standards to be Used in Determining When a Consultative Examination Will be Obtained in Connection with Disability Determinations

§ 416.919 The consultative examination.

(a) *General.* A consultative examination is a physical or mental examination or test purchased for you at our request and expense from a treating physician or psychologist, another source of record, or an independent source. The decision to purchase a consultative examination will be made on an individual case basis in accordance with the provisions of § 416.919a through § 416.919f. Selection of the source for the examination will be consistent with the provisions of § 416.903a.

(b) *Recontacting medical sources.* When evidence received from your treating physician or other medical sources is inadequate to allow us to determine whether you are disabled, additional information may be readily available from your treating physician or other medical sources in your record (that is, your case file) and must be obtained when significant to the disability determination. Whenever possible this contact will be made by a physician since a direct doctor-to-doctor contact is very productive. Before purchasing an examination, therefore, every consideration will be given to whether the additional information needed is readily available from the records of your medical sources. (See § 416.917(b) for reasons why more evidence may be needed and § 416.993 for your obligation to have a consultative examination when we request it.)

§ 416.919a When we will purchase a consultative examination and how we will use it.

(a) *General.* (1) The decision to purchase a consultative examination for you will be made after full consideration is given to whether the additional information needed (e.g., clinical findings, laboratory tests, diagnosis, and prognosis, etc.) is readily available from the records of your medical sources. We will seek clarification from a medical source who has provided a report when that report contains a conflict or ambiguity, or does not contain all necessary information or when the information supplied is not based on objective evidence. We will not, however, seek clarification from a medical source when it is clear that the source either cannot or will not provide the necessary findings, or cannot reconcile a conflict or ambiguity in the findings provided from the source's records. Therefore, before purchasing a consultative examination, we will consider not only existing medical reports, but also the background report containing your allegations and information about your vocational background, as well as other pertinent evidence in your file.

(2) When we purchase a consultative examination, we will use the report from the consultative examination to try to resolve a conflict or ambiguity if one exists. We will do this by comparing the persuasiveness and value of the evidence. We will also use a consultative examination to secure needed medical evidence the file does not contain such as clinical findings, laboratory tests, a diagnosis or prognosis necessary for decision.

(b) *Situations requiring a consultative examination.* A consultative examination may be purchased when the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on your claim. In addition, other situations, such as one or more of the following, will normally require a consultative examination (these situations are not all-inclusive):

(1) The specific additional evidence needed for adjudication has been pinpointed and high probability exists for obtaining it through purchase.

(2) The additional evidence needed is not contained in the records of your treating sources.

(3) Evidence that may be needed from your treating or other medical sources cannot be obtained for reasons beyond your control such as death or noncooperation of the medial source.

(4) Highly technical or specialized medical evidence which is needed is not available from your treating sources.

(5) A conflict, inconsistency, ambiguity or insufficiency in the evidence must be resolved.

(6) There is an indication of a change in your condition that is likely to affect your ability to function, but current severity is not documented.

(7) Information provided by any source appears not to be supported by objective evidence.

§ 416.919b When we will not purchase a consultative examination.

A consultative examination will not be purchased in the following situations (these situations are not all-inclusive):

(a) When any issues about the actual performance of substantial gainful activity have not been resolved.

(b) When, on the basis of your allegations and all available medical reports in your case file, it is apparent that you do not have an impairment(s) which will have more than a minimal effect on your capacity to work.

(c) When you do not meet all of the nondisability requirements.

§ 416.919c Purchase of title XVI slight impairment examinations.

(a) You may have filed a title XVI disability claim even though there is no history of medical treatment and the alleged impairment is apparently slight. This situation may occur, for example, where a State or local welfare agency requires you to obtain a formal title XVI determination before it will authorize welfare payments to you. The procedures that follow may be applied by us in the development of such a case. The method of obtaining medical

evidence described in this section will be used by us only when:

(1) You have no history of medical examination or treatment or there is some existing medical evidence but it is not relevant; and

(2) Your impairment appears to be slight, based on the nature of the allegations and the observations of record.

(b) The absence of a medical examination or treatment is not, of itself, evidence of a slight impairment. An objective of this procedure, therefore, is to assure that you are given an opportunity to submit medical evidence at no personal expense. (Any doubt as to whether the impairment is slight will be resolved in favor of doing the usual development.) Alternatively, we will contact you for supplemental information before proceeding with the development.

(c) Essentially, we will ask you to have an appropriate medical examination (at our expense) and to have the report of the examination sent to us.

(d) You will be advised that:

(1) An examination is necessary in order to evaluate your current condition;

(2) We must receive evidence of this examination; and

(3) We will pay the costs involved.

(e) We will not ordinarily make an appointment for this examination. Rather, we will ask you to make arrangements for a medical examination. If we can furnish the names of physicians or psychologists near your residence who can be expected to give a relatively prompt appointment, we will do so. If you request assistance in making the appointment, we will make the necessary arrangements. Additionally, if you appear to be unable to prosecute your claim, we will help you.

(f) When we notify you that an examination is necessary, we will enclose with the notice a medical report form, a form for you to authorize release of the medical report to us, and a letter to the provider. The letter to the provider will explain the reason for the examination and provide your allegations as to complaints and symptoms. However, the alleged impairment will not be specified as that may direct the examination at a specific impairment. The letter to the provider will also point out that the report of the examination should contain adequate medical history and a physical examination to permit an independent determination by us concerning the nature, severity, and duration of your impairment. It may also be necessary to preauthorize certain minimal laboratory testing such as hematocrit, white blood cell and differential, and urinalysis. The provider will be advised to request, by telephone, authorization for additional laboratory tests he or she deems necessary. Finally, the letter will state the approximate fee we will pay for the examination. If only a slight impairment is involved, the report of such an examination will provide the evidence needed to make a determination.

(g) *Action after evidence is requested.* If we ask you to have an examination, you will be presumed able to obtain it unless there is evidence to the contrary. If we do not receive a report within a reasonable time, and there is no indication that you did not receive the request for evidence, we will decide the case on the evidence in file. Your claim may be denied at any point if you are uncooperative (see § 416.916) and there is no indication that you are unable, rather than unwilling, to provide the requested information.

§ 416.919e Purchase of consultative examinations at the reconsideration level.

(a) When you request a review of our initial denial determination at the reconsideration level of review, consultative medical examinations will be obtained when needed, but not routinely. A consultative examination will not, if possible, be performed by the same physician or psychologist used in the initial claim.

(b) Where the evidence tends to substantiate an affirmation of the initial denial but you state that the treating physician or psychologist considers you disabled, we will consider obtaining a consultative examination from your physician (or psychologist). This is to ensure that all relevant evidence has been obtained and that we have thoroughly reconsidered your claim.

§ 416.919f Securing medical evidence at the ALJ hearing level.

(a) Where there is a conflict in the medical evidence at the hearing level of review before an administrative law judge (ALJ), the ALJ will try to resolve it by comparing the persuasiveness and value of the conflicting evidence. The ALJ's reasoning will be explained in the decision rationale. Where such resolution is not possible, the ALJ will secure additional medical evidence (e.g., clinical findings, laboratory tests, diagnosis, prognosis, etc.) to resolve the conflict. Even in the absence of a conflict, the ALJ will also secure additional medical evidence when the file does not contain clinical findings, laboratory tests, a diagnosis, or a prognosis necessary for a decision.

(b) Before requesting a consultative examination, the ALJ will ascertain whether the information is available as a result of a recent examination by any of your medical sources. If it is, the ALJ will request the evidence from that medical practitioner. If contact with the medical source is not productive for any reason, or if there is no recent examination by a medical source, the ALJ will obtain a consultative examination.

Standards for the Type of Referral and for Report Content

§ 416.919g Type of purchased examinations and selection of source.

(a) The types of examinations and tests we purchase depend upon the additional evidence needed for the disability determination. We will purchase only the specific evidence needed. For example, if special tests (such as X-ray, blood studies, or EKG) will furnish the additional evidence needed for the disability determination, a more comprehensive medical examination will not be authorized.

(b) The physician or psychologist selected to do the examination or test must be qualified. The physician's or psychologist's qualifications must indicate that the physician or psychologist is currently licensed in the State and has the training and experience to perform the type of examination or test requested. The physician or psychologist may use support staff to help perform the examination. Any such support staff must meet appropriate licensing or certification requirements of the State. See also § 416.903a.

§ 416.919h Your treating physician or psychologist.

When in our judgment your treating physician or psychologist is qualified, equipped, and willing to perform the additional examination or tests for the fee schedule payment, and furnishes complete and timely reports, your treating physician or psychologist will be selected to do the purchased examination. Even if only a supplemental test is required, your treating physician or psychologist is ordinarily the preferred source.

§ 416.919i Other sources for consultative examinations.

In the following situations, a source other than your treating physician or psychologist will be used for a purchased examination or test (these situations are not all-inclusive):

(a) Your treating physician or psychologist prefers not to perform such

an examination or does not have the equipment to provide the specific data needed, e.g., ventilatory studies are needed, and your physician does not wish to make arrangements to obtain these tests.

(b) There are conflicts or inconsistencies in your file which cannot be resolved by going back to your treating physician or psychologist.

(c) You prefer a source other than your treating physician or psychologist and have a good reason for your preference.

(d) We know from experience through previous purchase of evidence that your treating physician or psychologist may not be a productive source, e.g., does not provide complete or timely reports.

§ 416.919j Objections to the designated physician or psychologist.

You or your representative may object to your being examined by a designated physician or psychologist. If there is a good reason for the objection, we will schedule the examination with another physician or psychologist. A good reason may be where the consultative examination physician or psychologist had previously represented an interest adverse to you. For example, the physician or psychologist may have represented your employer in a workers' compensation case or may have been involved in an insurance claim or legal action adverse to you. Other things we will consider are: language barrier, office location of consultative examination physician or psychologist (2nd floor, no elevator, etc.), travel restrictions, and examination by the physician or psychologist in connection with a previous unfavorable determination. If the objection is because a physician or psychologist allegedly "lacks objectivity" (in general, but not in relation to you personnally) we will review the allegations (see § 416.919s). To avoid a delay in processing your claim, the consultative examination in your case will be changed to another physician or psychologist while a review is being conducted. Any objection to use of the substitute physician or psychologist will be handled in the same manner. However, if we previously conducted such a review and found that the reports of the consultative physician or psychologist in question conform to our guidelines, then we will not change your examination.

§ 416.919k Purchase of medical examinations, laboratory tests and other services.

We may purchase medical examinations, X-rays and laboratory tests (including specialized tests such as pulmonary functions, EKGs, stress tests, etc.) from a licensed physician or psychologist, hospital or clinic. Psychiatric evaluations and psychological evaluations and tests are also included in this category.

(a) The rates of payment to be used for purchasing medical or other services necessary to make determinations of disability may not exceed the highest rate paid by Federal or other agencies in the State for the same or similar types of service. The State will determine the rates of payment to be used for purchasing such services. The amount of reimbursement to the physician provider will be the amount billed for the services or the rates of payment which the State uses for purchasing such services, whichever is lower.

(b) If a physician's bill, or a request for payment for a physician's services includes a charge for a laboratory test for which payment may be made under this part, the amount payable with respect to the test shall be determined as follows:

(1) If the bill or request for payment indicates that the test was personally performed or supervised by the physician who submitted the bill (or for whose services the request for payment was made) or by another physician with whom that physician shares his or her practice, the payment will be based on the physician's usual and customary charge for the test or the rates of payment which the State uses for purchasing such services, whichever is the lesser amount.

(2) If the bill or request for payment indicates that the test was performed by an independent laboratory, the amount of reimbursement will not exceed the billed cost of the service or the rates of payment which the State uses for purchasing such services, whichever is the lesser amount. A nominal payment may be made to the physician for collecting, handling and shipping the specimen to the laboratory if the physician bills for such a service. The total reimbursement may not exceed the rates of payment which the State uses for purchasing such services.

(c) The State will assure that it can support the rates of payment it uses. The State shall also be responsible for monitoring and overseeing the rates of payment it uses to ensure compliance with paragraphs (a) and (b) of this section.

§ 416.919l Requesting examination by a specific physician, psychologist or institution—ALJ hearing level.

(a) In an unusual case, an ALJ may have reason to request an examination by a particular physician, psychologist or institution. Some examples include the following:

(1) Conflicts in the existing medical evidence require resolution by a recognized authority in a particular specialty;

(2) The impairment requires hospitalization for diagnostic purposes; or

(3) Your treating physician or psychologist is in the best position to submit a meaningful report.

§ 416.919m Diagnostic surgical procedures.

We will not order diagnostic surgical procedures such as myelograms and arteriograms for the evaluation of disability under the Social Security program. In addition, we will not order procedures such as cardiac catheterization and surgical biopsy. However, if any of these procedures have been performed as part of a workup by your treating physician or other medical source, the results may be secured and used to help evaluate an impairment(s)'s severity.

§ 416.919n Informing the examining physician or psychologist of examination scheduling and/or duration, report content and signature requirements.

The physicians or psychologists who perform consultative examinations will have a good understanding of the Social Security disability programs and their evidentiary role. They will be made fully aware of their responsibilities and obligations regarding confidentiality as described in § 401.105(e). Consulting physicians or psychologists will be fully informed at the time we first contact them, and at subsequent appropriate intervals, of the following obligations:

(a) In scheduling full consultative examinations, sufficient time should be allowed to permit the examining physician to take a case history and perform the examination (including any needed tests). The following scheduling intervals should be applied for examinations.

(1) General medical examination, at least 20 minutes;

(2) Comprehensive general medical examination, at least 30 minutes;

(3) Comprehensive musculoskeletal or neurological examination, at least 20 minutes;

(4) Comprehensive psychiatric examination, at least 40 minutes;

(5) Psychological examination, at least 60 minutes (Additional time may be required depending on types of psychological tests administered); and

(6) All others, at least 30 minutes or in accordance with accepted medical practices.

We recognize that actual practice will dictate that some examinations may be scheduled with greater or less frequency, depending on the circumstances in a particular situation. The purpose of these scheduling time frames is to ensure that such examinations are complete and that sufficient time is made available to obtain the information needed to make an accurate determination in your case. State agencies will monitor the scheduling of examinations to ensure that any overscheduling is avoided, as overscheduling may lead to examinations of so short a duration as to preclude the possibility of a thorough examination.

(b) *Report content.* The reported results of your medical history, examination, pertinent requested laboratory findings, discussions and conclusions must conform to accepted professional standards and practices in the medical field for a complete and competent examination. The facts in a particular case and the information and findings already reported in the medical and other evidence of record will dictate the extent of detail needed in the consultative examination report for that case. Thus, the detail and format for reporting the results of a purchased examination will vary depending upon the type of examination or testing requested. The reporting of information will differ from one type of examination to another when the requested examination relates to the performance of tests such as ventilatory function tests, treadmill exercise tests, or audiological tests. The medical report must be complete enough to help us determine the nature, severity, duration of the impairment and residual functional capacity. Pertinent points in your medical history, such as a description of chest pain, will reflect your statements of your symptoms, not simply the physician's or psychologist's statements or conclusions. The examining physician's or psychologist's report of the consultative examination will include the objective medical facts.

(c) *Elements of a complete examination.* A complete examination is one which involves all the elements of a standard examination in the applicable medical specialty. When a complete examination is involved, the report will include the following elements:

(1) Your major or chief complaint(s).

(2) A detailed description, within the area of specialty of the examination, of the history of your major complaint(s).

(3) A description, and disposition, of pertinent "positive," as well as "negative," detailed findings based on the history, examination and laboratory tests related to the major complaint(s) and any other abnormalities reported or found during examination or laboratory testing.

(4) The results of laboratory and other tests (e.g., X-rays) performed according to the requirements stated in the Listing of Impairments (see Appendix 1 of Subpart P of Part 404).

(5) The diagnosis and prognosis for your impairment(s).

(6) A statement as to what you can still do despite your impairment(s) (except in statutory blindness claims). This statement must describe the consultative physician's or psychologist's opinion concerning your ability, despite your impairment(s), to do basic work activities such as sitting, standing, lifting, carrying, handling objects, hearing, speaking, and traveling; and, in cases of mental impairment(s), the consultative physician's or psychologist's opinion as to your ability to reason or make occupational, personal, or social adjustments.

(i) In addition, the consultative physician or psychologist will consider, and provide some explanation or comment on, the major complaint(s) and any other abnormalities found during the history and examination or reported from the laboratory tests. The history, examination, evaluation of laboratory test results, and the conclusions will represent the information provided by the physician or psychologist who signs the report.

(ii) When less than a complete examination is required (for example, a specific test or study is needed), not every element is required.

(d) *Signature requirements.* All consultative examination reports will be personally reviewed and signed by the physician or psychologist who actually performed the examination. This attests to the fact that the physician or psychologist doing the examination or testing is solely responsible for the report contents and for the conclusions, explanations or comments provided with respect to the history, examination and evaluation of laboratory tests results. The examining physician's or psychologist's signature on a report annotated "not proofed" or "dictated but not read" is not acceptable. The physician's or psychologist's rubber stamp signature or the physician's or psychologist's signature entered by any other person is not acceptable.

§ 416.919o When a properly signed consultative examination report has not been received.

The following explains what adjudicative action we take if a consultative examination report is received unsigned or improperly signed.

(a) *Adjudication without a properly signed report.* Cases involving only the types of determinations specified in paragraphs (a) (1) and (2) of this section will be adjudicated without waiting for a properly signed consultative examination report. A properly signed consultative examination report will be obtained after the disability determination is made by us and included in the file. However, if the signature of the physician or psychologist who performed the original examination cannot be obtained because that physician or psychologist is deceased, the consultative examination will be rescheduled with another physician or psychologist.

(1) Continuous period of disability allowance with an onset date as the filing date or earlier than the filing date; or

(2) Continuance of disability.

(b) *Adjudication with a properly signed report.* We will not use an unsigned or improperly signed consultative examination report to make the types of determinations specified in paragraphs (b) (1), (2), (3), and (4) of this section. When needed for adjudication, a properly signed consultative examination report (including any supplement) must be obtained. If the signature of the physician or psychologist who performed the original examination cannot be obtained because that physician or psychologist is out of the country for an extended period of time, on an extended vacation, seriously ill, deceased, or cannot be contacted for any other reason, the consultative examination will be rescheduled with another physician or psychologist.

(1) Denial; or

(2) Cessation; or

(3) Period of disability allowance which has ended; or

(4) Allowance with an onset date later than the filing date.

§ 416.919p Reviewing reports of consultative examinations.

(a) We will review the report of the consultative examination to determine whether the specific information requested has been furnished. We will consider these factors in reviewing the report:

(1) Whether the report provides evidence which serves as an adequate

basis for decisionmaking in terms of the impairment it assesses.

(2) Whether the report is internally consistent. Whether all the diseases, impairments and complaints described in the history are adequately assessed and reported in the physical findings. Whether the conclusions correlate the findings from your medical history, physical examination and laboratory tests and explain all abnormalities.

(3) Whether the report is consistent with the other information available to us within the specialty of the examination requested. Whether the report fails to mention an important or relevant complaint within that specialty that is noted on other evidence in the file (e.g., your blindness in one eye, amputations, flail limbs or claw hands, etc.).

(4) Whether this is an adequate report of examination as compared to standards set out in the course of a medical education.

(5) Whether the report is properly signed.

(b) If the report is inadequate or incomplete, we will contact the examining consultative physician or psychologist, give an explanation of our evidentiary needs, and ask that the physician or psychologist furnish the missing information or prepare a revised report.

(c) Where the examination discloses new diagnostic information or test results which are significant to your treatment, we will consider referral of the consultative examination report to your treating physician or psychologist.

(d) We will perform ongoing special management studies on the quality of consultative examinations purchased from major medical sources and the appropriateness of the examinations authorized.

(e) We will take steps to ensure that consultative examinations are scheduled only with medical sources who have the equipment required to provide an adequate assessment and record of the level of severity of your alleged impairments.

§ 416.919q Conflict of interest.

All implications of possible conflict of interest between SSA medical consultants and their medical practices will be avoided. SSA medical consultants are not only those who work for us directly but also those who do review and adjudication work for us in the State agencies that make disability decisions for us. Our review physicians and psychologists will not perform consultative examinations for the Social Security disability programs without prior approval. In addition, they will not acquire or maintain, directly or indirectly, including any member of their families, any financial interest in a medical partnership or similar relationship in which consultative examinations are provided. Sometimes one of our review physicians or psychologists will have prior knowledge of a case (e.g., the claimant was a patient). Where this is so, the physician or psychologist will not participate in the review or determination of the case. This does not preclude the physician or psychologist from submitting medical evidence based on prior treatment or examination of the claimant.

Authorizing and Monitoring the Referral Process Used

§ 416.919s Authorizing and monitoring consultative examinations.

We will ensure that referral for consultative examinations and the purchase of consultative examinations are made in accordance with our policies. We will also monitor both the referral process and the product of the consultative examinations obtained. This monitoring will include reviews by independent medical specialists under direct contract with SSA. The following rules apply:

(a) Day-to-day responsibility for the consultative examination process rests with the State agencies that make disability determinations for us.

(b) The State agency will maintain a good working relationship with the medical community in order to recruit sufficient physicians and other providers of medical services to ensure ready availability of consultative examination providers.

(c) The State agency administrator will work consistent with Federal and State laws to achieve appropriate rates of payment for purchased medical services.

Procedures To Monitor the Consultative Examination

§ 416.919t Consultative examination oversight.

(a) Each State agency will be responsible for comprehensive oversight management of its consultative examination program with special emphasis on key providers.

(b) A key consultative examination provider is a provider meeting at least one of the following conditions:

(1) Any consultative examination provider with an estimated annual billing to the Social Security disability programs of at least $100,000; or

(2) Any consultative examination provider where the practice of medicine (or osteopathy) is primarily directed towards evaluation examinations rather than the treatment of patients; or

(3) Any consultative examination provider that does not meet the above criteria, but is one of the top five consultative examination providers, by dollar volume, in the State as evidenced by prior year data.

