NEIGHBORHOOD REINVESTMENT CORPORATION

Ninth Annual Meeting

TIME AND DATE: 3:00 p.m.—Wednesday, June 17, 1987 (rescheduled from May 20, 1987).

PLACE: 1325 G Street, NW., Suite 800. Washington, DC, 20005.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Timothy McCarthy, Director of Communications 376–2623.

AGENDA:

I. Call to order/corporate secretary
II. Election of temporary chairman
III. Election of chairman and vice chairman
IV. Approval of minutes, November 24, 1986
V. Executive director's activity report
VI. Personnel Committee report
VII. Election of officers and appointment of assistant secretary
VIII. Audit Committee report: Budget adjustments and reallocations
IX. Budget Committee report
X. Treasurer's report

Carol J. McCabe,

Secretary.

[FR Doc. 87–14879 Filed 6–26–87; 11:05 am]

BILLING CODE 7570–01–M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of June 29, July 6, 13, and 20, 1987.

PLACE: Commissioners' Conference Room, 1717 H Street, NW., Washington, DC.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of June 29

Tuesday, June 30

9:30 a.m.
Discussion of Pending Investigations (Closed-Ex. 5 & 7)
10:00 a.m.
Discussion of Management-Organization and Internal Personnel Matters (Closed-Ex. 2 & 6)
2:00 p.m.
Discussion/Possible Vote on Full Power Operating License for Braidwood-1 (Public Meeting)

Wednesday, July 1

8:30 a.m.
Discussion/Possible Vote on Full Power Operating License for Nine Mile Point-2 (Public Meeting)
10:00 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)
2:00 p.m.
Discussion of Management-Organization and Internal Personnel Matters (Closed-Ex. 2 & 6)

Week of July 6—Tentative

Wednesday, July 8

10:00 a.m.
Discussion/Possible Vote on Full Power Operating License for Beaver Valley-2 (Public Meeting)
11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of July 13—Tentative

Wednesday, July 15

10:00 a.m.
Briefing on Mark I Containments Status (Public Meeting)
11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of July 20—Tentative

Tuesday, July 21

10:00 a.m.
Briefing on Research Adjustment in Response to the National Academy of Sciences Report (Public Meeting)
2:00 p.m.
Briefing on Final Plan for NUREG-0956 Uncertainty Areas (Source Term) (Public Meeting)

Wednesday, July 22

10:00 a.m.
Discussion of Standardization Policy Statement Development (Public Meeting)

Thursday, July 23

10:00 a.m.
Briefing on Status of High Level Waste Management Program (Public Meeting)
2:00 p.m.
Briefing on the Status of TVA (Public Meeting)
3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

ADDITIONAL INFORMATION: Discussion of Management-Organization and Internal Personnel Matters (Closed-Ex. 2 & 6) scheduled for June 22, *postponed.*

TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING): (202) 634–1498.

CONTACT PERSON FOR MORE INFORMATION: Robert McOsker (202) 634–1410.

Robert McOsker,

Office of the Secretary

June 25, 1987.

[FR Doc. 87–14946 Filed 6–26–87; 3:49 pm]

BILLING CODE 7590–01–M

PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL

STATUS: Open. The Council will hold an executive session to discuss internal personal matters.

TIME AND DATE: July 8–9, 1987, 9:00 a.m.

PLACE: Templin's Hotel, 414 East First Avenue, Post Falls, Idaho.

MATTERS TO BE CONSIDERED:

1. Council Deliberation on System Planning Work Plan.
2. Staff Presentation on Status of Snake River Salmon and Steelhead Stocks.
3. Staff Presentation and Panel Discussion on Protected Areas.
4. Staff Presentation on Draft Analysis of Conservation Measures as required by Section 4(k) of the Northwest Power Act.
5. Council Discussion on Activities to help Lenders and Appraisers Recognize the Value of Energy Efficiency in Homes.
6. Public Comment on Western Electricity Study Briefing Paper on Electricity Use in the Western United States and Canada.
7. Council Action on the Council's Fiscal Year 1989 and 1988 Revised Budget.
8. Council Business.
9. Public Comment.

FOR FURTHER INFORMATION CONTACT: Ms. Bess Atkins at (503) 222–5161.