(c) State agencies have flexibility in managing their consultative examination programs but at a minimum will provide:

(1) An ongoing active recruitment program for consultative examination providers;

(2) A process for orientation, training, and review of new consultative examination providers;

(3) Procedures for control of scheduling consultative examinations;

(4) Procedures to ensure that close attention is given to specific evaluation issues involved in each case. Medical or supervisory approval will be required for the authorization or purchase of a consultative examination. The agency will encourage active participation by physicians in the consultative examination oversight program;

(5) Procedures to ensure that only required examination and tests are authorized in accordance with the standards set forth in this subpart. No open-ended authorizations will be issued. Additional tests or studies at the request of the consulting physician must be authorized in the same way as described in paragraph (c)(4) of this section;

(6) Ongoing review of consultative examination results to ensure that written guidelines are met;

(7) Procedures for handling complaints;

(8) A systematic onsite review program of key providers that will include annual onsite reviews of such providers when claimants are present for examinations. This provision does not contemplate that such reviews will involve participation in the actual examination but rather offer an opportunity to talk with claimants at the provider's site before and after the examination and review the provider's overall on-line operation;

(9) Procedures for evaluating claimant reactions to key providers;

(d) We, through our regional offices, will undertake at least one comprehensive review of each State agency annually to evaluate the State's management of the consultative examination process. The review team will include our regional medical advisor or his regional physician delegate. The review will involve visits to key providers, with State staff

participating, including a program physician when the visit will deal with medical techniques, judgment, or factors that go to the core of medical professionalism;

(e) The State agencies will cooperate with us and our regional offices when we conduct monitoring activities in connection with their oversight management of their consultative examination programs.

§ 416.919u Direct purchase of medical services across State lines.

Where necessary, a State agency may use a medical source in a neighboring State for a consultative examination. In such cases, the State agency will notify the neighboring State agency. The State agency requesting the examination will use its fee schedule in determining the fee to be paid to the source unless the neighboring State agency objects. Where such situations arise, the State agency desiring the examination will ask the neighboring State agency to make the arrangements using the fee schedule of the neighboring State agency.

9. Section 416.920 is amended by revising paragraph (a) to read as follows:

§ 416.920 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all evidence in your case record when we make a determination whether you are disabled. When you file a claim for disability benefits we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further. (Once you have been found eligible to receive disability or blindness benefits, we follow a somewhat different order of evaluation to determine whether your eligibility continues as explained in §§ 416.986 and 416.994.)

* * * * *

10. Section 416.927 is revised to read as follows:

§ 416.927 Medical opinions about your impairment or disability or blindness by physicians, psychologists or other acceptable medical sources.

(a) *General.* Under the statute, we are responsible for making the decision about whether you meet the statutory definition of disability. You can only be found disabled if you are unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. (See § 416.905). Your impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. (See § 416.908). Except in cases of children, the decision as to whether you are disabled may involve more than medical considerations and we may have to consider such factors as age, education, and past work experience. Such vocational factors are not within the expertise of medical sources. Also, you can only be found blind if you meet the statutory definition of blindness (see §§ 416.981 through 416.986).

(b) *Medical opinions that are conclusive.* A medical opinion by a treating source will be conclusive as to the medical issues of the nature and severity of your impairment(s) where we find that: (1) It is fully supported by medically acceptable clinical and laboratory diagnostic techniques and (2) it is not inconsistent with the other substantial medical evidence of record. A medical opinion that is not fully supported will not be conclusive.

(c) *Medical opinions that are not fully supported.* If an opinion by a treating source(s) is not fully supported, we will make every reasonable effort (i.e., an initial request and, after 10 days, one followup request) to obtain from your treating source(s) the relevant evidence that supports the medical opinion(s) before we make a determination as to whether you are disabled.

(d) *Inconsistent medical opinions.* Where we find that the opinion of a treating source regarding medical issues is inconsistent with the evidence of record including opinions of other sources that are supported by medically acceptable clinical and laboratory diagnostic techniques, we must resolve the inconsistency. If necessary to resolve the inconsistency, we will secure additional independent evidence and/or further interpretation or explanation from the treating source(s) and/or the consultative physician or psychologist. Our determination will be based on all the evidence in your case record, including the opinions of the medical sources. In resolving an inconsistency, we will give some extra weight to the treating source's supported opinion(s) which interprets the medical findings about the nature and severity of the impairment(s).

Example.—In a case involving arthritis of the shoulder, where the X-rays confirm bony destruction, the examinations indicate minimal swelling and inflammation, but the treating source supplies evidence of greater restriction in the range of motion than found by the consultative physician, we will ask the treating source for further interpretation of the range of motion studies. If the treating source supplies a reasonable explanation, e.g., that the individual's condition is subject to periods of exacerbation, the treating source's explanation will be given some extra weight over that of the consultative physician.

(e) *Medical opinions that will not be considered conclusive nor given extra weight.* We will not consider as conclusive nor give extra weight to medical opinions which are not in accord with the statutory or regulatory standards for establishing disability. Thus, opinions that the individual's impairment meets the Listing of Impairments in Appendix 1 of Subpart P of Part 404 of this chapter, where the medical findings which are the basis for that conclusion would not meet the specific criteria applicable to the particular impairment as set out in the Listing, will not be conclusive nor given extra weight. Likewise, an opinion(s) as to the individual's residual functional capacity which is not in accord with regulatory requirements set forth in §§ 416.945 and 416.946 will not be conclusive nor given extra weight.

Example 1.—A medical opinion that an impairment meets listing 2.02, but the medical findings show that the individual's visual acuity in the better eye after best correction is 20/100, would not be conclusive nor would it be given extra weight since listing 2.02 requires that the remaining vision in the better eye after best correction be 20/200 or less.

Example 2.—A medical opinion that the individual is limited to light work when the evidence shows that he or she can lift a maximum of 50 pounds and lift 25 pounds frequently will not be considered as conclusive nor given extra weight. This is because the individual's exertional capacity exceeds the criteria set forth in the regulations for light work.

11. Section 416.945 is amended by revising paragraph (a) to read as follows:

§ 416.945 Your residual functional capacity.

(a) *General.* Your impairments may cause physical and mental limitations that affect what you can do in a work setting. Your residual functional capacity is what you can still do despite your limitations. If you have more than one impairment, we will consider all of your impairments of which we are aware. We consider your capacity for various functions as described in the following paragraphs; (b) physical abilities; (c) mental impairments, and (d) other impairments. A residual functional capacity assessment may include descriptions (even your own) of limitations that go beyond the symptoms that are important in the diagnosis and treatment of your medical condition. Observations of your work limitations in addition to those usually made during formal medical examinations may also be used. These descriptions and observations, when used, must be considered along with the rest of your medical record to enable us to decide to what extent your impairment(s) keeps you from performing particular work activities.

This assessment of your remaining capacity for work is not a decision on whether you are disabled, but is used as the basis for determining the particular types of work you may be able to do despite your impairment(s). Then, using the guidelines in §§ 416.960 through 416.969, your vocational background is considered along with your residual functional capacity in arriving at a disability decision. In deciding whether disability continues or ends, the residual functional capacity assessment may also be used to determine whether any medical improvement you have experienced is related to your ability to work as discussed in § 416.994(b).

* * * * *

12. Section 416.946 is revised to read as follows:

§ 416.946 Responsibility for assessing and determining residual functional capacity.

The State agency medical consultants or other medical consultants designated by the Secretary are responsible for ensuring that the agency makes a decision about your residual functional capacity. In cases where the State agency makes the disability determination, a State agency medical consultant must assess residual functional capacity where it is required. This assessment is based on all of the evidence we have, including any statements regarding what you can still do, that have been provided by treating or examining physicians, consultative physicians, or any other medical consultant designated by the Secretary (see § 416.945). For cases in the disability hearing process, the responsibility for deciding your residual functional capacity rests with either the disability hearing officer, or, if the disability hearing officer's reconsidered determination is changed under § 416.1418, with the Director of the Office of Disability Hearings or his or her delegate. For cases at the Administrative Law Judge hearing or Appeals Council level, the responsibility for deciding your residual functional capacity rests with the Administrative Law Judge or Appeals Council.

13. Section 416.993 is revised to read as follows:

§ 416.993 Medical evidence in continuing disability review cases.

(a) *General.* If you are entitled to payments because you are disabled or blind, we will have your case file with the supporting medical evidence previously used to establish or continue your entitlement. Generally, therefore, the medical evidence needed will be that required to make a current determination as to whether you are still disabled, as defined under the medical improvement review standard (see § 416.994), or blind (see §§ 416.981 and 416.986).

(b) *Obtaining evidence from your medical sources.* You must give us reports from your physician, psychologist, or others who have evaluated you, as well as any other evidence that will help us determine if you are still disabled (see § 416.912). You must have a good reason for not giving us this information or we may find that your disability has ended (see § 416.994(b)(4)(ii)). If we ask you, you must contact your medical sources to help us get the reports. We will make every reasonable effort to help you in getting medical reports when you give us permission to request them from your physician, psychologist, or other medical sources. Every reasonable effort means that we will make an initial request and, after 10 days, one followup request to your medical source to obtain the medical evidence necessary to make a determination before we evaluate medical evidence obtained from another source on a consultative basis. The medical source will have 20 days from the followup to reply (unless experience indicates that a longer period is advisable in a particular case). In some instances we may order a consultative examination while awaiting receipt of medical source evidence. Before deciding that your disability or blindness has ended, we will develop a complete medical history covering at least the preceding 12 months (see § 416.912(b)).

(c) *When we will purchase a consultative examination.* A consultative examination may be purchased when we need additional evidence to determine whether or not your disability or blindness continues. As a result, we may ask you, upon our request and reasonable notice, to undergo consultative examinations and tests to help us determine if you are still disabled or blind (see § 416.917). We will decide whether or not to purchase a consultative examination in accordance with the standards in §§ 416.919a through 416.919f.

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April 20, 1987

Part III

Department of Transportation

Research and Special Programs Administration

49 CFR Part 107, et al.

Transportation of Hazardous Materials; Miscellaneous Amendments; Final Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 107, 171, 172, 173, 174, 176, 177, 178, and 179

[Docket No. HM-166U; Amdt. No. 107-16, 171-93, 172-109, 173-201, 174-63, 172-26, 177-70, 178-88, and 179-40]

Transportation of Hazardous Materials; Miscellaneous Amendments

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: This action is being taken to incorporate into the Department's Hazardous Materials Regulations a number of changes based on petitions from industry and initiation within the Department. This action is necessary to update the regulations, to eliminate the need for DOT approvals, and to reduce RSPA's backlog of rulemaking petitions.

The amendments in this rulemaking are intended primarily to reduce government regulations and paperwork, and to clarify existing regulations.

EFFECTIVE DATE: This amendment is effective May 18, 1987, except for § 172.519(b)(2) and (b)(4) which will be effective May 18, 1988. However, compliance with the regulations as amended herein, is authorized as of April 20, 1987. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 18, 1987.

FOR FURTHER INFORMATION CONTACT: Darrell L. Raines, Chief, Exemptions and Regulations Termination Branch, Office of Hazardous Materials Transportation, Research and Special Programs Administration, Washington, DC 20590, (202) 366-4488.

SUPPLEMENTARY INFORMATION: On June 3, 1986, the RSPA published a Notice of Proposed Rulemaking, Docket No. HM-166U; Notice No. 86-3 (51 FR 19866), which proposed a number of miscellaneous amendments to the Hazardous Materials Regulations. Notice 86-3 included a brief statement regarding each proposal and invited public comment prior to the closing date of July 31, 1986. On July 30, 1986 the RSPA published a notice (51 FR 27223) which extended the deadline date for filing comments to September 4, 1986.

The RSPA received sixty comments regarding the proposed rulemaking. The majority of commenters expressed support for the proposals. A few commenters suggested certain changes for improving specific aspects of the rulemaking. Four commenters offered certain changes. Listed below is a section by section summary of the amendments along with a summary of the comments and RSPA's comments why the recommended changes were or were not adopted:

A. Part 107

In appendix A to Subpart B, the address under "Motor Carriers" is changed because effective October 1, 1986, the Bureau of Motor Carrier Safety (BMCS) was disbanded and reorganized under the Associate Administrator for Motor Carriers. For this reason, the reference to BMCS is changed to the new title in Part 173 and Part 177.

B. Part 171

1. In § 171.7, paragraph (c)(1) is revised to update the latest ASME Code Reference.

2. Paragraph (d)(2) is amended by changing "1982" to read "1985".

3. Paragraph (d)(3)(ii) is amended by changing "1975" to read "1984".

4. Paragraph (d)(3)(iii) is amended by changing the title and "1971" to read "1983".

5. Paragraph (d)(3)(iv) is amended by changing "1972" to read "1985".

6. Paragraph (d)(3)(ix) is amended by changing "1977" to read "1985".

7. Paragraph (d)(1) is revised and paragraphs (d)(3)(x), (d)(3)(xi) and (d)(3)(xii) are added based on a petition from the Compressed Gas Association. These changes were not included in the notice of proposed rulemaking. However, since these changes are only updating the regulation, public notice is not considered necessary.

8. Four commenters responded to the proposed change to § 171.7(d)(5) and § 171.8 regarding ASTM D 4359-84 "Standard Test Method for Determining Whether A Material is a Liquid or a Solid". Although there were no serious objections to the proposed change there was concern that ASTM D 4359-84 may not be a suitable guide for determining whether a material meets the definition of a liquid or a solid. One commenter was concerned that they may find themselves in a position of having to try and comply with three different methods for determining if a material should be treated as a liquid or solid. RSPA believes that the proposed changes should be added as proposed. We believe that any problems that arise as a result of specifying this method will be outweighed by the benefits of its adoption. For this reason, paragraph (d)(5)(xxxiv) has been added as proposed.

In § 171.12, the introductory text of paragraph (a) is amended by changing the reference to "§ 173.12(a)" to read "§ 171.12a".

C. Part 172

In § 172.101 the Table is amended as follows:

1. The entry *"1-Bromo-3-nitrobenzene (unstable at 56°C)"* has been removed.

2. The entry "Compound, water treatment, liquid. *See* Water treatment, liquid" is removed.

3. The entry "Ethylene dibromide (RQ-1000/454) is revised by changing the hazard class, label, and packaging section references.

4. An entry for "Ethyl phosphonothioic dichloride, anhydrous" is reinstated.

5. The hazard class for "Ethylene glycol diethyl ether (diethyl cellosolve)" is changed from "Combustible liquid" to "Flammable liquid".

6. The entry "Gasohol (*gasoline mixed with ethyl alcohol*) *See* Gasoline" is revised to read "Gasohol (*gasoline mixed with ethyl alcohol containing 20% maximum alcohol) See* Gasoline". Also, § 172.336 (c)(4) and (c)(5) are revised as proposed.

7. The ID number of "Ink", Combustible liquid, is changed from "UN2867" to "UN1210".

8. The entry "Air, refrigerated liquid (cryogenic liquid)" has been added as proposed.

9. The proposed entry for "Aluminum alkyl" and "Aluminum alkyl halide" is not included in this rulemaking as proposed. On July 15, 1986, RSPA pubished an emergency final rule (51 FR 25639) which added paragraph (a)(1) to § 172.102. In view of that action, the proposed change for these two entries has been withdrawn.

10. Paragraph (a)(4) in § 172.202 is revised to require the unit of measure to be identified on the shipping paper. To be consistent with this revision, § 172.202(c)(1) has also been revised.

11. Footnote 8 of Table 2 in § 172.504 is amended to authorize the use of an Oxygen placard in order to eliminate the need for dual placarding.

12. Six commenters responded to the proposed change to § 172.519(b)(2) and (b)(4). One commenter recommended that the proposed weight of 200 pounds per ream be reduced to 165 (175 nominal) pounds per ream based on comparative studies of different placards. Two commenters supported the proposal and two recommended the matter be handled in a separate rulemaking. Upon further consideration of the matter, including an inquiry made to a supplier of placards, RSPA believes the proposed weight should be adjusted based on satisfactory experience with waterproofed placards having a weight

less than 200 pounds per ream. A 175 minimum weight is being adopted with credit for the weight of waterproofing materials included. Placard manufacturers may produce placards from stock having a weight per ream below 175 pounds if they determine the weight per sheet would be 175 pounds with the waterproofing material added. RSPA does not agree that this matter requires a separate rulemaking action and will monitor the performance of placards produced according to this rule to determine if further action is needed.

D. Part 173

1. Paragraph (b)(4) of § 173.11 is revised, as proposed, to require a shipper to identify the type of packaging on the registration statement.

2. Paragraph (b)(2) of § 173.12 is revised to require the open-head polyethylene drum to pass the same drop test as specified for the fiber drum.

3. The California Highway Patrol recommended that the introductory text of § 173.25(c) which reads "Hazardous materials classed Poison B" be changed to be consistent with § 177.841(e). RSPA agrees with this commenter and has revised the introductory text to read "Hazardous materials which are required to be labeled Poison".

4. In § 173.31, Retest Table 2 is amended by adding DOT Specification 110A600–W multi-unit tank car tanks.

5. Eleven commenters raised questions regarding portable tanks and the proposed amendments to §§ 173.32(a) and 173.32c. Several of the commenters raised questions which will require RSPA to spend a considerable amount of time in order to reach a decision. Since this rulemaking is already several weeks behind its anticipated publication date, RSPA has withdrawn the proposed changes to § 173.32(a) and § 172.32c from this rulemaking and will include them in a separate rulemaking in the near future.

6. In § 173.33, paragraph (d)(13) has been amended by changing "Director, Regional Motor Carrier Safety Office" to read "Regional Director of Motor Carrier Safety".

7. Included in this rulemaking, but not included in the notice, is an amendment in § 173.34(e)(8) to increase the number of pounds of water capacity from ten to twelve. This amendment is necessary in order to bring the maximum size in line with the 4B240ET specification.

8. Paragraph (g) in § 173.51 is amended to include a reference to 14 CFR 108.11.

9. Paragraph (b) in § 173.57 is removed as proposed.

10. An editorial correction is made in § 173.81(b) in order for the package marking to coincide with the § 172.101 Table.

11. Seven commenters supported the proposed change to § 173.86(h) and (i) which would eliminate costly and redundant data accumulation and testing of a material which represents a minimal hazard.

12. The introductory text of § 173.87 is revised to provide an exception to the Department of Defense (DOD) for shipments made under the provisions of § 173.7(a).

13. One commenter supported the proposed change to § 173.93(a)(2) which will eliminate some of the burden on shippers of smokeless powder for small arms.

14. Editorial corrections are made in § 173.104(c) to make the making requirements the same as the proper shipping name listed in the § 172.101 Table.

15. The use of DOT Specification 17C metal drums in § 173.122(a)(4) for the packaging of acrolein, inhibited is removed as proposed.

16. In § 173.164(a)(2), Specification 17C drums is added for the packaging of chromic acid or chromic acid mixture, dry.

17. RSPA received two comments regarding the co-mingling of inside boxes of smokeless powder under the provisions of § 173.197a. One commenter recommended that the net weight of smokeless powder in one box be increased from 16 pounds to 32 pounds. The commenter suggested this increase based on shipping experience under a Bureau of Explosives approval and a DOT exemption. RSPA does not agree that the net weight should be increased because the proposed change is to authorize the co-mingling of inside boxes without further approval. The B of E approval and the DOT exemption were not issued to provide for mixing different powders in one outside package.

18. The proposed change to § 173.220 to authorize the use of fiberboard boxes with inside polyethylene bags for packaging magnesium or zirconium scrap consisting of borings, shavings, or turnings is adopted as proposed.

19. The proposed change for "§173.245(a)" Note 2 should have read "§ 173.245a" Note 2. Although the proposed change was based on an AAR petition they have stated that the proposed amendment still does not authorize the presence of cobalt. Based upon their comments and upon further consideration, RSPA has revised the last sentence of Note 2 to reference ASTM B162–80 which counts cobalt as nickel. The same change has been made in §§173.253(a)(7); 173.271(a)(9); 173.294(a)(2), (a)(3) and (b): 179.202–8; 179.202–11 and 179.202–16 and will not be repeated in each of these referenced sections.

20. In § 173.262(b)(4) reference to "§ 178.353–5" is corrected to read "§ 178.343–5".

21. In § 173.266, paragraph (f)(2) is revised to provide for the proper identification plate marking for stainless steel cargo tanks.

22. Paragraph (d)(1) in § 173.277 has been removed.

23. The proposed amendment to § 173.300(a) to clarify that a cryogenic liquid is subject to regulation without regard to the pressure in the container is withdrawn. Two commenters stated that the proposed amendment would present a hardship to distributors of atmospheric cryogenic liquids and cryogenic helium, at pressures below 25.3 psig. Upon further consideration, RSPA agrees with these commenters and withdraws the proposed amendment.

24. The proposed change to § 173.301(k) to not require the outside packaging to provide valve protection if the cylinder has a protective collar or neck ring is adopted.

25. Paragraph § 173.302(a)(5)(iv) is revised by removing the restriction of a maximum 3000 psi marked service pressure on 3AL cylinders used in oxygen service.

26. The Table in § 173.304(a)(2) is amended by authorizing the use of (1) DOT–3AL1800 cylinders for carbon dioxide and (2) DOT–4BW225 for the transportation of sulfur dioxide.

27. In Note 6 of § 173.314(c) the figure "¾" is changed to read "82.5".

28. In § 173.315 paragraph (c) is revised to correct an omission that was made in Docket HM–115 on June 16, 1983.

29. In § 173.316, the Table in paragraph (c)(2) is revised to provide filling limits for "air, refrigerated liquid".

30. In § 173.318, paragraph (b) is revised to require the use of a primary and a secondary system of pressure relief devices on cargo tanks used in certain cryogenic service. With the exception of paragraphs (b)(3) and (b)(5), all of paragraph (b) is revised and rearranged for clarity. Paragraphs (b)(3) and (b)(5) are now paragraphs (b)(9) and (b)(10), respectively. Paragraphs (f)(2) and (f)(3) have been amended to provide filling limits for "air, refrigerated liquid" and to increase the filling limit authorized for "hydrogen" when transported in cargo tanks.

31. Except for minor editorial changes, the proposed changes to § 173.320 is adopted.

32. Section 173.965 *Cotton and other fibers,* is added as proposed.

E. Part 174

The proposed change in § 174.9(b) regarding whether heater coil inlet and outlet pipes "must" or "may" be left open for drainage is withdrawn. Based upon the data from the Federal Railroad Administration, RSPA agrees that the pipes "must" be left open for drainage and for airing out which helps to prevent rusting within the coils.

F. Part 176

In § 176.76, paragraph (g)(2) is added to authorize small passenger vessels of 100 gross tons, or less, to carry a hazardous material in a portable tank under certain conditions.

G. Part 177

1. In § 177.814, paragraph (b) is amended by changing "Director, Regional Motor Carrier Safety Office" and "Director of Regional Motor Carrier Safety Office" to read "Regional Director of Motor Carrier Safety". Also, a similar change is made in § 177.824(f) and § 177.824(f)(2).

2. Nineteen commenters supported the removal of paragraph (k) in § 177.834 which pertains to access to mixed ladings. The paragraphs is removed as proposed, and references to it in §§ 177.835, 177.837, 177.838, 177.839, 177.840 and 177.841 are corrected.

3. Five commenters supported the proposed change to § 177.841(e) to prohibit a motor carrier from carrying poisons or irritating materials in the passenger compartment of a motor vehicle. One commenter suggested that the wording be amended to include sleeper berth. RSPA agrees with this commenter and has revised the sentence accordingly.

4. One commenter agreed with the proposed change in § 177.848(b). However, he also suggested that a new paragraph be added in § 172.203(m) to require additional information to be added on the shipping paper. RSPA believes that this suggested change goes beyond the scope of this rulemaking. Also, the suggested wording may be controversial. For these reasons, the commenters suggestion is not adopted.

H. Part 178

1. A change to § 178.38–10(c) is included in this final rule to eliminate confusion due to the fact that there are optional test pressures authorized in the hydrostatic test prescribed in § 178.38–14. Good design and performance is assured by using two times the service pressure in the formula instead of three times the service pressure.

2. In § 178.42–14, the introductory text of paragraph (a) is revised to specifically state the location where the marking requirements must be on a DOT Specification 3E cylinder.

3. The proposed changes to correct and update the DOT–3AL Specification (§ 178.46) are incorporated, as proposed.

4. In § 178.51–10(d) and § 178.61–10(b) the ratio of tangential length to outside diameter is revised to read "4.1" instead of "4.0".

5. A correction is made in § 178.53–9(a) by changing "0.40" to read "0.04".

6. Section 178.54 for 4B240–FLW cylinders is removed from Part 178. Part 173 will continue to authorize the use of these cylinders.

7. In § 178.245–1, the introductory text of paragraph (a) is revised to bring the specification for DOT–51 tanks in line with the MC 331 and MC 338 specifications.

8. Docket HM–166T changed the words "tank motor vehicle" to read "cargo tank" in several sections in Part 178. However, as pointed out by the California Highway Patrol, the words "tank motor vehicle" makes better sense in § 178.337–1(d) and § 178.337–13(b). RSPA agrees and these two sections are revised accordingly.

I. Part 179

1. An editorial change is made in § 179.100–13(a) by removing the word "directly" in the second sentence.

2. The proposed changes regarding bottom outlets and fittings in § 179.100–14(a)(1) and § 179.100–14(a)(3) are adopted, as proposed.

3. The proposed change in § 179.102–2(a)(3) to allow the use of a new insulation package for chlorine tank cars is adopted.

4. The proposed revision to § 179.102–13 has been withdrawn as requested by the petitioner. The AAR stated that they believe the requirements for hydrogen fluoride tank cars now are adequately covered by the AAR's Specification for Tank Cars, § 2.1.7. Since the time the AAR submitted its petition, they have worked wth the CMA on improving the proposed specification and § 2.1.7 incorporates the improvements.

5. The proposed revisions to § 179.103–5(b)(1) and (b)(4) were based on a petition by the AAR. RSPA proposed in the last sentence of § 179.103–5(b)(1) that the permanent attachment of supplementary exterior fittings be approved by the Director, Office of Hazardous Materials Transportation. RSPA is well aware of the approval authority by the AAR Committee on Tank Cars in Part 179 of 49 CFR. Requiring RSPA approval in this particular section was an error on our part and § 179.103–5(b)(1) has been amended by changing "approved by the Director, Office of Hazardous Materials Transportation" to read "approved by the AAR Committee on Tank Cars".

6. No objections were received regarding the proposal to clarify the heading in each of the Tables in § 179.200–7. However, the AAR requested that the same change be made in § 179.220–7. RSPA agrees with this commenter and has revised § 179.220–7 accordingly.

7. The proposed revision of § 179.200–13 was intended to clarify the present discrepancies in the nozzle-to-tank joints between pressure tank car tanks and non-pressure tank car tanks. The AAR, upon further consideration, has requested a few editorial changes. RSPA has revised § 179.200–13 as requested.

8. The proposed changes to § 179.200–17 were suggested by the AAR and were intended to clarify the present wording. RSPA changed the wording in the last sentence of paragraph (a)(1) by requiring approval by the Director, Office of Hazardous Materials Transportation. Again, our reason for proposing approval by the Director, OHMT was not intended and "approval by the AAR Committee on Tank Cars" appears in the final rule.

9. Except for minor changes, sections 179.202–8, 179.202–11, 179.202–16, 179.202–18, 179.220–19, 179.221–1, 179.222 and 179.301 are revised as proposed in the notice. In § 179.220–7 the Tables are changed as discussed in § 179.200–7.

Based on limited information available concerning size and nature of entities likely to be affected, I certify that this regulation will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. Also, in view of the type of changes, the RSPA has further determined that this rulemaking (1) is not "major" under Executive Order 12291; (2) is not "significant" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); (3) will not affect not-for-profit enterprises, or small governmental jurisdictions; and (4) does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321 et seq.). A regulatory evaluation is not considered necessary because the anticipated impact is minimal

The following list of **Federal Register** Thesaurus of Indexing Terms apply to this rulemaking:

List of Subjects

49 CFR Part 107

Hazardous materials transportation, Emergency exemptions.

49 CFR Part 171

Hazardous materials transportation, Definitions, Incorporation by Reference.

49 CFR Part 172

Hazardous materials transportation, Labeling, Packaging and containers.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers.

49 CFR Part 174

Hazardous materials transportation, Railroad Safety.

49 CFR Part 176

Hazardous materials transportation, Maritime carriers.

49 CFR Part 177

Hazardous materials transportation, Motor carriers.

49 CFR Part 178

Hazardous materials transportation, Packaging and containers.

49 CFR Part 179

Hazardous materials transportation, Railroad safety.

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

1. The authority citation for Part 107 continues to read as follows:

Authority: 49 U.S.C. 1421(c); 49 U.S.C. 1802, 1806, 1808–1811; 49 CFR 1.45 and 1.53 and App. A of Part 1, Pub. L. 89–670 (49 U.S.C. 1653(d), 1655).

2. In Appendix A to Subpart B, the address and telephone number for "Motor Carriers" is revised to read as follows:

Appendix A to Subpart B—List of Department of Transportation Officials Through Whom Application for Exemptions Seeking Priority Treatment of the Basis of Existing Emergencies May be Initiated by Telephone

* * * * *

Motor Carriers

Chief, Standards Development Division, Office of Motor Carrier Standards, Federal Highway Administration, Department of Transportation, Washington, DC 20590. Day 202–366–2981 and Night 202–267–2100.

* * * * *

PART 171—GENERAL INFORMATION REGULATIONS, AND DEFINITIONS

3. The authority citation for Part 171 continues to read as follows:

Authority: 49 U.S.C. 1802, 1803, 1804, 1808; 49 CFR Part 1, unless otherwise noted.

4. In § 171.7, paragraphs (d)(1), (d)(2), (d)(3)(ii), (d)(3)(iii), (d)(3)(iv), and (d)(3)(ix) are revised; paragraphs (d)(3)(x), (d)(3)(xi), (d)(3)(xii), and (d)(5)(xxxiv) are added to read as follows:

§ 171.7 Matter incorporated by reference.

* * * * *

(d) * * *

(1) ASME Code means Sections II (Parts A and B), V, VIII (Division I), and IX of the 1986 edition of the "American Society of Mechanical Engineers Boiler and Pressure Vessel Code" and addenda thereto through June 30, 1985".

(2) AAR Specifications for Tank Cars means the 1985 edition of the "Association of American Railroads Specifications for Tank Cars, Specification M–1002".

(3) Compressed Gas Association:

* * * * *

(ii) CGA Pamphlet C–6, is titled, "Standards for Visual Inspection of Steel Compressed Gas Cylinders", 1984 edition.

(iii) CGA Pamphlet C–7 is titled, "Guide to the Preparation of Precautionary Labeling and Marking of Compressed Gas Containers", 1983 edition including Appendix A issued April 15, 1983.

(iv) CGA Pamphlet C–8, is titled, "Standard for Requalification of DOT–3HT Seamless Steel Cylinders", 1985 edition.

* * * * *

(ix) CGA Pamphlet G–4.1 is titled, "Cleaning Equipment for Oxygen Service", 1985 edition.

(x) CGA Pamphlet G–2.2 is titled, "Guideline Method for Determining Minimum of 0.2% Water in Anhydrous Ammonia", 1985 edition.

(xi) CGA Technical Bulletin TB–2 is titled, "Guidelines for Inspection and Repair of MC–330 and MC–331 Cargo Tanks", 1980 edition.

(xii) CGA Pamphlet C–6.1 is titled, "Standards for Visual Inspection of Aluminum Compressed Gas Cylinders", 1984 edition.

* * * * *

(5) American Society for Testing and Materials:

* * * * *

(xxxiv) ASTM D 4359–84 is titled, "Standard Test Method for Determining Whether a Material is a Liquid or a Solid", 1984 edition.

* * * * *

5–6. In § 171.8, a definition for "Liquid" and "Solid" is added in their proper alphabetical order to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

"Liquid" means a material that has a vertical flow of over 2 inches (50 mm) within a three minute period, or a material having one gram (lg) or more liquid separation, when determined in accordance with the procedures specified in ASTM D 4359–84, "Standard Test Method for Determining whether a Material is a Liquid or Solid", 1984 edition.

* * * * *

"Solid" means a material which has a vertical flow of two inches (50 mm) or less within a three-minute period, or a separation of one gram (lg) or less of liquid when determined in accordance with the procedures specified in ASTM D 4359–84 "Standard Test Method for Determining Whether a Material is a Liquid or Solid", 1984 edition.

* * * * *

§ 171.12 [Amended]

7. Paragraph 171.12(a) is amended by replacing the section reference "§ 173.12a" with the section reference "§ 171.12a".

PART 172—HAZARDOUS MATERIALS TABLES AND HAZARDOUS MATERIALS COMMUNICATIONS REGULATIONS

8. The authority citation for Part 172 continues to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1805, 1808; 49 CFR Part 1, unless otherwise noted.

9. In § 172.101, the Hazardous Materials Table is amended by removing, adding, or revising the following entries.

§ 172.101 Hazardous materials table.

*/E/A/W	Hazardous materials descriptions and proper shipping names	Hazard class	Identification number	Label(s) required (if not excepted)	Packaging		Maximum net quality in one package		Water shipments		
					Exceptions	Specific requirements	Passenger carrying aircraft or railcar	Cargo aircraft only	Cargo vessel	Passenger vessel	Other requirements
(1)	(2)	(3)	3(a)	(4)	5(a)	5(b)	6(a)	6(b)	7(a)	7(b)	7(c)
	REMOVE										
	1-Bromo-3-Nitrobenzene (unstable at 56° C).	Forbidden									
	Compound, water treatment, liquid. *See* Water treatment, liquid.										
	REVISE										
	Ethylene dibromide	Poison B	UN 1605	Poison	173.345	173.346	1 quart	55 gallons	1,2	1,2	Stow away from living quarters.
	Ethylene glycol diethyl ether (*diethyl Cellosolve*).	Flammable liquid	UN 1153	Flammable	173.118	173.119	1 quart	10 gallons	1,2	1,2	
	Gasohol (*gasoline mixed with ethyl alcohol containing 20% maximum alcohol*). *See* Gasoline.										
	Ink	Combustible Liquid	UN 1210	None	173.118a	None	No limit	No limit	1,2	1,2	
	ADD										
	Air, refrigerated liquid (cryogenic liquid).	Nonflammable Gas	UN 1003	Nonflammable Gas	173.320	173.318	Forbidden	300 pounds	1,2	1,2	Stow separate from flammables. Do not overstow with other cargo.
	Ethyl phosphonothioic dichloride, anhydrous.	Corrosive material	NA 1760	Corrosive	173.244	173.245 173.245a	1 quart	1 quart	1	4	

10. In § 172.202, paragraphs (a)(4) and (c)(1) are revised to read as follows:

§ 172.202 Description of hazardous materials on shipping papers.

(a) * * *

(4) Except for empty packagings, cylinders for compressed gases, and packagings of greater than 110 gallons capacity, the total quantity by weight (net or gross as appropriate) or volume, including the unit of measure, of the hazardous material covered by the description. For example: "800 lbs", "55 gal".

* * * * *

(c) * * *

(1) Abbreviations may be used to specify the type of packaging and unit of measurement for total quantity. For example: "10 ctns. Paint, Flammable liquid, UN1263, 500 lbs".

* * * * *

11. In § 172.336, paragraphs (c)(4) and (c)(5) are revised to read as follows:

§ 172.336 Identification numbers; special provisions and exceptions.

* * * * *

(c) * * *

(4) For each of the different liquid petroleum distillate fuels, including gasoline and gasohol in a compartmented cargo tank or tank car, if the identification number is displayed for the distillate fuel having the lowest flash point.

(5) For each of the different liquid petroleum distillate fuels, including gasoline and gasohol transported in a cargo tank, if the identification number is displayed for the liquid petroleum distillate fuel having the lowest flash point.

* * * * *

12. In § 172.504, footnote 8 in Table 2 is revised to read as follows:

§ 172.504 General placarding requirements.

* * * * *

(d) * * *

[8] A NON-FLAMMABLE GAS placard is not required on a motor vehicle displaying a FLAMMABLE GAS placard or an OXYGEN placard.

* * * * *

13. In § 172.519, paragraphs (b)(2) and (b)(4) are revised to read as follows:

§ 172.519 General specifications for placards.

* * * * *

(b) * * *

(2) A weight of 175 pounds per ream of 24 by 36-inch sheets (waterproofing materials included);

* * * * *

(4) Been treated with plastic or other waterproofing material that will give it the ability to withstand open weather exposure (including rain) for 30 days without a substantial reduction in effectiveness.

PART 173—SHIPPERS-GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

14. The authority citation for Part 173 continues to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1805, 1806, 1807, 1808; 49 CFR Part 1, unless otherwise noted.

15. In § 173.11, paragraph (b)(4) is revised to read as follows:

§ 173.11 Shipper's registration statement; flammable cryogenic liquids.

* * * * *

(b) * * *

(4) The type of packaging and the serial number or vehicle identification number of each portable tank and cargo tank, and the reporting mark and number of each tank car, owned, leased, or otherwise controlled by the shipper and used to offer a flammable cryogenic liquid for transportation.

* * * * *

16. In § 173.12, paragraph (b)(2) is revised to read as follows:

§ 173.12 Exception for shipment of waste material.

* * * * *

(b) * * *

(2) A four foot drop test as specified in § 178.224–2(b).

* * * * *

17. In § 173.25, the introductory text of paragraph (c) is revised to read as follows:

§ 173.25 Authorized packages and overpacks.

* * * * *

(c) Hazardous materials which are required to be labeled Poison, may be transported in the same motor vehicle with material that is marked or known to be foodstuffs, feed or any edible material intended for consumption by humans or animals provided the Poison B material is marked, labeled, and packaged in accordance with this subchapter, conforms to the requirements of paragraph (a) of this section and is overpacked as specified in § 177.841(e) or is in an overpack meeting the following requirements:

* * * * *

18. In § 173.31, Retest Table 2 following paragraph (d)(6) is amended by adding Specification 110A600–W in its proper numerical sequence to read as follows:

§ 173.31 Qualification, maintenance, and use of tank cars.

* * * * *

(d) * * *

RETEST TABLE 2

Specification	Retest interval—years		Retest pressure p.s.i.		Safety relief valve pressure-p.s.i.	
	Tank	Safety relief devices[4]	Tank hydrostatic expansion[6]	Tank air test	Start-to-discharge	Vapor tight
* * * *						
110A600–W	5	2	600	100	450	360
* * * *						

* * * * *

19. In § 173.33, paragraph (d)(13) is amended by revising the last sentence to read as follows:

§ 173.33 Qualification, maintenance, and use of cargo tanks.

* * * * *

(d) * * *

(13) * * * However, upon a written request to, and with the approval of the Regional Director of Motor Carrier Safety, for the region in which a motor carrier has its principal place of business, the carrier may maintain the reports at a regional or terminal office.

* * * * *

§ 173.34 [Amended]

20. In § 173.34, in paragraph (e)(8) is amended by replacing the words "not over ten pounds" with the words "not over twelve pounds".

21. In § 173.51, paragraph (g) is revised to read as follows:

§ 173.51 Forbidden explosives.

* * * * *

(g) Loaded firearms (except as provided in 14 CFR 108.11).

* * * * *

22. In § 173.57, paragraph (b) is removed and reserved as follows:

§ 173.57 Rocket ammunition.

(a) * * *

(b) [Reserved]

23. In § 173.58, paragraph (b) is removed and reserved as follows:

§ 173.58 Ammunition for small arms.

(a) * * *

(b) [Reserved]

24. In § 173.81, the heading and paragraph (b) are revised to read as follows:

§ 173.81 Cord, detonating.

* * * * *

(b) Each outside packaging shall be plainly marked "CORD, DETONATING-HANDLE CAREFULLY".

* * * * *

25. In § 173.86, paragraph (a)(2) is revised and paragraphs (h) and (i) are added to read as follows:

§ 173.86 New explosives definitions; approval and notification.

(a) * * *

(2) Has previously produced the explosive compound, mixture or device, but has made a change in the formulation, design, process or production equipment. An explosive compound mixture or device will not be considered a "new explosive" if an agency listed in paragraph (b) of this section has determined and confirmed in writing that there are no significant differences in hazard characteristics from the explosive compound, mixture or device previously approved. The written determination must be submitted to and approved by, the Director, OHMT before the explosive is offered for transportation.

* * * * *

(h) The requirements of this section do not apply to small arms ammunition which is:

(1) Not a forbidden explosive under § 173.51;

(2) Ammunition for rifle, pistol, or shotgun;

(3) Ammunition with inert projectile or blank ammunition; and

(4) Ammunition not exceeding 50 caliber for rifle or pistol cartridges or 8 gauge for shotshells.

(i) If experience or other data indicate that the hazard of a material (device) containing an explosive composition is greater or less than indicated according to the definition and criteria specified in §§ 173.53, 173.86, and 173.100 of this Part, the Director, OHMT may, following examination in accordance with paragraph (b) of this section, revise its classification or except the material (device) from the requirements of this subchapter.

26. In § 173.87, the first sentence is amended to read as follows:

§ 173.87 Explosives in mixed packaging.

Unless specifically authorized in this subchapter, explosives may not be packaged in the same outside packaging with other articles unless packaged by the DOD in accordance with § 173.7(a).

* * *

27. In § 173.93, paragraph (a)(2) is added to read as follows:

§ 173.93 Propellant explosives (solid) for cannon, small arms, rockets, guided missiles, or other devices, and propellant explosives (liquid).

(a) * * *

(2) Smokeless powder for small arms may be shipped as Class B explosives in packagings approved in accordance with § 173.197a.

* * * * *

28. In § 173.104, the heading and paragraph (c) are revised to read as follows:

§ 173.104 Cord, detonating; fuse, mild detonating, metal clad; or flexible linear shaped charge, metal clad.

* * * * *

(c) Cord, detonating *flexible;* fuse, mild detonating, metal clad and flexible linear shaped charges, metal clad shall be packed in wooden or fiberboard boxes. Each package shall be marked "CORD, DETONATING-HANDLE CAREFULLY" or "FLEXIBLE LINEAR SHAPED CHARGES, METAL CLAD-HANDLE CAREFULLY", as appropriate.

29. In § 173.122, paragraph (a)(4) is removed and reserved to read as follows:

§ 173.122 Acrolein, inhibited.

(a) * * *

(4) [Reserved]

* * * * *

30. In § 173.164, paragraph (a)(2) is revised to read as follows:

§ 173.164 chromic acid or chromic acid mixture, dry.

(a) * * *

(2) Specification 17C, 17H, or 37A (§§ 178 115, 178.118, 178.131 of this subchapter) metal drums. Spec. 37A metal drums constructed from 22-gauge steel throughout are authorized for a gross weight of 490 pounds or less when shipped in a carload or truckload lot.

* * * * *

31. In § 173.197a, the section is revised to read as follows:

§ 173.197a Smokeless powder for small arms.

Smokeless powder for small arms in quantities not exceeding 100 pounds net weight transported in one rail car or motor vehicle may be classed as a flammable solid when examined for this classification by the Bureau of Explosives or the Bureau of Mines and approved by the Director, OHMT. Maximum quantity in any inside packaging may not exceed 8 pounds. Inside packagings must be arranged and protected to prevent simultaneous ignition of the contents. The complete package must be a type examined by the Bureau of Explosives or the Bureau of Mines and approved by the Director, OHMT. In addition, inside packages which have been examined by the Bureau of Explosives or the Bureau of Mines and approved by the Director, OHMT, may be overpacked in DOT–12A65, 12B65, or 12H65 fiberboard boxes provided all inside containers are firmly packed to prevent movement and the net weight of smokeless powder in any one box does not exceed 16 pounds. Each outside package must bear a FLAMMABLE SOLID label.

32. In § 173.220, the introductory text of paragraph (a) is revised and paragraph (a)(3) is added to read as follows:

§ 173.220 Magnesium or zirconium scrap consisting of borings, clippings, shavings, sheets, turnings, or scalpings, and magnesium metallic (other than scrap), powder, pellets, turnings, or ribbon; magnesium aluminum.

(a) Magnesium or zirconium scrap consisting of borings, shavings, or turnings, must be packed in closed metal barrels or drums, wooden barrels, metal pails, fiber drums, fiberboard boxes with inside polyethylene bags or liner, or four-ply paper bags. Fiberboard boxes with inside polyethylene bags or liner or paper bags are not authorized for less-than-carload or less-than-truckload shipments.

* * * * *

(3) When transported by vessel, magnesium scrap may not be carried in paper bags and zirconium scrap may only be packaged in an hermetically sealed metal drum not exceeding 80 pounds net weight.

* * * * *

33. In § 173.245a, footnote 2 following the Table in paragraph (a) is revised to read as follows:

§ 173.245a Corrosive liquids, n.o.s. shipped in bulk.

(a) * * *

[2] Specification 103ANW tank car tanks must be fabricated of solid nickel at least 95 percent pure and containing not more than 1 percent iron. Metal test coupons for welding procedure qualification must contain not more than 1 percent iron. All cast metal parts of the tank in contact with the lading must have a minimum nickel content of approximately 96.7 percent. Specification 103A tank car tanks must be lead-lined steel or must be made of steel with at least 10 percent nickel cladding. Specification 103AW, 111A100F2, or 111A100W2 tanks must be lead-lined steel or made of steel with a minimum nickel cladding of 1/16 inch thickness. Nickel cladding in tanks must be low carbon nickel in accordance with ASTM B162–80.

* * * * *

34. In § 173.253, paragraphs (a)(7) and (a)(8) are revised to read as follows:

§ 173.253 Chloroacetyl chloride.

(a) * * *

(7) Specification 103AW, 111A60W2, or 111A100F2 (§§ 179.200, 179.201 of this subchapter). Tanks cars. Tanks must have a nickel cladding of 1/16 inch minimum thickness. Nickel cladding in tanks must be low carbon nickel in accordance with ASTM B162–80.

(8) Specification 103ANW (§§ 179.200 and 179.201 of this subchapter). Tank cars. Tanks must be fabricated of solid nickel at least 95 percent pure and containing not more than 1 percent iron. Metal test coupons for welding procedure qualification must contain not more than 1 percent iron. All cast metal parts of the tank in contact with the lading must have a minimum nickel content of approximately 96.7 percent.

* * * * *

§ 173.262 [Amended]

35. In § 173.262, in paragraph (b)(4) is amended by replacing the reference "§ 178.353–5" with the reference "178.343–5" in the last sentence.

36. In § 173.266, the eight sentence in paragraph (f)(2) is revised to read as follows:

§ 173.266 Hydrogen peroxide solution in water.

* * * * *

(f) * * *

(2) * * * The tank metal identification plate required shall be marked "DOT MC 310–H_2O_2" or "DOT MC 312–AL–H_2O_2" or "DOT MC 312–SS–H_2O_2", as appropriate, and in addition, the cargo tank shall be clearly marked in letters not less than one inch high "FOR HYDROGEN PEROXIDE ONLY". * * *

37. In § 173.271, paragraphs (a)(7), (a)(8)(iv), and (a)(9) are revised to read as follows:

§ 173.271 Methyl phosphonic dichloride, phosphorus oxybromide, phosphorus oxychloride, phosphorus tricloride, and thiosphosphoryl phosphorus chloride.

(a) * * *

(7) Speification 103ANW (§§ 179.200, 179.201 of this chapter). Tank cars. Tanks must be fabricated of solid nickel at least 95 percent pure and containing not more than 1 percent iron. Metal test coupons for welding procedure qualification must contain not more than 1 percent iron. All cast metal parts of the tank in contact with the lading must have a minimum nickel content of approximately 96.7 percent.

(8) * * *

(iv) Specification MC 311 or MC 312 cargo tanks. Tanks must be fabricated of solid nickel at least 95 percent pure and not more than 1 percent iron. Metal test coupons for welding procedure qualification must contain not more than 1 percent iron. All cast metal parts of the tank in contact with the lading must have a minimum nickel content of approximately 96.7 percent. Authorized only for phosphorus oxychloride and phosphorus trichloride.

(9) Specification 103A [1], 103AW, 111A60W2, or 111A00F2 (§§ 179.200, 179.201 of this subchapter). Tank cars. Specification 103A [1], tanks must be lead-lined steel or made of steel with nickel cladding of at least 10 percent of the shell thickness. Specification 103AW, 111A60W2, or 111A100F2 tanks must be lead-lined steel or made of steel with nickel cladding with a minimum thickness of 1/16 inch. Nickel cladding in tanks must be low carbon nickel in accordance with ASTM B162–80.

* * * * *

38. In § 173.277, paragraph (d)(1) is removed and reserved as follows:

§ 173.277 Hypochlorite solutions.

* * * * *

(d) * * *

(1) Reserved]

* * * * *

39. In § 173.294, the heading, paragraphs (a)(2), (a)(3), and (b) are revised to read as follows:

§ 173.294 Chloroacetic acid, liquid or solution.

(a) * * *

(2) Specification 103ANW, 103AW, 111A60W2, or 111A100F2 (§§ 179.200, 179.201 of this subchapter). Tank cars. Specification 103AW, 111A60W2, or 111A100F2 tanks cars must be nickel clad with a nickel thickness of at least 20 percent of the shell thickness. Nickel cladding in tanks must be low carbon nickel in accordance with ASTM B162–80.

(3) Specification MC 310, MC 311, or MC 312 (§ 178.343 of this chapter). Cargo tanks. Tanks must be fabricated of solid nickel at least 95 percent pure and containing not more than 1 percent iron, Type 304 of 316 stainless steel or be suitably lined. Nickel metal test coupons for welding procedures qualification must contain no more than 1 percent iron.

* * * * *

(b) Chloroacetic acid, anhydrous, when shipped as a liquid must be shipped in Specification 103ANW tank cars fabricated of nickel containing not more than 1 percent iron or in Specification 103AW or 111A60W2 tank car tanks with nickel cladding of at least 20 percent of the shell thickness or be provided with a suitable corrosive resistant coating or lining. Nickel cladding in tanks must be low carbon nickel in accordance with ASTM B162–80.

40. In § 173.301, paragraph (k)(1) is revised to read as follows:

§ 173.301 General requirements for shipment of compressed gases in cylinders.[1]

* * * * *

(k) *Outside packagings.* * * *

(1) Outside packaging must provide protection for the cylinder. Unless the cylinder has a protective collar or neck ring, the outside packaging must provide protection to the valve against accidental functioning and damage.

* * * * *

41. In § 173.302, paragraph (a)(5)(iv) is revised to read as follows:

§ 173.302 Charging of cylinders with nonliquefied compressed gases.

(a) * * *

(5) * * *

(iv) The pressure in the cylinder may not exceed 3,000 psig at 70° F.

* * * * *

42. In § 173.304, the Table in paragraph (a)(2) is amended by revising the entries for carbon dioxide and sulfur dioxide as follows:

§ 173.304 Charging of cylinders with liquefied compressed gas.

(a) * * *

(2) * * *

Kind of gas	Maximum permitted filing density (percent) (see note 1)	Containers marked as shown in this column or of the same type with higher service pressure must be used except as provided in §§ 173.34(a), (b), and 173.301(j) (see notes following table)
*	*	*
Carbon dioxide (see notes 4, 7, and 8).	68	DOT-3A1800; DOT-3AX1800; DOT-3AA1800; DOT-3AAX1800; DOT-3; DOT-3E1800; DOT-311800; DOT-3HT2000; DOT-39; DOT-3AL1800
*	*	*
Sulfur dioxide (see note 8).	125	DOT-3A225; DOT-3AA225; DOT-3B225; DOT-4A225; DOT-4B225; DOT-4BA225; DOT-4BW225; DOT-4B240ET; DOT-3; DOT-4; DOT-25; DOT-26-150; DOT-38; DOT-39; DOT-3E1800; and DOT-3AL225
*	*	*

43. In § 173.314, the third sentence of Note 6 following the Table in paragraph (c) is revised to read as follows:

§ 173.314 Requirements for compressed gases in tank cars.

* * *

(c) * * *

Note 6: * * * The discharge capacity of each of these safety relief devices must be sufficient to prevent building up of pressure in the tank in excess of 82.5 precent of the tank test pressure. * * *

* * * * *

44. In § 173.315, the introductory text of paragraph (c) is revised to read as follows:

§ 173.315 Compressed gases in cargo tanks and portable tanks.

* * * * *

(c) Except as otherwise provided, the loading of a liquefied gas into a cargo tank or portable tank shall be determined by weight or by a suitable liquid level gauging device. The vapor pressure (psig) at 115°F. must not exceed the design pressure of the cargo tank or portable tank container. The liquid portion of the gas shall not fill the tank at 105°F. if the tank is insulated, or at 115°F. if the tank is uninsulated, except that this requirement shall not apply to:

* * * * *

45. In § 173.316, the Table in paragraph (c)(2) is revised to read as follows:

§ 173.316 Cryogenic liquids in cylinders.

* * * * *

(c) * * *

(2) * * *

Pressure control valve setting (maximum start-to-discharge pressure psig)	Maximum permitted filling density (percent by weight)					
	Air	Argon	Nitrogen	Oxygen	Helium	Neon
45	82.5	133	76	108	12.5	109
75	80.3	130	74	105	12.5	104
105	78.4	127	72	103	12.5	100
170	76.2	122	70	100	12.5	92
230	75.1	119	69	98	12.5	85
295	73.3	115	68	96	12.5	77
360	70.7	113	65	93	12.5	.....
450	65.9	111	61	91	12.5	.....
540	62.9	107	58	88	12.5	.....
625	60.1	104	55	86	12.5	.....
Design service temperature (°F.)	−320	−320	−320	−320	−452	−411

* * * * *

46. In § 173.318, paragraphs (b), (f)(2), and (f)(3) are revised to read as follows:

§ 173.318 Cryogenic liquids in cargo tanks.

* * * * *

(b) *Pressure relief systems and pressure control valves.*—(1) *Types of pressure relief systems.*—(i) *Tanks in oxygen and flammable cryogenic liquid service.* Except as otherwise provided in this paragraph, each tank in oxygen and flammable cryogenic liquid service must be protected by two independent pressure relief systems which are not connected in series, namely:

(A) A primary system of one or more pressure relief valves; and

(B) A secondary system of one of more frangible discs or pressure relief valves. For a tank in carbon monoxide service, the secondary system must be pressure relief valves only.

(ii) *Tanks in helium and atmospheric gas (except oxygen) cryogenic liquid service.* For a tank used in helium and atmospheric gas (except oxygen) cryogenic liquid service, the tank must be protected by at least one pressure relief system consisting of:

(A) One of more pressure relief valves; or

(B) A combination of one or more pressure relief valves and one or more frangible discs.

(2) *Capacities of pressure relief systems.*—(i) *Tanks in oxygen or flammable cryogenic liquid service.* For tanks in oxygen or flammable cryogenic liquid service, the primary system and the secondary system of pressure relief devices must each have a flow capacity equal to or greater than that calculated by the applicable formula in paragraph 5.3.2 or paragraph 5.3.3 of CGA Pamphlet S–1.2. In addition:

(A) The primary pressure relief system must have his total flow capacity at a pressure not exceeding 120 percent of the tank's design pressure.

(B) The secondary pressure relief system must have this total flow capacity at a pressure not exceeding 150 percent of the tank's design pressure.

(ii) *Tanks in helium and atmospheric gas (except oxygen) cryogenic liquid service.* For tanks in helium and atmospheric gas (except oxygen) cryogenic liquid service, the pressure relief system must have a flow capacity equal to or greater than that calculated by the applicable formula in paragraphs 5.3.2 or 5.3.3 of CGA Pamphlet S–1.2. If the pressure relief system consists of a combination of pressure relief valves and frangible discs, the pressure relief valves must have a total venting capacity equal to or greater than that calculated by the applicable formula in paragraph 4.1.10.1.1 of CGA Pamphlet S–1.2. The pressure relief system must have this total flow capacity at a pressure not exceeding 150 percent of the tank's design pressure.

(3) *Type and construction of pressure relief devices.*—(i) Each pressure relief device must be designed and constructed for a pressure equal to or exceeding the tank's design pressure at the coldest temperature reasonably expected to be encountered.

(ii) Pressure relief devices must be either spring-loaded pressure relief valves of frangible discs. Pressure relief valves must be of a type that automatically open and close at predetermined pressures.

(4) *Setting of pressure relief devices.*—(i) On a tank used in oxygen or flammable cryogenic liquid service, the pressure relief devices must perform as follows.

(A) Each pressure relief valve in the primary relief system must be set-to-discharge at a pressure no higher than 110 percent of the tank's design pressure.

(B) Each pressure relief device in the secondary pressure relief system must be designed to commence functioning at a pressure no lower than 130 percent and no higher than 150 percent of the tank's design pressure.

(ii) On a tank used in helium and atmospheric gas (except oxygen) cryogenic liquid service, the pressure relief devices in the pressure relief system must be designed to commence functioning at no higher than 150 percent of the tank's design pressure.

(5) *Optional pressure relief devices and pressure control valves.* In addition to the required pressure relief devices, a cargo tank in cryogenic liquid (except carbon monoxide) service may be equipped with one or both of the following:

(i) One or more pressure control valves set at a pressure below the tank's design pressure.

(ii) One or more frangible discs set to function at a pressure not less than one and one-half times or more than two times the tank's design pressure.

(6) *Maximum filling rate.* (i) For a tank used in oxygen and flammable cryogenic liquid service, the maximum rate at which the tank is filled must not exceed the liquid flow capacity of the primary pressure relief system rated at a pressure not exceeding 120 percent of the tank's design pressure.

(ii) On tanks used in helium and atmospheric gas (except oxygen) cryogenic liquid service, the maximum rate at which the tank is filled must not exceed the liquid flow capacity of the pressure relief valves rated at 150 percent of the tank's design pressure.

(7) *Arrangement and location of pressure relief devices.* (i) The discharge from any pressure relief system must be directed upward and be unobstructed to the outside of the protective housing in such a manner as to prevent impingement of gas upon the jacket or any structural part of the vehicle.

(ii) Each pressure relief valve must be arranged or protected to prevent the accumulation of foreign material between the relief valve and the atmospheric discharge opening in any relief piping. The arrangement must not impede flow through the device.

(iii) Each pressure relief valve must be designed and located to minimize the possibility of tampering. If the pressure setting or adjustment is external to the valve, the valve adjustment must be sealed.

(iv) Each pressure relief device must have direct communication with the vapor space of the tank at the midlength of the top centerline.

(v) Each pressure relief device must be installed and located so that the cooling effect of the contents during venting will not prevent the effective operation of the device.

(8) *Connections.* (i) Each connection to a pressure relief device must be of sufficient size to allow the required rate of discharge through the pressure relief device. The inlet connection must be not less than one-half inch nominal pipe size.

(ii) A shut-off valve may be installed in a pressure relief system only when the required relief capacity is provided at all times.

(9) *Pressure relief devices for piping hose and vacuum-insulated jackets.* (i) Each portion of connected liquid piping or hose that can be closed at both ends must be provided with either a hydrostatic pressure relief valve without an intervening shut-off valve, or a check valve permitting flow from the pipe or hose into the tank. If used, the relief valve must be located so as to prevent its discharge from impinging on the tank, piping, or operating personnel.

(ii) On a vacuum-insulated cargo tank the jacket must be protected by a suitable relief device to release internal pressure. The discharge area of this device must be at least 0.00024 square inch per pound of water capacity of the tank. This relief device must function at a pressure not exceeding the internal design pressure of the jacket, calculated in accordance with the ASME Code, or 25 psig, whichever is less.

(10) *Tank inlet, outlet, pressure relief device and pressure control valve markings.* (i) Each tank inlet and outlet, except pressure relief devices and pressure control valves, must be permanently marked to indicate whether it communicates with "vapor" or "liquid" when the tank is filled to the maximum permitted filling density.

(ii) Each pressure relief valve must be plainly and permanently marked with the pressure, in psig, at which it is set-to-discharge, the discharge rate of the device in SCF per minute (SCFM) of free air, and the manufacturer's name or trade name and catalog number. The marked set-to-discharge pressure valve must be visible with the valve in its installed position. The rated discharge capacity of the device must be determined at a pressure of 120 percent of the design pressure of the tank.

(iii) Each pressure control valve must be plainly and permanently marked with the pressure, in psig, at which it is set-to-discharge.

(f) * * *

(2) *Air, argon, helium, nitrogen, and oxygen, cryogenic liquids* must be loaded and shipped in accordance with the following table:

PRESSURE CONTROL VALVE SETTING OR RELIEF VALVE SETTING

Maximum set-to-discharge pressure (psig)	Maximum permitted filling density (percent by weight)				
	Air	Argon	Helium	Nitrogen	Oxygen
26			12.5		
30	80.3	129	12.5	74	105
40	79.2		12.5		
50	78.0		12.5		
55	77.3	125	12.5	71	102
60	76.9		12.5		
80	75.3		12.5		
85	75.1	121	12.5		99
100	73.0		12.5		
105	73.7		12.5	67	
120	72.2		12.5		
140	71.4		12.5		
145	70.9	115	12.5	64	94
180	68.3		12.5		
200	67.3	110	12.5	61	91
250	63.3	106	12.5	57	87
275	62.3	105	12.5	56	86
325	59.4	101		53	83
Design service temperature.	−320°F	−320°F	−452°F	−320°F	−320°F

(3) *Carbon monoxide, hydrogen (minimum 95 percent para-hydrogen), ethylene, and methane or natural gas, cryogenic liquids* must be loaded and shipped in accordance with the following table:

PRESSURE CONTROL VALVE SETTING OR RELIEF VALVE SETTING

Maximum set-to-discharge pressure (psig)	Maximum permitted filling density (percent by weight)			
	Carbon monoxide	Ethylene	Hydrogen	Methane or natural gas
13			6.6	
15	75.0		6.6	40.5
17	74.0		6.6	
20		53.5		40.0
25	73.0			
30	72.0	52.7	6.3	39.1
35				
40		52.0		38.6
45	71.5			
50		51.4	6.0	38.2
55				
60		50.8		
70		50.2	5.7	37.5
90		49.2		
95				
100		48.4	5.4	36.6
115		48.2		
125			5.0	
150			4.5	
175	62.5	45.8		
285	56.0			
Design service temperature.	−320°F	−155°F	−423°F	−260°F

* * * * *

47. Section 173.320 is revised to read as follows:

§ 173.320 Cryogenic liquids; exceptions.

(a) Atmospheric gases and helium, cryogenic liquids, in Dewar flasks, insulated cylinders, insulated portable tanks, insulated cargo tanks, and insulated tank cars, designed and constructed so that the pressure in such packagings will not exceed 25.3 psig under ambient temperature conditions during transportation are not subject to the requirements of this subchapter when transported by motor vehicle or railcar except as specified in paragraphs (a)(1), (a)(2), and (a)(3) of this section.

(1) Sections 171.15 and 171.16 of this subchapter pertaining to the reporting of incidents, not including a release that is the result of venting through a pressure control valve, or the neck of the Dewar flask.

(2) Subparts A, B, C, and D of Part 172, (§§ 174.24 for rail and 177.817 for highway) and in addition, Part 172 in its entirety for oxygen.

(3) Subparts A and B of Part 173, and §§ 174.1 and 177.800, 177.804, 177.807, and 177.823 of this subchapter.

(b) The requirements of this subchapter do not apply to atmospheric gases and helium:

(1) During loading and unloading operations (pressure rises may exceed 25.3 psig); or

(2) When used in operation of a process system; such as a refrigeration system (pressure may exceed 25.3 psig).

(c) For transportation aboard aircraft, see § 171.11 of this subchapter.

48. Section 173.965 is added to read as follows:

§ 173.965 Cotton and other fibers.

Cotton and the fibers jute, hemp, flax, sisal, coir, kapok, or similar vegetable fibers, when offered for transportation by water, must be packaged in bales, securely and tightly bound with rope, wire, or other similar means.

PART 176—CARRIAGE BY VESSEL

49. The authority citation for Part 176 continues to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1805, 1806(b), 1808; 49 CFR Part 1, unless otherwise noted.

50. In § 176.76, paragraph (g)(2) is added to read as follows:

§ 176.76 Highway vehicles, railroad vehicles, freight containers, and portable tanks containing hazardous materials.

* * * * *

(g) * * *

(2) Small passenger vessels of 100 gross tons, or less, may carry a hazardous material in a portable tank only when 16 or less passengers are on board and only when specifically authorized by the Officer-in-Charge, Marine Inspection, by endorsement of the vessel's Certificate of Inspection.

* * * * *

PART 177—CARRIAGE BY PUBLIC HIGHWAY

51. The authority citation for Part 177 continues to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1805; 49 CFR Part 1, unless otherwise noted.

52. In § 177.814, paragraph (b) is revised to read as follows:

§ 177.814 Retention of manufacturer's certificate and retest reports.

* * * * *

(b) Upon a written request to, and with the approval of, the Regional Director of Motor Carrier Safety, for the region in which a motor carrier has his principal place of business, a motor carrier may retain the certificate and other data specified in paragraph (a) of this section at a regional or terminal office. The address and jurisdictions of the Regional Directors of Motor Carrier

Safety are shown in § 390.40 of Chapter III of this title.

* * * * *

53. In § 177.824, the introductory text of paragraph (f) and the last sentence of paragraph (f)(2) are revised to read as follows:

§ 177.824 Retesting and inspection of cargo tanks.

* * * * *

(f) *Reporting requirements.* Each motor carrier shall file with the Chief, Standards Development Division, Office of Motor Carrier Standards, Federal Highway Administration, Department of Transportation, Washington, DC 20590, a written listing of all MC 330 and MC 331 cargo tanks he has in service. Each motor carrier, upon placing in service or withdrawing from service any MC 330 and MC 331 cargo tank (other than a cargo tank used in interchange service which is reported upon by another carrier), shall file a supplemental report with the Office of Motor Carrier Standards.

* * * * *

(2) * * * However, upon a written request to, and with the approval of the Regional Director of Motor Carrier Safety, for the region in which a motor carrier has his principal place of business, the carrier may maintain the reports at a regional or terminal office.

* * * * *

54. In § 177.834, paragraph (k) is removed and reserved to read as follows:

§ 177.834 General requirements.

* * * * *

(k) [Reserved]

* * * * *

55. In §§ 177.835, 177.837, 177.838, 177.839 and 177.840 the first line following each of the section headings is revised and paragraph (g) in § 177.838 is revised to read as follows:

§ 177.835 Explosives.

(See also §§ 177.834 (a) to (j).)

* * * * *

§ 177.837 Flammable liquids.

(See also §§ 177.834 (a) to (j).)

* * * * *

§ 177.838 Flammable solids and oxidizing materials.

(See also §§ 177.834 (a) to (j).)

* * * * *

(g) Smokless powder for small arms in quantities not exceeding 100 pounds net weight transported in one rail car or motor vehicle may be classed as a flammable solid when examined for this classification by the Bureau of Explosives or the Bureau of Mines and approved by the Director, OHMT. Maximum quantity in any inside packaging may not exceed 8 pounds. Inside packagings must be arranged and protected to prevent simultaneous ignition of the contents. The complete package must be a type examined by the Bureau of Explosives or the Bureau of Mines and approved by the Director, OHMT. In addition, inside packages which have been examined by the Bureau of Explosives or the Bureau of Mines and approved by the Director, OHMT, may be overpacked in DOT-12A65, 12B65, or 12H65 fiberboard boxes provided all insider containers are firmly packed to prevent movement and the net weight of smokeless powder in any one box does not exceed 16 pounds. Each outside package must bear a FLAMMABLE SOLID label.

§ 177.839 Corrosive liquids.

(See also §§ 177.834 (a) to (j).)

* * * * *

§ 177.840 Compressed gases, including cryogenic liquids.

(See also §§ 177.834 (a) to (j).)

* * * * *

56. In § 177.841, the first line following the section heading is revised and paragraph (e) is amended by adding a sentence at the end to read as follows:

§ 177.841 Poisons.

(See also §§ 177.834 (a) to (j).)

* * * * *

(e) * * * No motor carrier may transport a packaging containing a material which is required to be labeled "Poison", "Poison gas", or "Irritant" in the driver's compartment (including a sleeper berth) of a motor vehicle.

57. In § 177.848, paragraph (b) is revised to read as follows:

§ 177.848 Segregation and separation chart of hazardous materials.

* * * * *

(b) Cyanides or cyanide mixtures must not be loaded or stored with acids or any other acidic materials which could release hydrocyanic acid from cyanides.

* * * * *

PART 178—SHIPPING CONTAINER SPECIFICATIONS

58. The authority citation for Part 178 continues to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1805, 1806, 1808; 49 CFR Part 1, unless otherwise noted.

59. In § 178.38, § 178.38–10, paragraph (b) is amended by revising the formula to read as follows:

§ 178.38 Specification 3B; seamless steel cylinders.

§ 178.38–10 Wall thickness.

* * * * *

(b) * * * P=at least two times service pressure or 450 pounds per square inch, whichever is the greater; * * *.

60. In § 178.42, § 178.42–14, the introductory text of paragraph (a) is revised to read as follows:

§ 178.42 Specification 3E; seamless steel cylinders.

§ 178.42–14 Marking.

(a) Marking on each cylinder by stamping plainly and permanently on the shoulder, top head, neck or sidewall as follows;

* * * * *.

61. In § 178.46, § 178.46–4(a), § 178.46–5(d)(1) and footnote 1 of (d)(2), § 178.46–6(c), and § 178.46–8(e) are revised to read as follows:

§ 178.46 Specification 3AL; seamless cylinders made of definitely prescribed aluminum alloys.

§ 178.46–4 Duties of the inspector.

(a) The inspector shall determine that all materials are in compliance with the requirements of this specification.

* * * * *

§ 178.46–5 Authorized material and identification of material.

* * * * *

(d) * * *

(1) CHEMICAL COMPOSITION LIMITS [1]

[Chemical Composition (in weight percent)]

Aluminum Assoc. alloy designation No.	Si	Fe	Cu	Mn	Mg	Cr	Zn	Ti	Pb	Bi	Other [2]		Al
											Each	Total	
6351	0.7–1.3	0.50	0.10	0.40–0.80	0.40–0.80	.....	0.20	0.20	0.01	0.01	0.05	0.15	Remainder.
6061	0.40–0.80	0.70	0.15–0.40	0.15	0.80–1.20	0.04–0.35	0.25	0.15	0.01	0.01	0.05	0.15	Do.

[1] ASTM B 221–76 Standard Specification for Aluminum-Alloy Extruded Bars, Rods, Shapes, and Tubes, Table 1 Chemical Composition Limits, except for Pb and Bi. Limits are in percent maximum unless otherwise indicated.

[2] Analysis is regularly made only for the elements for which specific limits are shown, except for unalloyed aluminum. If however, the presence of other elements is suspected to be, or in the course of routine analysis is indicated to be in excess of specified limits, further analysis is made to determine that these other elements are not in excess of the amount specified. (Aluminum Association Standards and Data/Sixth Edition 1979).

(2) *Mechanical Property Limits.*

* * * * *

[1] "D" represents specimen diameters. When the cylinder wall is greater than 3/16 inch thick, a retest without reheat treatment using the 4D size specimen is authorized if the test using the 2 inch size specimen fails to meet elongation requirements.

* * * * *

§ 178.46–6 Manufacture.

* * * * *

(c) Thickness of the cylinder base may not be less than the prescribed minimum wall thickness of the cylindrical shell. The cylinder base must have a basic torispherical, hemispherical, or ellipsoidal interior base configuration where the dish radius is no greater than 1.2 times the inside diameter of the shell. The knuckle radius may not be less than 12 percent of the inside diameter of the shell. The interior base contour may deviate from the true torispherical, hemispherical or ellipsoidal configuration provided that—

(1) Any areas of deviation are accompanied by an increase in base thickness;

(2) All radii of merging surfaces are equal to or greater than the knuckle radius;

(3) Each design has been qualified by successfully passing the cycling tests in § 178.46–6(f); and

(4) Detailed specifications of the base design are available to the inspector.

* * * * *

§ 178.46–8 Openings.

* * * * *

(e) All openings must be threaded. Threads must comply with the following:

(1) Each thread must be clean cut, even, without checks, and to gauge.

(2) Taper threads, when used, must conform to one of the following:

(i) American Standard Pipe Thread (NPT) type, conforming to the requirements of Federal Standard H–28 (1978), Section 7;

(ii) National Gas Taper Thread (NGT) type, conforming to the requirements of Federal Standard H–28 (1978), Sections 7 and 9; or

(iii) Other taper threads conforming to other standards may be used provided the length is not less than that specified for NPT threads.

(3) Straight threads, when used, must conform to one of the following:

(i) National Gas Straight Thread (NGS) type, conforming to the requirements of Federal Standard H–28, (1978), Sections 7 and 9;

(ii) Unified Thread (UN) type, conforming to the requirements of Federal Standard H–28, (1978), Section 2;

(iii) Controlled Radius Root Thread (UNJ) type, conforming to the requirements of Federal Standard H–28 (1978), Section 4.

(iv) Other straight threads conforming to other recognized standards may be used provided that the requirements in subparagraph (e)(4) of this section are met.

(4) All straight threads must have at least 6 engaged threads, a tight fit, and a factor of safety in shear of at least 10 at the test pressure of the cylinder. Shear stress must be calculated by using the appropriate thread shear area in accordance with Federal Standard H–28 (1978), Appendix A5, Section 3.

62. In § 178.51, § 178.51–10, paragraph (d), is revised to read as follows:

§ 178.51 Specification 4BA; welded or brazed steel cylinders made of definitely prescribed steels.

§ 178.51.–10 Wall thickness.

* * * * *

(d) For a cylinder with a wall thickness less than 0.100 inch, the ratio of tangential length to outside diameter may not exceed 4.1.

§ 178.53–9 [Amended]

Paragraph (a) of § 178.53–9 is amended by replacing the number "0.40" with the number "0.04".

§ 178.54 [Removed and Reserved]

63. Section 178.54 is removed and reserved.

64. In § 178.61, §178.61–10, paragraph (b) is revised to read as follows:

§ 178.61 Specification 4BW; welded steel cylinders made of definitely prescribed steels with electric-arc welded longitudinal seam.

§ 178.61–10 Wall thickness.

* * * * *

(b) For a cylinder with a wall thickness less than 0.100 inch, the ratio of tangential length to outside diameter may not exceed 4.1.

65. In §178.245–1, the introductory text of paragraph (a) is revised to read as follows:

§ 178.245 Specifications 51; steel portable tanks.

(a) Tanks must be seamless or welded steel construction or combination of both and have a water capacity in excess of 1,000 pounds. Fusion welded tanks must be postweld heat treated and radiographed as prescribed in the ASME Code except that each tank constructed in accordance with Part UHT of the ASME Code must be postweld heat treated. Where postweld heat treatment is required, the tank must be treated as a unit after completion of all the welds in and/or to the shell and heads. The method must be as prescribed in the ASME Code. Welded attachments to pads may be made after postweld heat treatment is made. A tank used for anhydrous ammonia must be postweld heat treated. The postweld heat treatment must be as prescribed in the ASME Code, but in no event at less than 1050°F. tank metal temperature. Additionally, tanks constructed in

accordance with Part UHT of the ASME Code must conform to the following requirements:

* * * * *

§ 178.337-1 [Amended]

66. Paragraph (d) of § 178.337-1 is amended by replacing the words "cargo tanks" with the words "tank motor vehicle".

§ 178.337-13 [Amended]

67. Paragraph (b) of § 178.337-13 is amended by replacing the second and third words "cargo tanks" with the words "tank motor vehicle".

PART 179—SPECIFICATIONS FOR TANK CARS

68. The authority citation for Part 179 continues to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1805, 1806, 1808; 49 CFR Part 1, unless otherwise noted.

69. In § 179.100, § 179.100-13(a), § 179.100-14(a)(1) and (a)(3) are revised to read as follows:

§ 179.100 General specifications applicable to pressure tank car tanks.

§ 179.100-13 Venting, loading and unloading valves, measuring and sampling devices.

(a) Venting, loading and unloading valves must be of approved design, made of metal not subject to rapid deterioration by the lading, and must withstand the tank test pressure without leakage. The valves shall be bolted to seatings on the manway cover, except as provided in § 179.103. Valve outlets shall be closed with approved screw plugs or other closures fastened to prevent misplacement.

* * * * * *

§ 179.100-14 Bottom outlets.

(a) * * *

(1) The extreme projection of the bottom washout equipment may not be more than that allowed by Appendix E of the AAR Specifications for Tank Cars.

* * * * * *

(3) If the bottom washout nozzle extends 6 inches or more from shell of tank, a V-shaped breakage groove shall be cut (not cast) in the upper part of the outlet nozzle at a point immediately below the lowest part of the inside closure seat or plug. In no case may the nozzle wall thickness at the root of the "V" be more than ¼-inch. Where the nozzle is not a single piece, provision shall be made for the equivalent of the breakage groove. The nozzle must be of a thickness to insure that accidental breakage will occur at or below the "V" groove or its equivalent. On cars without continuous center sills, the breakage groove or its equivalent may not be more than 15 inches below the tank shell. On cars with continuous center sills, the breakage groove or its equivalent must be above the bottom of the center sill construction.

* * * * * *

70. In § 179.102, § 179.102-2, paragraph (a)(3) is revised to read as follows:

§ 179.102 Special commodity requirements for pressure tank car tanks.

§ 179.102-2 Chlorine.

(a) * * *

(3) Insulation must be 4 inches minimum thickness of corkboard or of polyurethane foam or must be 2 inches minimum thickness of 4 pounds per cubic foot minimum density ceramic fiber covered by 2 inches minimum thickness of glass fiber.

* * * * * *

71. In § 179.103, § 179.103-5, paragraphs (b)(1) and (b)(4) are revised to read as follows:

§ 179.103 Special requirements for class 114A * * * tank car tanks.

§ 179.103-5 Bottom outlets.

* * * * * *

(b) * * *

(1) The extreme projection of the bottom outlet equipment may not be more than allowed by Appendix E of the AAR Specifications for Tank Cars. All bottom outlet reducers and closures and their attachments shall be secured to car by at least ⅜-inch chain, or its equivalent, except that bottom outlet closure plugs may be attached by ¼-inch chain. When the bottom outlet closure is of the combination cap and value type, the pipe connection to the valve shall be closed by a plug, cap, or approved quick coupling device. The bottom outlet equipment should include only the valve, reducers and closures that are necessary for the attachment of unloading fixtures. The permanent attachment of supplementary exterior fittings must be approved by the AAR Committee on Tank Cars.

* * * * * *

(4) If the outlet nozzle extends 6 inches or more from shell of tank, a V-shaped breakage groove shall be cut (not cast) in the upper part to the outlet nozzle at a point immediately below the lowest part of value closest to the tank. In no case may the nozzle wall thickness at the roof of the "V" be more than ¼-inch. On cars without continous center sills, the breakage groove or its equivalent may not be more than 15 inches below the tank shell. On cars with continous center sills, the breakage groove or its equivalent must be above the bottom of the center sill construction.

* * * * * *

72. In § 179.200, § 179.200-7, paragraphs (b), (c), (d), (e), and (f) are amended by changing the heading in each Table; § 179.200-13 is revised, and in § 179.200-17, paragraphs (a)(1), (a)(6), (a)(7), (b)(1), and (b)(3) are revised to read as follows:

§ 179.200 General specifications applicable to non-pressure tank car tanks

§ 179.200-7 Materials.

(a) * * *

(b) * * *

Specifications	Minimum tensile strength (p.s.i.) welded condition [1]	Minimum elongation in 2 inches (percent) weld metal (longitudinal)

* * * * *

(c) * * *

Specifications	Minimum tensile strength (p.s.i.) welded condition [3] [6]	Minimum elongation in 2 inches (percent) 0 temper weld metal (longitudinal)

* * * * *

(d) * * *

Specifications	Minimum tensile strength (p.s.i.) welded condition [1]	Minimum elongation in 2 inches (percent) weld metal (longitudinal)

* * * * *

(e) * * *

Specifications	Minimum tensile strength (p.s.i.) welded condition [1]	Minimum elongation in 2 inches (percent) weld metal (longitudinal)

* * * * *

(f) * * *

Specifications	Minimum tensile strength (p.s.i.) welded condition [1]	Minimum elongation in 2 inches (percent) weld metal (longitudinal)

* * * * *

§ 179.200–13 Manway ring or flange, safety relief device flange, bottom outlet nozzle flange, bottom washout nozzle flange and other attachments and openings.

(a) These attachments shall be fusion welded to the tank and reinforced in an approved manner in compliance with the requirements of Appendix E, figure 10, of the AAR Specifications for Tank Cars.

(b) The opening in the manway ring must be at least 16 inches in diameter except that acid resistant lined manways must be at least 18 inches in diameter before lining.

(c) The manway ring or flange, shall be made of cast, forged or fabricated metal. The metal of the dome, tank, or nozzle must be compatible with the manway ring or flange, so that they may be welded together.

(d) The openings for the manway or other fittings shall be reinforced in an approved manner.

§ 179.200–17 Bottom outlets.

(a) * * *

(1) The extreme projection of the bottom outlet equipment may not be more than that allowed by Appendix E of the AAR Specifications for Tank Cars. All bottom outlet reducers and closures and their attachments shall be secured to the car by at least ⅜-inch chain, or its equivalent, except that the bottom outlet closure plugs may be attached by ¼-inch chain. When the bottom outlet closure is of the combination cap and valve type, the pipe connection to the valve shall be closed by a plug, cap, or approved quick coupling device. The bottom outlet equipment should include only the valve, reducers and closures that are necessary for the attachment of unloading fixtures. The permanent attachment of supplementary exterior fittings shall be approved by the AAR Committee on Tank Cars.

* * * * *

(6) To provide for the attachment of unloading connections, the discharge end of the bottom outlet nozzle or reducer, the valve body of the exterior valve, or some fixed attachment thereto, shall be provided with one of the following arrangements or an approved modification thereof. (See Appendix E. Fig. E17 of the AAR Specifications for Tank Cars for illustrations of some of the possible arrangements.)

(i) A bolted flange closure arrangement including a minimum 1-inch NPT pipe plug (see Fig. E17.1) or including an auxiliary valve with a threaded closure.

(ii) A threaded cap closure arrangement including a minimum 1-inch NPT pipe plug (see Fig. E17.2) or including an auxiliary valve with a threaded closure.

(iii) A quick-coupling device using a threaded plug closure of at least 1-inch NPT or having a threaded cap closure with a minimum 1-inch NPT pipe plug (see Fig. E17.3 through E17.5). A minimum 1-inch auxiliary test valve with a threaded closure may be substituted for the 1-inch pipe plug (see Fig. E17.6). If the threaded cap closure does not have a pipe plug or integral auxiliary test valve, a minimum 1-inch NPT pipe plug shall be installed in the outlet nozzle above the closure (see Fig. E17.7).

(iv) A two-piece quick-coupling device using a clamped dust cap must include an in-line auxiliary valve, either integral with the quick-coupling device or located between the primary bottom outlet valve and the quick-coupling device. The quick-coupling device closure dust cap or outlet nozzle shall be fitted with a minimum 1-inch NPT closure (see Fig. E17.8 and E17.9).

(7) If the outlet nozzle extends 6 inches or more from the shell of the tank, a V-shaped breakage groove shall be cut (not cast) in the upper part of the outlet nozzle at a point immediately below the lowest part of valve closest to the tank. In no case may the nozzle wall thickness at the root of the "V" be more than ¼ inch. The outlet nozzle on interior valves or the valve body on exterior valves may be steam jacketed, in which case the breakage groove or its equivalent must be below the steam chamber but above the bottom of center sill construction. If the outlet nozzle is not a single piece, or if exterior valves are applied, provisions shall be made for the equivalent of the breakage groove. On cars without continuous center sills, the breakage groove or its equivalent must be no more than 15 inches below the tank shell. On cars with continuous center sills, the breakage groove or its equivalent must be above the bottom of the center sill construction.

* * * * *

(b) * * *

(1) The extreme projection of the bottom washout equipment may not be more than that allowed by Appendix E of the AAR Specifications for Tank Cars.

* * * * *

(3) If the washout nozzle extends 6 inches or more from the shell of the tank, a V-shaped breakage groove shall be cut (not cast) in the upper part of the nozzle at a point immediately below the lowest part of the inside closure seat or plug. In no case may the nozzle wall thickness at the root of the "V" be more than ¼ inch. Where the nozzle is not a single piece, provisions shall be made for the equivalent of the breakage groove. The nozzle must be of a thickness to insure that accidental breakage will occur at or below the "V" groove or its equivalent. On cars without continuous center sills, the breakage groove or its equivalent may not be more than 15 inches below the outer shell. On cars with continuous center sills, the breakage groove or its equivalent must be above the bottom of the center sill construction.

73. In § 179.202, § 179.202–8, § 179.202–11, and § 179.202–16 are revised to read as follows:

§ 179.202 Special commodity requirements for non-pressure tank car tanks.

§ 179.202–8 Chloracetyl chloride.

Tank cars used to transport chloracetyl chloride must have a nickel cladding with a minimum thickness of 1/16 inch. Nickel cladding in tanks must be low carbon nickel in accordance with ASTM B162–80. Specification DOT–103ANW tank car tanks used to transport chloracetyl chloride shall be fabricated or solid nickel at least 95 percent pure and containing not more than 1 percent iron. Metal test coupons for welding procedure qualification must contain not more than 1 percent iron. All cast metal parts of the tank in contact with the lading must have a minimum nickel content of 96.7 percent.

§ 179.202–11 Phosphorus oxybromide, phosphorus oxychloride, phosphorus trichloride, and thiophosphoryl chloride.

Specification 103ANW tank cars used to transport phosphorus oxybromide, phosphorus oxychloride, phosphorus trichloride, and thiophosphoryl chloride, shall be fabricated of solid nickel at least 95 percent pure and containing not more than 1 percent iron. Metal test coupon for welding procedure qualification must contain not more than 1 percent iron. All cast metal parts of the tank in contact with the lading must have a minimum nickel content of approximately 96.7 percent. Specification 103A tank cars used to transport phosphorus oxybromide, phosphorus oxychloride, thiophosphoryl

chloride must be lead-lined steel, or made of steel with a nickel cladding of at least 10 percent of the shell thickness. Specifications 103AW, 111A100F2, or 111A60W2 tank cars used to transport phosphorus oxybromide, phosphorus oxychloride, thiophosphoryl chloride must be lead-lined steel or made of steel with a minimum thickness of nickel cladding of 1/16-inch. Nickel cladding must be low carbon nickel in accordance with ASTM B162–80. Specification 103EW tank cars used to transport phosphorus trichloride and thiophosphoryl chloride must have tanks fabricated from Type 316 stainless steel. Unlined Specification 103A, 103AW, 111A100F2, or 111A100W2 tank cars are authorized for phosphorus trichloride only.

§ 179.202–16 Chloroacetic acid, liquid.

(a) Tank cars used to transport chloroacetic acid, liquid, must have tanks with nickel cladding of at least 20 percent of the shell thickness. Nickel cladding in tanks must be low carbon nickel in accordance with ASTM B162–80.

(b) Chloroacetic acid, anhydrous, when shipped as a liquid, shall be shipped in Specification 103ANW tank car tanks fabricated of nickel containing not more than 1 percent iron, or in Specification 103AW or 111A60W2 tank car tanks with nickel cladding of at least 20 percent of the shell thickness, or be provided with a suitable corrosion resistant coating or lining. Metal test coupons for welding procedure qualification must contain not more than 1 percent iron. Nickel cladding in tanks must be low carbon nickel in accordance with ASTM B162–80.

74. In § 179.220, § 179.220–1 is revised; § 179.220–7 paragraphs (b), (c), (d), and (e) are amended by changing the heading in each Table; § 179.220–18, paragraphs (a)(1), (a)(6), (b)(1), and (b)(3) are revised and in § 179.220–19, the last sentence of paragraph (c) is revised to read as follows:

§ 179.220 General specifications applicable to nonpressure tank car tanks consisting of an inner container supported within an outer shell (Class DOT–115).

§ 179.220–1 Tanks built under these specifications must meet the requirements of § 179.220, § 179.221, and § 179.222.

§ 179.220–7 Materials.

* * * * *

(b) * * *

Specifications	Minimum tensile strength (p.s.i.) welded condition[1]	Minimum elongation in 2 inches (percent) weld metal (longitudinal)

* * * * *

(c) * * *

Specifications	Minimum tensile strength (p.s.i.) welded condition[3] [6]	Minimum elongation in 2 inches (percent) weld metal (longitudinal)

* * * * *

(d) * * *

Specifications	Minimum tensile strength (p.s.i.) welded condition[1]	Minimum elongation in 2 inches (percent) weld metal (longitudinal)

* * * * *

(e) * * *

Specifications	Minimum tensile strength (p.s.i.) welded condition[1]	Minimum elongation in 2 inches (percent) weld metal (longitudinal)

* * * * *

§ 179.220–18 Bottom outlets.

(a) * * *

(1) The extreme projection of the bottom outlet equipment may not be more than that allowed by Appendix E of the AAR Specifications for Tank Cars. All bottom outlet reducers and closures and their attachments shall be secured to car by at at least 3/8-inch chain, or its equivalent, except that bottom outlet closure plugs may be attached by 1/4-inch chain. When the bottom outlet closure is of the combination cap and valve type, the pipe connection to the valve shall be closed by a plug, or cap. The bottom outlet equipment should include only the valve, reducers and closures that are necessary for the attachment of unloading fixtures. The permanent attachment of supplementary exterior fittings shall be approved by the AAR Committee on Tank Cars.

* * * * *

(6) If outlet nozzle and its closure extends below the bottom of the outer shell, a V-shaped breakage groove shall be cut (not cast) in the upper part of the outlet nozzle at a point immediately below the lowest part of the valve closest to the tank. In no case may the nozzle wall thickness at the root of the "V" be more than 1/4-inch. The outlet nozzle or the valve body may be steam jacketed, in which case the breakage groove or its equivalent must be below the steam chamber but above the bottom of the center sill construction. If the outlet nozzle is not a single piece or its exterior valves are applied, provision shall be made for the equivalent of the breakage groove. On cars without continuous center sills, the breakage groove or its equivalent may not be more than 15 inches below the outer shell. On cars with continuous center sills, the breakage groove or its equivalent must be above the bottom of the center sill construction.

* * * * *

(b) * * *

(1) The extreme projection of the bottom washout equipment may not be more than that allowed by Appendix E of the AAR Specifications for Tank Cars.

* * * * *

(3) If washout nozzle extends below the bottom of the outer shell, a V-shaped breakage groove shall be cut (not cast) in the upper part of the nozzle at a point immediately below the lowest part of the inside closure seat or plug. In no case may the nozzle wall thickness at the root of the "V" be more than 1/4-inch. Where the nozzle is not a single piece, provisions shall be made for the equivalent of the breakage groove. The nozzle must be of a thickness to insure that accidental breakage will occur at or below the "V" groove or its equivalent. On cars without a continuous center sill, the breakage groove or its equivalent may not be more than 15 inches below the outer shell. On cars with continuous center sills, the breakage groove or its equivalent must be above the bottom of the center sill construction.

* * * * *

§ 179.220–19 Safety relief devices.

* * * * *

(c) * * * Except for tanks for

chloroprene (see § 179.222–1), tanks equipped with vents shall be stenciled "Not for flammable liquids".

75. In § 179.221–1, is amended by adding an entry at the end of the Table to read as follows:

§ 179.221 Individual specification requirements applicable to tank car tanks consisting of an inner container supported within an outer shell.

§ 179.221–1 Individual specification requirements.

* * * * *

Specification	115A60W1	115A60ALW	115A60W6
* * * * *			
Special reference	§ 179.222–1		§ 179.222–1

76. Sections 179.222 and 179.222–1 are added to read as follows:

§ 179.222 Special commodity requirements for DOT 115A tank car tanks.

In addition to § 179.220 and § 179.221 the following requirements are applicable.

§ 179.222 Chloroprene.

DOT 115A tank car tanks used to transport chloroprene shall be equipped with a safety vent of a diameter not less than 12 inches complying with § 179.221–1 instead of a safety relief valve. The outer shell shall be stenciled "CHLOROPRENE" on both sides in letters not less than four inches high.

77. In § 179.301 and Table in paragraph (a) is revised to read as follows:

§ 179.301 Individual specification requirements for multi-unit tank car tanks.

(a) * * *

DOT specification	106A500–X	106A800–X	110A500–W	110A600–W	110A800–W	110A1000–W
Bursting pressure, p.s.i. (see § 179.300–5)	[1]	[1]	1250	1500	2000	2500
Minimum thickness shell, inches	13/32	11/16	11/32	3/8	15/32	19/32
Test pressure, p.s.i. (see § 179.300–16)	500	800	500	600	800	1000
Safety relief devices, p.s.i. (see § 179.300–15)						
Start-to-discharge, or burst maximum, p.s.i.	375	600	375	450	600	700
Vapor-tight, minimum p.s.i	300	480	300	360	480	650

[1] None specified.

Issued in Washington, DC, on April 3, 1987 under authority delegated in 49 CFR 1.53.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

[FR Doc. 87–7864 Filed 4–17–87; 8:45 am]

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federal register

Monday
April 20, 1987

Part IV

Environmental Protection Agency

Protest Appeals of Recipients' Procurement Actions Under Federal Assistance Agreements; Subject Index List of EPA Regional Administrator Protest Appeal Determinations Issued During 1986; Notice

ENVIRONMENTAL PROTECTION AGENCY

[FRL-3189-6]

Protest Appeals of Recipients' Procurement Actions Under Federal Assistance Agreements; Subject Index List of EPA Regional Administrator Protest Appeal Determinations Issued During 1986

This notice publishes the subject index list of bid protest appeal decisions issued by EPA Regional Administrators during 1986. These determinations were made pursuant to the EPA protest procedures set forth at 40 CFR 35.939 (assistance awarded prior to May 12, 1982), 40 CFR Part 33, May 12, 1982 Interim Final Rules (assistance awarded between May 12, 1982 and March 28, 1983) and 40 CFR Part 33, March 28, 1983 Final Rules (assistance awarded after March 28, 1983).

This is the Ninth EPA subject index which lists only the decisions issued in the year stated. The first index, listing Regional Administrator protest appeal determinations issued during the period 1974 through 1977, was published at 43 FR 29086–95 (July 5, 1978). This was supplemented by the index of 1978 determinations published at 44 FR 25812–18 (May 2, 1979), the index of 1979 determination published at 45 FR 58770–74 (September 4, 1980), the index of 1980 determination published at 46 FR 30476–80 (June 8, 1981), the index of 1981 and 1982 determinations published at 49 FR 36004–15 (September 13, 1984), the index of 1983 decisions published at 50 FR 4148–54 (January 29, 1985), the index of 1984 decisions published at 50 FR 23061–68 (May 30, 1985) and the index of 1985 decisions published at 51 FR 32038–46 (September 8, 1986).

The index lists 40 appeal determinations and 3 reconsideration request determinations issued by the EPA Regional Administration in 1986.

The determinations are cited informally with the names of the assistance receipients and protesters shortened and abbreviated for administrative convenience. Each entry begins by identifying the year the appeal was decided and the sequential determination number for the year. This number is not part of the preferred citation which should state the following: Grantee, State, (EPA Region _____, date of determination) (Protest of _____).

The issues have been divided into two major subject headings and then alphabetized. Procedural protest issues are listed under the heading "Protest Appeals;" substantive procurement issues are listed under the heading "Procurement."

Copies of specific protest appeal determinations may be examined at or obtained from the EPA Offices of Regional Counsel or from the Office of General Counsel in EPA headquarters.

FOR FURTHER INFORMATION CONTACT: Anthony F. Guadagno: Grants, Contracts, and General Law Division (LE–132G), Office of General Counsel, United States Environmental Protection Agency, Washington, DC 20460; (202) 382–5313.

Dated: April 3, 1987.

Francis S. Blake,

General Counsel (LE–130).

Bid Protest Appeals—Procedural Matters

A/E Judgment

86:03 Alice, TX (VI, 1–15–86) (*W.T. Young Const. Co.*) (EPA examines the factors on which grantee bases a procurement decision to determine if materially incomplete or erroneous) (where rational basis is lacking but causes no harm to competition, EPA will not reverse grantee decision).

86:05 Southbridge, MA (I, I–24–86) (*Vulcan Ind., Inc.*) (EPA defers to A/E judgment concerning minimum performance needs unless it lacks a rational basis) (finding that engineer's judgment has a rational basis does not mean that EPA believes the specifications reflect the best engineering judgment. No opinion is offered by EPA regarding the relative merits of one product to another or their suitability for particular applications).

86:11 Struthers, OH (V, 2–27–86) (*Air-O-Lator*) (failure to demonstrate basis for rejecting equipment).

86:18 St. Louis, MO (VII, 4–8–86) (*John Fabic Tractor Co.*) (grantee demonstrated performance based reasons for technical criteria of engines).

86:30 Wappingers Falls, NY (II, 7–14–86) (*Myerco, Inc.*) (equipment rejected because it could not interface with previously installed equipment).

85:54 Anne Arundel County, MD (III, 7–18–86) (*Roberts Filter Manuf. Co.*) (*Reconsideration*) (a bid which fails to meet a material term of the specifications must be rejected as nonresponsive—a material term cannot be waived after bid opening in order to accept a low bid).

Burden of Proof

85:55 Little Blue Valley, MO (VII, 1–13–86) (*Roots-Dresser Ind.*) (*Reconsideration*) (protester alleging restrictive specifications must show it was excluded—grantee must then show that specifications were based on minimum project needs and that there was a rational basis for excluding protester's equipment—burden then shifts to protester to show that the specifications were not based on minimum performance requirements or that there was no rational basis).

86:18 St. Louis, MO (VII, 4–8–86) (*John Fabic Tractor Co.*) (protest concerning specifications—protester must refute grantee's prima facie showing of rational basis).

86:25 Huntington, WV (III, 5–23–86) (*RAM Engineering, Inc.*) (where protester failed to prove equipment was excluded by specifications it could not challenge the specifications as unduly restrictive).

86:38 South Valley, UT (VIII, 10–28–86) (*Western Road Machinery Co.*) (unsupported and groundless claims rejected as frivolous).

Exhaustion of Administrative Remedy

86:10 Cheyenne, WY (VIII, 2–26–86) (*Roscoe Brown, Inc.*) (late protest asserting Buy American violation raises matter of contract administration. EPA will not order grantee to undo existing contract; relief is limited to allowability of costs).

86:29 Kankakee, IL (V, 7–7–86) (*Global Const. Co.*) (appeal dismissed as premature where it was filed with EPA before grantee issued determination).

Jurisdiction

86:08 Woodbridge, NJ (II, 2–6–86) (*Metcalf & Eddy, Inc.*) (post-contract award matters are not protestable) (EPA will not consider appeal involving matter currently in court).

86:17 Mattabassett-Cromwell, CT (I, 3–28–86) (*Crouse Combustion Systems and Komline-Sanderson*) (post-contract award decisions concerning subcontract equipment are not protestable by prime).

86:39 Columbus, OH (V, 10–29–86) (*Ingersoll-Rand*) (EPA regulations and protest appeal procedures do not apply to procurements that are not EPA funded).

86:40 Michigan City, IN (V, 11–4–86) (*Tenco Hydro, Inc.*) (subcontractor substitution is a matter of contract administration and not protestable).

Procedures

86:07 Clay Township, IN (V, 1–29–86) (*Iacobelli Const., Inc.*) (protester who did not appeal dismissal of its protest cannot reassert issues related to original procurement during a new protest following rebidding).

86:08 Woodbridge, NJ (II, 2–6–86) (*Metcalf & Eddy, Inc.*) (EPA will not consider appeal involving matter currently in State court).

86:09 Newberg, OR (X, 2–10–86) (*Metal Dynamics Int'l Corp.*) (appeal filed with wrong office at EPA and was consequently untimely).

86:10 Cheyenne, WY (VIII, 2–26–86) (*Roscoe Brown, Inc.*) (protest improperly submitted to State instead of to grantee).

86:14 Anne Arundel County, MD (III, 3–7–86) (*Amocams Telemetry Systems, Inc*) (protest appeal improperly filed with EPA Headquarters instead of with Regional Counsel's office) (notification that contract is being awarded to competitor can reasonably be considered a final determination of a bid protest).

86:29 Kankakee, IL (V, 7–7–86) (*Global Const. Co.*) (protest must be filed with grantee and determination made before appeal can be filed with EPA).

86:41 Corry, PA (III, 11–18–86) (*Lyco, Inc.*) (nominal error in addressing protest to City instead of to the municipal authority which was the grantee was insufficient grounds for dismissing protest).

Rational Basis Test

86:03 Alice, TX (VI, 1–15–86) (*W.T. Young Const. Co.*) (EPA examines the factors on which grantee bases a procurement decision to determine if materially incomplete or erroneous) (where rational basis is lacking but causes no harm to competition, EPA will not reverse decision).

86:05 Southbridge, MA (I, 1–24–86) (*Vulcan Ind., Inc.*) (EPA defers to A/E judgment concerning minimum performance needs unless it lacks a rational basis) (finding that engineer's judgment has a rational basis does not mean that EPA believes the specifications reflect the best engineering judgment. No opinion is offered by EPA regarding the relative merits of one product to another or their suitability for particular applications).

86:11 Struthers, OH (V, 2–27–86) (*Air-O-Lator*) (failure to demonstrate basis for rejecting equipment).

86:18 St. Louis, MO (VII, 4–8–86) (*John Fabic Tractor Co.*) (grantee demonstrated performance based reasons for technical criteria of engines) (EPA will not substitute its technical judgment for that of the grantee's consulting engineer if the grantee presents a rational engineering basis in support of its actions).

85:54 Anne Arundel County, MD (III, 7–18–86) (*Roberts Filter Manuf. Co.*) (*Reconsideration*) (by finding a rational basis for specifications, EPA does not give an opinion that the specifications reflect the best, or only, rational engineering judgment concerning a product or its suitability for a particular use).

86:37 Newberg, OR (X, 10–3–86) (*Envirex, Inc.*) (grantee demonstrated performance reasons for design requirements).

Recipient Determination

86:14 Anne Arundel County, MD (III, 3–7–86) (*Amocams Telemetry Systems, Inc.*) (protest appeal improperly filed with EPA Headquarters instead of with Regional Counsel's office) (notification that contract is being awarded to competitor can reasonably be considered final determination of a bid protest).

86:08 Woodbridge, NJ (II, 2–6–86) (*Metcalf & Eddy, Inc.*) (award to a competitor gives protester notice its protest was denied) (protester's burden to demonstrate timeliness).

Reconsideration

85:55 Little Blue Valley, MO (VII, 1–13–86) (*Roots-Dresser Ind.*) (*Reconsideration*) (EPA authority) (same test as used for judicial review, *i.e.*, there must be clear showing of material factual mistake, newly discovered evidence, or substantial legal error) (denied where no showing of factual mistake, new evidence or error of law).

85:48 Frederick, MD (III, 1–24–86) (RDP Co.) (*Reconsideration*) (the standard of reconsideration of bid protests is limited to whether the original determination was clearly erroneous as a matter of law or fact) (reconsideration denied where facts raised to clarify party's argument could have been presented during original appeal).

86:05 Southbridge, MA (I, 5–13–86) (*Vulcan Ind., Inc.*) (*Reconsideration*) (inherent authority of EPA to reconsider will only be used where there is newly discovered evidence or clear error of law or fact in original determination).

86:17 Mattabassett-Cromwell, CT (I, 5–22–86) (*Crouse Combustion and Komline-Sanderson*) (*Reconsideration*) (denied because no showing of material factual mistake, newly discovered evidence, or substantial legal error) (parties cannot reargue points previously discussed).

85:54 Anne Arundel County, MD (III, 7–18–86) (*Roberts Filter Manuf. Co.*) (*Reconsideration*) (in the absence of a clear showing of material factual mistake, newly discovered evidence, or substantial legal error, EPA will not reconsider a protest appeal determination).

Regulations

86:23 Decatur, IL (V, 5–16–86) (*Paul A. Laurence Co.*) (Section 33.1120(b)(2) limits protest review to issues of federal law or regulation. Violations of State or local law are not subject to EPA review).

86:25 Huntington, WV (III, 5–23–86) (*RAM Engineering, Inc.*) (for grant awarded prior to 1983, grantee has option whether to follow Part 33 instead of Part 35 regulation).

Remedy

86:10 Cheyenne, WY (VIII, 2–26–86) (*Roscoe Brown, Inc.*) (potential Buy American violation is a matter of contract administration. EPA will not order grantee to undo existing contract. Relief is limited to allowability of costs under the grant).

85:55 Little Blue Valley, MO (VII, 1–13–86) (*Roots-Dresser Inc.*) (a contract already awarded under a defective IFB will not necessarily be disturbed by EPA since the harm caused by the IFB deficiencies cannot usually be rectified after contract award without substantial project delay. The potential gain achieved by rewriting the IFB would not overcome the harm caused to the project and other bidders due to delay and expense of rebidding).

Review

Authority and Scope of Review

85:54 Anne Arundel County, MD (III, 7–18–86) (*Roberts Filter Manuf. Co.*) (*Reconsideration*) (EPA may review a grant recipient's procurement action independent of a protest appeal and when a procurement action is protested, may look beyond the recipient's written protest determination).

Sua Sponte Review

85:55 Little Blue Valley, MO (VII, 1–13–86) (*Roots-Dresser Ind.*) (a contract already awarded under a defective IFB will not necessarily be disturbed by EPA since the harm caused by the IFB deficiencies cannot usually be rectified after contract award without substantial project delay. The potential gain achieved be rewriting the IFB would not overcome the harm caused to the project and other bidders due to delay and expense of rebidding).

86:42 Columbus, OH (V, 11–18–86) (*Kokosing Const. Co.*) (where appeal dismissed because of untimely protest, EPA nevertheless reviewed the merits).

Standing

86:05 Southbridge, MA (I, 1–24–86) (*Vulcan Ind., Inc.*) (supplier may protest specifications).

86:07 Clay Township, IN (V, 1–29–86) (*Iacobelli Const., Inc.*) (non-bidder lacks standing to protest contract awarded on

rebid even though he bid on initial procurement).

86:09 Newberg, OR (X, 2–10–86) (*Metal Dynamics Int'l Corp.*) (subcontractor lacks standing to protest equipment evaluation).

86:17 Mattabassett-Cromwell, CT (I, 3–28–86) (*Crouse Combustion Systems and Komline-Sanderson*) (subcontractor has standing to protest restrictive application of specifications. Prime contractor cannot protest post-contract award decisions concerning subcontract equipment).

86:28 La Plata, CO (VIII, 6–25–86) (*Mendez Excavation Co.*) (potential MBE subcontractor has standing to protect MBE efforts made by prime contract bidder).

86:30 Wappingers Falls, NY (II, 7–14–86) (*Myerco, Inc.*) (potential supplier may protest unduly restrictive specifications but cannot protest evaluation of its equipment by the engineer).

86:34 Manchester, NH (I, 8–6–86) (*New England Concrete Pipe Corp.*) (subcontractor supplier cannot protest award of subcontract on grounds that prime contractor selected equipment not meeting specifications).

86:35 Eureka Springs, AR (VI, 8–12–86) (*Hardison Fluid Equipment, Inc.*) (without addressing the issue of standing, EPA Region VI allowed a subcontractor supplier to protest rejection of its equipment based on criteria not specified in the IFB).

86:36 Caledonia, MN (V, 9–10–86) (*Austgen Biojet and Fluidyne Corp.*) (subcontractor supplier may not challenge responsiveness of competitor's equipment or grantee's evaluation of competitor's equipment).

86:37 Newberg, OR (X, 10–3–86) (*Envirex, Inc.*) (subcontractor equipment supplier was permitted to protest rejection of its equipment claiming unduly restrictive application of specifications). (Note: Compare Manchester, NH (I, 8–6–86) and New York, NY (II, 3–3–84) denying standing).

86:38 South Valley, UT (VIII, 10–28–86) (*Western Road Machinery Co.*) (nonresponsive bidder lacks standing to protest grantee's rejection of all bids) (where third low bidder is not next in line to receive award, it lacks standing to protest).

86:40 Michigan City, IN (V, 11–4–86) (*Tenco Hydro, Inc.*) (subcontractor substitution may not be protested).

86:41 Corry, PA (III, 11–18–86) (*Lyco, Inc.*) (where specifications exclude a supplier's equipment, the supplier may protest the prequalification process without first submitting its equipment for evaluation).

Summary Disposition

86:29 Kankakee, IL (V, 7–7–86) (*Global Const. Co.*) (dismissal for failure to exhaust administrative remedies).

Time Limitations

86:01 St. Andrews, GA (IV, 1–10–86) (*Marley Pump Co.*) (protest that brand name or equal specifications are unduly restrictive must be filed before bid opening).

86:55 Little Blue Valley, MO (VII, 1–13–86) (*Roots-Dresser Ind.*) (*Reconsideration*) (protest challenging application of specifications must be filed prior to bid opening where specifications are applied as written) (this decision explains significant changes from Part 35 to Part 33 regulation).

86:04 Tappahanock, VA (III, 1–17–86) (*Envirodyne Systems, Inc.*) (protest alleging proprietary specifications must be filed before bid opening) (the purpose of EPA's regulation is to prevent the serious delay of a project and to protect the competitive bidding process. A supplier has ample time to file protest prior to bid opening, and if he fails to object to the specifications he waives any right to later raise this issue).

86:05 Southbridge, MA (I, 1–24–86) (*Vulcan Ind., Inc.*) (protest challenging technical design features of brand name or equal specification is untimely when filed after bid opening).

86:08 Woodbridge, NJ (II, 2–6–86) (*Metcalf & Eddy, Inc.*) (award to a competitor gives protester notice its protest was denied) (protester's burden to demonstrate timeliness).

86:10 Cheyenne, WY (VIII, 2–26–86) (*Roscoe Brown, Inc.*) (protest that contractor's selection of equipment violated Buy American provision must be filed by supplier within 7 days of knowing contractor's decision) (time limitation requirement necessary in order to maintain construction schedule).

86:09 Newberg, OR (X, 2–10–86) (*Metal Dynamics Int'l Corp.*) (where appeal filed within 7 days but at wrong office at EPA—it was late).

86:14 Anne Arundel County, MD (III, 3–7–86) (*Amocams Telemetry Systems, Inc.*) (notification that contract was being awarded to protester's competitor was reasonable notice of rejection of the protest and started the appeal clock).

86:05 Southbridge, MA (I, 5–13–86) (*Vulcan Ind., Inc.*) (*Reconsideration*) (protest challenging brand name or equal specification must be filed before bid opening).

86:22 Brunswick, MO (VII, 5–15–86) (*Jay Shartran Co.*) (supplier/manufacturer's protest challenging application of brand name or equal specifications cannot be filed after prime bid opening where the specification itself gave notice of basis for protest).

86:25 Huntington, WV (III, 5–23–86) (*RAM Engineering, Inc.*) (where prequalification was denied, offeror timely protested within 7 days of adverse evaluation—Note: the 7 day time limit applied because evaluation rather than specifications was being challenged).

86:27 Chelan, WA (X, 6–24–86) (*Marley Pump. Co.*) (a protest by an equipment supplier challenging specifications as unduly restrictive must be filed before the prime contract bid opening date. The requirement that protests be filed within 7 days of knowledge of the basis of protest, which is applicable to other types of protests, does not apply to protests concerning unduly restrictive specifications).

86:30 Wappingers Falls, NY (II, 7–14–86) (*Myerco, Inc.*) (where specifications exclude supplier, a protest must be filed before bid opening, not after equipment evaluation and rejection) (equipment supplier's protest was late where it was filed more than 7 days after alleged restrictive application of specifications).

86:54 Anne Arundel County, MD (III, 7–18–86) (*Roberts Filter Manuf. Co.*) (*Reconsideration*) (protest alleging that technical or design features of the specifications are unduly restrictive must be filed before bid opening, where the specifications, as written, give notice of the basis for the protest).

86:35 Eureka Springs, AR (VI, 8–12–86) (*Hardison Fluid Equipment, Inc.*) (where prime contractor is told by grantee that proposed subcontract equipment is rejected, the time for subcontractor to protest may begin to run on or about the date the prime contractor received notice).

86:36 Caledonia, MN (V, 9–10–86) (*Austgen Biojet and Fluidyne Corp.*) (protest alleging unduly restrictive specifications was dismissed for failure to file prior to bid opening).

86:42 Columbia, OH (V, 11–18–86) (*Kokosing Const. Co.*) (where unsuccessful bidder had ability to examine successful bidder's bid at time of bid opening, it had burden of discovering basis for protecting responsiveness of that bid and filing a protest in less than the 15 days taken).

86:41 Corry, PA (III, 11–18–86) (*Lyco, Inc.*) (where protest was filed untimely but grantee rebid the contract and the protest was still active, there was sufficient time for grantee to revise restrictive specifications and the protest was deemed timely).

86:05 Southbridge, MA (I, 5–13–86) (*Vulcan Ind., Inc.*) *(Reconsideration)* (protest based on improprieties in solicitation clearly apparent before bid opening must be filed before bid opening) (an offeror of "or equal" equipment that does not meet specifications cannot wait until equipment rejection to file protest).

Procurement

A/E Services

86:27 Chelan, WA (X, 6–24–86) (*Marley Pump Co.*) (a recipient is expected to evaluate equipment submittals, including "or equal" items, and may not separately charge a prime contract bidder for evaluating equipment listed in its bid as "or equals").

Bid Shopping

86:12 Mokena, IL (V, 3–3–86) (*Modern Builders Ind. Concrete Co.*) (EPA does not prohibit bid shopping).

Bidders & Offerors

No entries.

Bids

Acceptance Period

No entries.

Addendum

No entries.

Alternates

No entries.

Ambiguity

86:32 Coleraine-Bovey-Taconite, MN (V, 7–25–86) (*Kenko, Inc.*) (where it was unclear from bid whether unit prices were included for certain items, bid was ambiguous and nonresponsive).

Base Bids

86:26 Huntington, WV (III, 5–27–86) (*Crouse Combustion Systems, Inc.*) (IFB required bidders to base its bid on brand name equipment and it was unclear how "or equal" prices would be evaluated).

86:27 Chelan, WA (X, 6–24–86) (*Marley Pump Co.*) (the single base bid method of soliciation and evaluation for equipment may not be used to determine the low responsive bidder and, further, a bid evaluation method which favors the naming of brand name items to the exclusion of "or equals" violates this fundamental principle).

Cancellation of Solicitation

No entries.

Evaluation

86:03 Alice, TX (VI, 1–15–86) (*W.T. Young Const. Co.*) (as contract award criterion, "available funds" need not be available on day of bid opening).

86:04 Tappahanock, VA (III, 1–17–86) (*Envirodyne Systems, Inc.*) (engineer's opinion concerning enhanced performance reliability and maintenance accomplished by requiring certain design features deferred to by EPA).

86:17 Mattabassett-Cromwell, CT (I, 3–28–86) (*Crouse Combustion Systems and Komline-Sanderson*) (period for allowing performance tests can be limited by grantee, otherwise costs and delay could be excessive).

86:18 St. Louis, MO (VII, 4–8–86) (*John Fabic Tractor Co.*) (on prequalification submittals, A/E judgment concerning capital costs, life cycle costs and maintenance and operation costs is given deference).

86:21 Chelan, WA (X, 5–9–86) (*Lyco, Inc.*) (different manufacturers treated differently—grantee improperly waived requirements for one manufacturer while rigidly enforcing similar requirements against another manufacturer).

86:27 Chelan, WA (X, 6–24–86) (*Marley Pump Co.*) (a recipient is expected to evaluate equipment submittals, including "or equal" items, and may not separately charge a prime contract bidder for evaluating equipment listed in its bid as "or equals").

86:30 Wappingers Falls, NY (II, 7–14–86) (*Myerco, Inc.*) (subcontractor supplier cannot protest improper evaluation of its equipment).

86:35 Eureka Springs, AR (VI, 8–12–86) (*Hardison Fluid Equipment, Inc.*) (grantee improperly rejected equipment meeting terms of its specification on basis of undisclosed criteria).

Late

86:06 Weslaco, TX (VI, 1–28–86) (*Nunn & Schumway Const. Co., Inc.*) (bid delivered to wrong office but nevertheless in exclusive possession of contracting authority prior to bid submission deadline and of actual bid opening may not be rejected as late).

Mistake

86:13 South Burlington, VT (I, 3–5–86) (*Pizzagalli, Const. Co.*) (where bidder presented clear and convincing evidence of bid mistake, its nature, how it occurred, and the intended price, bid correction is allowable) (where no bid displacement, evidence outside the bidding documents may be considered in determining whether bidder has met clear and convincing evidence standard).

86:15 Dupont, PA (III, 3–7–86) (*Marona Const. Co.*) (correction resulting in bid displacement permitted where mistake and intended bid clear on the face of bid) (words-over-numbers reconciliation clause not controlling).

86:16 Cecil County, MD (III, 3–11–86) (*Cecil Const. Corp.*) (where bid is significantly below A/E estimate and other bids, and grantee has reason to suspect mistake, grantee must ask bidder to verify bid, calling attention to the suspected error) (where mistake was clear and intended amount was evident from worksheets, bid correction must be permitted where there is no bid displacement).

86:23 Decatur, IL (V, 5–16–86) (*Paul A. Laurence Co.*) (words-over-numbers reconciliation clause should not be mechanically applied where it results in bizarre result clearly unintended by the bidder. Correction of unit prices is permitted where the mistake and intended bid are clearly apparent from the face of the bid).

Preparation Costs

No entries.

Qualified

No entries.

Rejection of All Bids

86:38 South Valley, UT (VIII, 10–28–86) (*Western Road Machinery Co.*) (where grantee discovered its specifications eliminated equipment which could meet its performance needs, it had good cause to reject all bids and resolicit).

86:45 Hudson County, NJ (II, 12–31–86) (*James L. Horan, Inc.*) (where only tow bids received, both far exceeding engineer's estimate, grantee has reasonable basis for rejecting all bids).

Signature

86:15 Dupont, PA (III, 3–7–86) (*Marona Const. Co.*) (failure to execute Bid Security Form waived as a minor irregularity where bidder otherwise committed to its bid).

86:23 Decatur, IL (V, 5–16–86) (*Paul A. Laurence Co.*) (failure to sign bid in one place did not render bid nonresponsive since bid was signed elsewhere and clearly evidenced bidder's intent to be bound).

Time to Prepare

No entries.

Unbalanced

No entries.

Unit Pricing

No entries.

Bonds

86:15 Dupont, PA (III, 3–7–86) (*Marona Const. Co.*) (failure to execute

Bid Security Form waived as a minor irregularity where bidder otherwise committed to its bid).

86:31 Orange, TX (VI, 7–15–86) (*Baytown Const. Co.*) (where bid bond was made payable to an entity other than the grantee, the grantee determined it was nevertheless enforceable under State law—EPA affirmed).

86:36 Caledonia, MN (V, 9–10–86) (*Austgen Biojet and Fluidyne Corp.*) (in the absence of clear IFB language, performance warranty bond requirements are matters of responsibility).

86:41 Corry, PA (III, 11–18–86) (*Lyco, Inc.*) (150% bond warranty equipment for 5 years was found to be inordinately high and unduly burdensome).

Buy American Act

86:01 St. Andrews, GA (IV, 1–10–86) (*Marley Pump Co.*) (question of Buy American Act violation will not be reached unless domestic product is shown to meet the minimum performance requirements).

85:55 Little Blue Valley, MO (VII, 1–13–86) (*Roots-Dresser Ind.*) (*Reconsideration*) (listing a foreign supplier in a "brand name or equal" clause does not give that supplier a preference and does not violate the Buy American Act).

86:10 Cheyenne, WY (VIII, 2–26–86) (*Roscoe Brown, Inc.*) (product found to be 50% domestic) (matter of contract administration).

86:22 Brunswick, MO (VII, 5–15–86) (*Jay Shartran Co.*) (domestic materials comprised 73% of the pump equipment so a comparison of costs was therefore unnecessary).

86:27 Chelan, WA (X, 6–24–86) (*Marley Pump Co.*) (a foreign manufacturer may be specified as a brand name under a "brand name or equal" specification) (where equipment is procured by subcontract, compliance with Buy American provisions of the Clean Water Act is generally a matter of contract administration, not protestable to EPA).

Competitive Negotiation

No entries.

Conflict of Interest

No entires.

Engineering Judgment

86:04 Town of Tappahanock, VA (III, 1–17–86) (*Envirodyne Systems, Inc.*) (EPA deferred to opinion concerning technical adequacy and compliance of proposed equipment—also deferred to decision to require certain design features to enhance performance reliability and maintenance).

86:17 Mattabassett-Cromwell, CT (I, 3–28–86) (*Crouse Combustion Systems and Komline-Sanderson*) (deference to performance based reasons for design criteria).

86:25 Huntington, WV (III, 5–23–86) (*RAM Engineering, Inc.*) (exercise of judgment in the design of incineration equipment and technical adequacy and compliance of proposed equipment given deference by EPA where rational basis for decision).

86:26 Huntington, WV (III, 5–27–86) (*Crouse Combustion Systems, Inc.*) (where rational basis for engineer's decision, EPA would not substitute its opinion for that of engineer concerning the technical adequacy or compliance of proposed equipment).

85:54 Anne Arundel County, MD (III, 7–18–86) (*Roberts Filter Manuf. Co.*) (Reconsideration) (by finding a rational basis for specifications, EPA does not give an opinion that the specifications reflect the best, or only, rational engineering judgment concerning a product or its suitability for a particular use).

86:37 Newberg, OR (X, 10–3–86) (*Envirex, Inc.*) (rational basis for determining certain design criteria to be necessary for performance needs) (EPA does not decide whether specifications reflect best judgment and EPA decision does not reflect an opinion regarding relative merits of one supplier's equipment versus another).

Experience Requirements

86:11 Struthers, OH (V, 2–27–86) (*Air-O-Lator*) (EPA reversed grantee decision which found supplier did not meet the specified experience) (no rational basis for rejecting equipment and grantee failed to justify need for requirement).

Invitation for Bids (IFB)

Alternate

86:41 Corry, PA (III, 11–18–86) (*Lyco, Inc.*) (design specifications to be met by alternate equipment must be clearly identified in the IFB).

Defective

86:32 Coleraine-Bovey-Taconite, MN (V, 7–25–86) (*Kenko, Inc.*) (where IFB received by bidder was missing two pages, bidder was responsible for learning of the clearly apparent omission and submitting the unit prices included on missing pages with its bid).

Jurisdiction

86:23 Decatur, IL (V, 5–16–86) (*Paul A. Laurence Co.*) (violation of State law is not protestable unless the action also violates federal law or regulation).

License Requirement

No entries.

Listing

86:12 Mokena, IL (V, 3–3–86) (*Modern Builders Ind. Concrete Co.*) (incomplete list could be completed after bid opening where it was matter of responsibility).

86:23 Decatur, IL (V, 5–16–86) (*Paul A. Laurence Co.*) (bid shopping does not violate EPA regulation but rather is a matter exclusively of State or local law. Where IFB did not expressly state that listing subcontractors was a matter of responsiveness, the failure to provide such information with the bid was correctly waived as non-material deficiency).

Minority Business and Women's Business Enterprise (MBE/WBE)

86:02 San Bernardino, CA (IX, 1–15–86) (*MCI Constructors, Inc.*) (grantee determination findings bidders nonresponsible for failing to meet positive efforts requirements given deference by EPA).

86:06 Weslaco, TX (VI, 1–28–86) (*Nunn & Schumway Const. Co., Inc.*) (goals are not quotas and a contract may not be deemed nonresponsible merely for failure to attain the goal. Where, as here, contractor met the goal, he is presumed to have made positive efforts).

86:19 Anne Arundel County, MD (III, 4–28–86) (*Ferguson Trenching Co., Inc.*) (grantee's determination that bidder is nonresponsible failing to demonstrate good faith efforts is upheld by EPA where it has a rational basis).

86:23 Decatur, IL (V, 5–16–86) (*Paul A. Laurence Co.*) (where bidder certifies it will meet the MBE/WBE goals, the failure to document positive efforts is a matter of responsibility even if the IFB states it is a matter of responsiveness).

86:25 Huntington, WV (III, 5–23–86) (*RAM Engineering, Inc.*) (fact that a firm is a MBE does not excuse it from meeting the technical specifications).

86:28 La Plata, CO (VIII, 6–25–86) (*Mendez Excavation Co.*) (compliance with MBE/WBE requirements is generally a matter of responsibility and defects may be cured after bid opening).

86:33 Elyria, OH (V, 7–30–86) (*Wilson Bennett, Inc.*) (where IFB did not clearly make MBE/WBE requirements matters of responsiveness, grantee improperly rejected bid as nonresponsive. Bid rejection was affirmed, however, because post-bid submissions of MBE/WBE requirements failed to demonstrate bidder "responsibility") (grantee required that only MBEs certified by grantee be used).

Prequalification

86:18 St. Louis, MO (VII, 4–8–86) (*John Fabic Tractor Co.*) (supplier may protest specifications after being rejected if it is before prime contract bids are opened).

86:21 Chelan, WA (X, 5–9–86) (*Lyco, Inc.*) (challenge to the specifications and equipment evaluation demonstrated the specification eliminated competition and created unjustified sole source).

86:25 Huntington, WV (III, 5–23–86) (*RAM Engineering, Inc.*) (functional equivalent of direct procurements subject to EPA review) (submittal rejected as nonresponsive for failure to meet material terms of bidding documents. Grantee had rational basis for rejecting equipment as technically inadequate where offer failed to submit information needed for evaluation).

86:26 Huntington, WV (III, 5–27–86) (*Crouse Combustion Systems, Inc.*) (rational basis for rejecting submittal which substantially deviated from specifications where grantee demonstrated the specifications were performance related).

86:41 Corry, PA (II, 11–18–86) (*Lyco, Inc.*) (where specifications exclude a supplier's equipment, the supplier may protest the prequalification process without first submitting its equipment for evaluation) (prequalification process does not excuse offerors from meeting material specifications).

Responsibility

86:02 San Bernardino, CA (IX, 1–15–86) (*MCI Constructors, Inc.*) (grantee's determination finding bidders nonresponsible for failing to meet MBE positive efforts requirements given deference by EPA).

86:06 Weslaco, TX (VI, 1–28–86) (*Nunn & Schumway Const. Co., Inc.*) (bid may not be deemed nonresponsible merely for failure to attain MBE goal; where contractor met goal, it is assumed to have made positive efforts).

86:19 Anne Arundel, MD (III, 4–28–86) (*Ferguson Trenching Co., Inc.*) (grantee's determination finding bidder nonresponsible for failing to demonstrate good faith efforts is upheld by EPA where it has a rational basis) (failure to meet definitive MBE responsibility criteria rendered bid nonresponsible).

86:24 Sidney, NB (VII, 5–20–86) (*Nuncon Const. Corp.*) (where low bidder failed to submit financial information within 10 days of bid opening, he was properly rejected as nonresponsible) (EPA defers to grantee determination of nonresponsibility in absence of bad faith or evidence of no rational basis) (grantee acted reasonably in limiting its review to information provided within the normal review period for determining a bid protest and EPA will not cause grantee to reopen decision based on information made available only during appeal).

86:28 La Plata, CO (VIII, 6–25–86) (*Mendez Excavation Co.*) (where post-bid opening MBE compliance efforts were considered by grantee, EPA deferred to affirmative findings of responsibility) (grantee exercised reasonable discretion in the amount of time it permitted responsibility defects to be cured).

86:31 Orange, TX (VI, 7–15–86) (*Baytown Const. Co.*) (EPA will not reverse a rationally based grantee decision affirmatively finding bidder responsible).

86:33 Elyria, OH (V, 7–30–86) (*Wilson Bennett, Inc.*) (where IFB did not clearly make MBE/WBE requirements matters of responsiveness, grantee improperly rejected bid as nonresponsive. Bid rejection was affirmed, however, because post-bid submissions of MBE/WBE requirements failed to demonstrate bidder "responsibility") (grantee required that only MBEs certified by grantee be used).

86:36 Caledonia, MN (V, 9–10–86) (*Austgen Biojet and Fluidyne Corp.*) (bid could not be rejected as nonresponsive for failure to provide performance bond) (post bid opening information must be considered by grantee).

Responsiveness

85:55 Little Blue Valley, MO (VII, 1–13–86) (*Roots-Dresser Ind.*) (*Reconsideration*) (under "brand name or equal" specifications, equipment which meets performance requirements but fails to meet specified design features is nonresponsive and cannot be accepted even if grantee concludes it meets the project needs).

86:04 Tappahanock, VA (III, 1–17–86) (*Envirodyne Systems, Inc.*) (EPA will defer to engineer's rationally based decision concerning technical adequacy or compliance of proposed equipment).

86:12 Mokena, IL (3–3–86) (*Modern Builders Ind. Concrete Co.*) (bid may not be rejected for failure to submit subcontractor list where IFB did not make it matter of responsiveness).

86:15 Dupont, PA (III, 3–7–86) (*Marona Const. Co.*) (failure to execute Bid Security Form waived as a minor irregularity where bidder otherwise committed to its bid).

86:24 Sidney, NB (VII, 5–20–86) (*Nuncon Const. Corp.*) (finding of nonresponsiveness due to failure to submit financial information after bid opening was in error).

86:25 Huntington, WV (III, 5–23–86) (*RAM Engineering, Inc.*) (prequalification submittal rejected as nonresponsive for failure to submit information needed for evaluation).

86:31 Orange, TX (VI, 7–15–86) (*Baytown Const. Co.*) (where bid bond was made payable to wrong legal entity it was nevertheless enforceable under State law and the bid was therefore responsive).

86:54 Anne Arundel County, MD (III, 7–18–86) (*Roberts Filter Manuf. Co.*) (*Reconsideration*) (a bid which fails to meet a material term of the specifications must be rejected as nonresponsive—a material term cannot be waived after bid opening in order to accept a low bid).

86:32 Coleraine-Bovey-Taconite, MN (V, 7–25–86) (*Kenko, Inc.*) (where bid failed to include unit prices for items on the pages that were missing from the IFB given to the bidder, the bid was nonresponsive. Bidder should have realized the IFB was missing pages).

86:36 Caledonia, MN (V, 9–10–86) (*Austgen Biojet and Fluidyne Corp.*) (grantee improperly rejected subcontractor supplier as nonresponsive for failing to satisfy performance bond requirements; EPA required grantee to evaluate responsibility of suppliers) (where prime contract bidder is responsive, grantee may award contract and require substitution of subcontractor equipment to meet specifications).

86:38 South Valley, UT (VIII, 10–28–86) (*Western Road Machinery Co.*) (where equipment was determined to be adequate for performance needs but it did not meet specified physical characteristics, the bid was nonresponsive and grantee properly rejected all bids and readvertised).

86:42 Columbus, OH (V, 11–18–86) (*Kokosing Const. Co.*) (submittal of alternative construction sequence with bid does not render bid nonresponsive where the submission does not materially deviate from the sequence stated in the IFB, even though the submittal was not made in accordance with procedures set forth in IFB).

Specifications

Brand Name or Equal

85:55 Little Blue Valley, MO (VII, 1–13–86) (*Roots-Dresser Ind.*) (*Reconsideration*) (when recipient does not specifically identify salient features but specifies detailed technical features, each feature is deemed a necessary requirement of the equipment which must be met by offeror in order to be responsive. Equipment must not merely

meet performance needs but must meet all specified design features).

86:05 Southbridge, MA (I, 1–24–86) (*Vulcan Ind., Inc.*) (equipment must meet technical design features specified in order to be "equal." Performance equivalence does not make it "equal").

86:26 Huntington, WV (III, 5–27–86) (*Crouse Combustion Systems, Inc.*) (IFB ambiguously mixed the terms "brand name of equal" and "alternate equipment proposals") (IFB improperly stated that equipment which "substantially" met the specifications could be accepted) (IFB was unclear on how "or equal" equipment prices would be evaluated—may be similar to single base bidding) (IFB must permit bids to be based on "or equal" items which will be evaluated after contract award).

86:27 Chelan, WA (X, 6–24–86) (*Marley Pump Co.*) (where "brand name or equal" specifications are used, bidders for the prime contract who commit to meeting the specifications must be permitted to base their bids on "or equal" equipment items without risk of being rejected as nonresponsive because one of their equipment items is determined to be unacceptable after bid opening) (bidder commits to meeting the specifications in the IFB and if it is determined by the grantee that the equipment fails to meet the specification, the contractor may be required to substitute conforming equipment and must do so at no additional cost to the grantee).

86:41 Corry, PA (III, 11–18–86) (*Lyco, Inc.*) (use of "or equal" specification does not eliminate undue restrictiveness of design specifications based on a proprietary product) (where specifications describe unique system and recite detailed design specifications, those salient features cannot be disregarded by grantee).

Design (See also Unduly Restrictive Specifications)

No entries.

Local Preference

No entries.

Minimum Need (See also Unduly Restrictive Specifications)

No entries.

Oral Statements

86:04 Tappahanock, VA (III, 1–17–86) (*Envirodyne Systems, Inc.*) (design features intended to enhance performance reliability and maintenance supported by rational performance basis).

Performance

86:07 Clay Township, IN (V, 1–29–86) (*Iacobelli Const., Inc.*) (unreasonable for bidder to rely on oral statements of grantee).

86:17 Mattabassett-Cromwell, CT (I, 3–28–86) (*Crouse Combustion Systems and Komline-Sanderson*) (equipment performance test period can be limited to avoid excessive cost and delay).

86:37 Newberg, OR (X, 10–3–86) (*Envirex, Inc.*) (where design criteria were stated as operational performance requirements such as producing 16% cake solids, grantee had rational performance reasons for the requirements).

86:41 Corry, PA (III, 11–18–86) (*Lyco, Inc.*) (coupling performance and design specifications does not unduly restrict design criteria which every bidder must meet regardless of equipment performance).

Restrictive (See Unduly Restrictive)

Unduly Restrictive

86:18 St. Louis, MO (VII, 4–8–86) (*John Fabic Tractor Co.*) (specification is not unduly restrictive where it is reasonably based on performance needs).

86:21 Chelan, WA (X, 5–9–86) (*Lyco, Inc.*) (specifications copied from one manufacturer's catalog which eliminated all competition created *de facto* sole source procurement) (where a particular manufacturer's specification is used by A/E as starting point for writing project specifications, it must be opened to eliminate unnecessary design features and to permit competition) (improper to require all manufacturers to perform difficult test developed by competitor which is not a national standard).

86:25 Huntington, WV (III, 5–23–86) (*RAM Engineering, Inc.*) (where protester failed to prove equipment was excluded by specifications it could not challenge the specifications as unduly restrictive).

86:27 Chelan, WA (X, 6–24–86) (*Marley Pump Co.*) (only those characteristics and features of a brand name equipment item which are essential to the minimum performance needs of a project may be specified as salient characteristics).

86:35 Eureka Springs, AR (VI, 8–12–86) (*Hardison Fluid Equipment, Inc.*) (where grantee rejection of equipment was not based on specified salient characteristics but on an unstated interpretation which it failed to describe in IFB, rejection was improper).

86:37 Newberg, OR (X, 10–3–86) (*Envirex, Inc.*) (grantee met burden of demonstrating specification was performance related and reflective of the project's minimum performance needs; design criteria were stated in terms of operational performance and efficiency levels rather than physical characteristics).

86:41 Corry, PA (III, 11–18–86) (*Lyco, Inc.*) (where specifications unduly restrict competition, the problem is not cured by permitting alternate equipment bids, since alternate can be rejected at the will of the grantee) (specification requiring suppliers to copy a competitor's design placed suppliers at disadvantage in violation of Clean Water Act).

Salient Requirements

No entries.

Sole Source

86:18 St. Louis, MO (VII, 4–8–86) (*John Fabric Tractor Co.*) (where only one manufacturer was listed on prequalified equipment list, it was not sole source procurement because two suppliers were prequalified and several others were capable of competing)

86:21 Chelan, WA (X, 5–9–86) (*Lyco, Inc.*) (specifications based on manufacturer's catalog eliminated all competition and created *de facto* sole source).

86:41 Corry, PA (III, 11–18–86) (*Lyco, Inc.*) (where specifications permit only one manufacturer of equipment, it creates impermissible sole source procurement, in the absence of performance justification for confining procurement to the equipment).

State and Local Law

86:03 Alice, TX (VI, 1–15–86) (*W.T. Young Const. Co.*) (EPA will not consider issues of State law in absence of overriding federal requirements.).

86:08 Woodbridge, NJ (II, 2–6–86) (*Metcalf & Eddy, Inc.*) (EPA will defer to a State court's determination unless overriding federal requirement).

86:31 Orange, TX (VI, 7–15–86) (*Baytown Const. Co.*) (EPA accorded deference to grantee legal opinion that under State law a bid bond made out to the wrong term would nevertheless be enforceable).

Subcontract Award

86:17 Mattabassett-Cromwell, CT (I, 3–28–86) (*Crouse Combustion Systems and Komline-Sanderson*) (grantee decision rejecting subcontract equipment is a matter of contract administration and not protestable).

86:30 Wappingers Falls, NY (II, 7–14–86) (*Myerco, Inc.*), (potential supplier lacks standing to protest the grantee's adverse evaluation of its equipment).

86:34 Manchester, NH (I, 8–6–86) (*New England Concrete Pipe Corp.*) (subcontractor supplier cannot protest award of subcontract on grounds that prime contractor selected equipment not meeting specifications).

86:36 Caledonia, MN (V, 9–10–86) (*Austgen Biojet and Fluidyne Corp.*) (grantee may award contract to prime contract bidder and require substitution of subcontractor equipment to meet specifications).

86:40 Michigan City, IN (V, 11–4–86) (*Tenco Hydro, Inc.*) (substitution of a listed subcontractor is an issue of contract administration and not protestable).

Subcontractor Listing (See Listing Requirements) Waiver

86:15 Dupont, PA (III, 3–7–86) (*Marona Const. Co.*) (failure to execute Bid Security Form waived as a minor irregularity where bidder otherwise committed to its bid and grantee properly protested).

86:42 Columbus, OH (V, 11–18–86) (*Kokosing Const. Co.*) (immaterial deviation from IFB instructions was properly waived where IFB did not clearly make it a matter of responsiveness and no prejudice resulted to other bidders).

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Federal Register

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April 20, 1987

Part V

Department of Transportation

Research and Special Programs Administration

State of Vermont Rules for Transportation of Irradiated Reactor Fuel and Nuclear Waste; Decision on Appeal; Notice

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. IRA-30]

Inconsistency Ruling No. IR-15; Decision on Appeal; Vermont Rules for Transportation of Irradiated Reactor Fuel and Nuclear Waste

AGENCY: Research and Special Programs Administration; DOT.

ACTION: Decision on Appeal.

SUMMARY: In response to the appeal of the Vermont Agency of Transportation from the findings made in Inconsistency Ruling No. IR-15 (49 FR 46660; November 27, 1984), that inconsistency Ruling is affirmed.

EFFECTIVE DATE: April 20, 1987.

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Office of Chief Counsel, Research and Special Programs Administration, 400 Seventh Street, SW., Washington, DC 20590 (Tel: 202/366-4400).

SUPPLEMENTARY INFORMATION:

I. Background

On November 27, 1984, the Department of Transportation (DOT) published nine inconsistency rulings (IR-7 through 15; 49 FR 46632 *et seq.*) concerning state and local restrictions on radioactive materials transportation in the states of Michigan, New York and Vermont. Included in this omnibus proceeding was Inconsistency Ruling No. 15 (IR-15) dealing with regulations of the Vermont Agency of Transportation (hereinafter "Vermont" or "the State"). The Ruling found that Rules I(e), III(D)(3-4), III(E-L) and IV through VIII are inconsistent with the Hazardous Materials Transportation Act (HMTA) (49 U.S.C. app. 1801-1811) or the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted in accordance with § 112(a) of the HMTA (49 U.S.C. app. 1811(a)).

The procedural regulations governing Departmental issuance of inconsistency rulings are codified in 49 CFR 107.201-107.211. Prior to November 1, 1985, these provided for the issuance of rulings by the Associate Director for Hazardous Materials Regulation (§ 107.209) and the issuance of decisions on appeal from such rulings by the Director of the Materials Transportation Bureau (§ 107.211). IR-15 was issued in accordance with § 107.209 on November 20, 1984. As required by § 107.211, Vermont filed an appeal within 30 days of issuance of IR-15. Comments opposing the appeal were filed by the Electric Utility Companies' Nuclear Transportation Group.

Effective November 1, 1985, the Research and Special Programs Administration (RSPA) underwent a reorganization in which the Materials Transportation Bureau was abolished and its hazardous materials responsibilities were assigned to the Office of Hazardous Materials Transportation. The functions formerly performed by the Bureau Director were assigned to the Administrator of RSPA. (See 50 FR 45728, November 1, 1985.) Accordingly, this decision on appeal is issued by the Administrator of RSPA.

II. The Appeal

A. Introduction

Vermont has appealed IR-15 only with respect to its Rules III(G), III(J), III(K), V and VII. Therefore, I will consider and discuss only those rules.

Many of the findings being appealed were discussed exhaustively in IR-15. I will respond only to the specific issues raised on appeal and generally will not reiterate the Ruling's discussions, with which I fully concur. As my decision demonstrates, DOT has almost totally occupied the field of radioactive hazardous materials transportation safety, and thus most state and local regulation in that field will be found inconsistent and thus preempted.

B. Rule III(G)

Vermont appeals the finding in IR-15 that its Rule III(G) is inconsistent with the HMR. Rule III(G) requires carrier submission of an emergency plan before shipment of irradiated reactor fuel or radioactive wastes which are highway route controlled quantities under 49 CFR 173.403 (referred to as "RADWAS" in the Vermont regulations). The specific requirement is for:

> (G) A copy of an emergency plan which describes procedures to be taken by the carrier in an emergency to eliminate or minimize the radiation exposure of the public.

Vermont contends that there are good reasons why this Rule goes beyond the driver training requirements of 49 CFR 177.825. It says that the usefulness of the Federal requirements would be severely compromised in many accidents where the driver would be killed or rendered unconscious: The State concludes by stating:

> Vermont submits that Rule III-G fills a disturbing lacuna in the Federal regulatory scheme. Given, on the one hand, the slight additional burden imposed on carriers by Rule III-G, and, on the other, the paralysis that all too easily might result from the ignorance of law enforcement and rescue personnel who arrive on accident scene and find a dead or unconscious driver, the validity of Rule III-G should be upheld.

Vermont mistakenly implies that DOT's driver training requirements in 49 CFR 177.825(d) are the only means whereby emergency response to radioactive materials incidents has been addressed in the HMR. However, 49 CFR 173.22(c) requires shippers of irradiated reactor fuel to comply with Nuclear Regulatory Commission (NRC) requirements for a physical protection plan. The NRC regulations (10 CFR 73.37(b)) include a requirement for licensees to make advance arrangements with local law enforcement agencies along shipment routes for their response to an emergency or a call for assistance. Also, 10 CFR 73.21(c) authorizes access to licensees' "safeguards information" regarding such shipments by state and local law enforcement authorities responsible for emergency response.

It is clear that DOT and NRC have determined what information and documentation requirements should be imposed on carriers for the safe transportation of radioactive materials, including information needed for emergency response. Therefore, state and local requirements applicable to carriers going beyond the Federal requirements create confusion for transporters, are obstacles to the accomplishment of the objectives of the HMTA and the HMR, and thus are inconsistent with them. (IR-2 (44 FR 75566, Dec. 20, 1979); IR-6 (48 FR 760, Jan. 6, 1983); IR-8 (49 FR 46637, Nov. 27, 1984). Thus, I affirm the finding in IR-15 that Vermont's Rule III(G) is inconsistent.

Rule III(J)

Vermont appeals the finding in IR-15 that Rule III(J) is inconsistent with the HMTA. That Rule requires carriers of highway route controlled quantities of radioactive materials to provide—

> (J) A certificate that a bond or insurance *acceptable to the Secretary* [of the Vermont Agency of Transportation] has been posted to cover all types of damages caused by release of the shipped RADWAS materials, and in no event shall such bond or insurance be for less than Five Million Dollars ($5,000,000) total damages. (Emphasis added.)

Vermont contends that IR-15 found an inconsistency between the State's $5,000,000 requirement and the amount required by a Federal Highway Administration regulation, in effect prior to January 1, 1985, incorporated in the HMR (49 CFR 177.804). However, the State contends that any inconsistency ceased on January 1, 1985, when the

Federal requirement increased to $5,000,000.

Vermont's argument that Rule III(J) is saved simply because the Federal indemnification level and the State's level are both $5,000,000 must fail. In fact, the State's requirement for a bond or insurance "acceptable to the Secretary" (with $5,000,000 being the minimum acceptable amount) is at variance with the Federal limit. A Vermont official has apparent authority to increase the liability coverage required by the HMR. IR–15 correctly stated that "State adoption of higher insurance coverage requirements can operate as barriers to transportation." 49 FR 46664. A similar New York State Thruway Authority (NYSTA) indemnification requirement was addressed in IR–10 (49 FR 46645, Nov. 17, 1984):

> By denying the use of the Thruway to any radioactive materials shipment not offering what the NYSTA considers to be proper indemnification, the NYSTA rule directly results in the diversion of such shipments into other jurisdictions and the increase of overall time in transit. In other words, the overall exposure to the risks of radioactive materials transportation is increased and exported. For this reason, the NYSTA rule necessarily poses an obstacle to the accomplishment of the Congressional objective of enhancing hazardous materials transportation safety. 49 FR 46646.

The indemnification level established through the HMR, coupled with the indemnification provisions of the Price-Anderson Act (42 U.S.C. 2210), provides the exclusive standard for radioactive materials transportation indemnification. They have totally occupied that field, and any state or local bond, insurance or indemnification requirement not identical to the HMR requirement is an obstacle to the accomplishment of the objectives of the HMTA and the HMR. Therefore, I affirm the finding in IR–15 that Rule III(J) is inconsistent with the HMTA.

Rule III(K)

Vermont appeals the finding in IR–15 that its Rule III(K) is inconsistent with the HMTA and the HMR.

That Rule requires carriers of highway route controlled quantities of radioactive materials to file—

> (K) A certificate giving the point of origin and point of destination of the shipment and stating that the route to be used is the shortest and most direct, or if not so, then stating the explicit reason(s) that the proposed route was chosen.

Vermont contends that IR–15 incorrectly characterized this requirement as imposing an inconsistent route selection criterion. It argues that Rule III(K) is a reporting requirement, not a route selection requirement, and that it does not interfere with carriers' compliance with the route selection criteria of 49 CFR 177.825(a).

The State says that this requirement is needed for Vermont to keep itself apprised of developments affecting route selection, i.e., state and local requirements elsewhere which may operate to direct traffic to Vermont. Upon learning of improper regulatory obstacles elsewhere, the State contends, it could then apply for an inconsistency ruling or institute judicial proceedings.

Even if not used by the State as a routing criterion, Rule III(K) nevertheless must withstand analysis as a possibly inconsistent information requirement. To the extent that Vermont desires information on origin and destination of shipments passing through Vermont, it already receives that information under an NRC regulation (incorporated in the HMR by general reference in §§ 173.22 and 177.825) requiring notification to governors of spent fuel shipments (10 CFR 73.37(f)). As indicated above, DOT and NRC have totally occupied the field of information requirements relating to transportation of radioactive materials. Thus, information requirements different from or in addition to them create an unjustifiable obstacle to accomplishment of the goals of the HMTA and the HMR. IR–2, IR–6, IR–8 (all *supra*).

Therefore, I affirm the finding in IR–15 that Rule III(K) is inconsistent with the HMTA and the HMR.

Rule V

Vermont appeals the finding in IR–15 that its Rule V is inconsistent with the HMTA and the HMR.

Vermont's Rule V provides:

V. Approval notification.

> Upon the Secretary granting approval to transport, the applicant shall be notified in writing, not less than 48 hours before the scheduled shipment and the Secretary shall indicate any conditions or limitations to the approval, including but not limited to: operation of highway vehicles or railcars at reduced speed over High Level Bridge(s) or other locales deemed of risk, and prohibition or interruption of transport due to inclement weather or other adverse conditions.

Although expressly noting that it is not appealing the IR–15 finding of inconsistency as to Vermont's Rule IV prohibiting transport of radioactive wastes in Vermont without the Secretary's prior written approval, the State argues that Rule V is not inconsistent. It contends that IR–15 improperly intepreted Rule V as imposing some additional burden on carriers.

The gist of the State's argument follows:

> By its own terms, Rule V should be a boon to carriers in that it protects them against summary or capricious administrative action by requiring the Secretary to make known to them, in writing at least 48 hours in advance, his position on approval of the proposed shipment, together with any conditions or limitations attached to the approval. The requirement that the Secretary afford adequate advance written notice should be particularly helpful to carriers in fulfilling their federally mandated obligation to "consider available information" before applying route selection criteria. *See* 49 C.F.R. 177.825(a)(1983).

The State goes on to list the following types of route-related matters about which carriers will have information by virtue of this rule: interstate highway repaving projects, civil disobedience threats, special events causing traffic congestion, bridge failures, rock slides, and washouts.

By its very terms, however, Vermont's Rule V is more than an administrative provision specifying which State official will provide what notice to carriers concerning road conditions in Vermont. It speaks of "the Secretary granting approval to transport" and indicating "any conditions or limitations to the approval".

In light of the virtually total occupation of the field of radioactive materials transportation by the HMTA and the HMR, State or local provisions requiring approval or authorizing conditions to be established for the transportation of radioactive materials (other than compliance with Federal regulations) constitute unauthorized prior restraints on shipments that are presumptively safe based on their compliance with Federal regulations and are inconsistent with the HMTA and the HMR. IR–8 (49 FR 46637), IR–10 (49 FR 46645), IR–11 (49 FR 46647), IR–12 (49 FR 46650), IR–13 (49 FR 46653) (all Nov. 27, 1984). Vermont's Rule V purports to authorize state approvals, conditions, and limitations in this field and thus is inconsistent. Furthermore, it is inconsistent because of its inextricable link with the basic prior approval provisions in Vermont's Rule IV (which the State is not appealing).

Therefore, I affirm the finding in IR–15 that Rule V is inconsistent with the HMTA and the HMR.

Rules VII(A)–(B)

Vermont appeals the findings in IR–15 that its Rules VIII (A) and (B) are inconsistent with the HMTA to the extent that they impose an obligation to

act upon transporters of radioactive materials.

Those provisions state:

(A) Each motor vehicle shipment of RADWAS shall be monitored by:

(1) a leading State Police vehicle occupied by at least one law enforcement officer;

(2) a vehicle occupied by State Monitoring Team personnel; and

(3) a trailing State Police vehicle occupied by at least one law enforcement officer.

(4) Each shipment by railcar or barge through or in the State shall be accompanied as directed by the Secretary.

The State asserts that IR–15 incorrectly speculated that these provisions might require a carrier to wait at a State border until monitoring personnel arrived. It says that there are no "explicit" requirements placed on carriers although "[s]ome minimal degree of cooperation is implicit"—similar, it says, to a carrier's compliance with speed limits, traffic laws, etc. The state sets forth several practical reasons for state monitoring, including inadequate resources of towns along the route, bad weather, and long emergency response times.

Section 173.22(c) of the HMR requires shippers of irradiated reactor fuel to provide physical protection under a plan established under NRC requirements. The latter provide, in 10 CFR 73.37(c), that a transport vehicle carrying spent nuclear fuel must:

(1) In a heavily populated area, be either:

(i) Occupied by at least two persons and escorted by an armed member of the local law enforcement agency in a mobile unit of such agency, or

(2) In any other area, either:

(i) Be occupied by at least two people,

(ii) Be escorted by a separate vehicle containing at least two persons, or

(iii) Meet one of the heavily populated area criteria.

These provisions evince a clear intent of DOT and NRC to fully occupy the field of escorts for transportation of radioactive materials. Thus, although escort requirements identical to the DOT/NRC requirements (IR–14, 49 FR 46656 (Nov. 27, 1984)) or notice requirements facilitating compliance with such escort requirements (IR–17, 51 FR 20925 (June 9, 1986)) may be consistent, requirements for other additional or special escorts for radioactive transportation are inconsistent. IR–11, 49 FR 46647 (Nov. 27, 1984); IR–13, 49 FR 46653 (Nov. 27, 1984).

Thus, IR–15 was correct in finding Rules VII (A) and (B) inconsistent insofar as they impose an obligation upon transporters because they provide escort standards different from those in the HMR. To the extent they merely indicate the nature of escorts the State will provide, they are not "requirements" subject to preemption under 49 USC app. § 1811(a). However, the State has foregone the opportunity to specifically deny that these rules require a carrier to wait at its borders for escorts other than those required by the HMR. Thus, these rules may constitute a requirement upon carriers and, to the extent that they do, they are inconsistent with the HMTA and the HMR. Therefore, I affirm the finding in IR–15 to that effect.

Rule VII(C)

Finally, Vermont appeals the finding in IR–15 that its Rule VII(C) is inconsistent. That rule provides:

(C) The ranking State police officer accompanying the shipment shall be the authority to modify the conditions of the approval in response to weather, accident or exigent circumstances which may affect the safety of the shipment. Any modification which will result in a delay of more than two hours in the time of departure of the shipment from Vermont shall be appoved by the Secretary or his designee.

As it did with respect to its Rule V, the State argues that its Rule VII(C) approval modification procedures place a burden on the State rather than on carriers of radioactive materials. It contends that this Rule contains an explicitly limited delegation of authority, should assist carriers in complying with the "emergency conditions" provisions of 49 CFR 177.825(b)(2)(i), and thus is consistent with the HMR.

Section 177.825(b)(2)(i) authorizes the carrier to deviate from a preferred route when justified by "emergency conditions". State or local governments have authority to provide notice of such conditions and to restrict or suspend all traffic operations when road, weather, traffic or other hazardous conditions or circumstances warrant. IR–3, 46 FR 18918 (Mar. 26, 1981); *American Trucking Assn.* v. *City of Boston*, C.A. 81–628–MA (D. Mass. 1981); *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp 509 (R.I. 1982), *aff'd* 698 F. 2d 559 (1st Cir. 1983). However, Vermont has not provided sufficient justification for its decision to single out radioactive materials traffic for different types of control than hazardous materials generally.

Rule VII(C) says that the ranking State police officer "shall be the authority to modify the conditions of the approval" and states that significant modifications "shall be approved by the Secretary or his designee." These are inconsistent with the carrier discretion and responsibility provided by the HMR and demonstrate the correctness of the finding in IR–15 that Rule VII(c) is an inconsistent element of an inconsistent state approval system. That rule is inconsistent on its own terms and also inconsistent because of its inextricable link with the basic prior approval provisions in Vermont's Rule IV. I affirm the finding of inconsistency.

III. Conclusion

For the reasons indicated above and for the reasons set forth in IR–8 itself, I affirm the determination by the Associate Director of the Materials Transportation Bureau in IR–8 that Vermont Agency of Transportation Rules III(G), III(J), III(K), V and VII are inconsistent with the HMTA and the HMR.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued in Washington, DC, on April 13, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

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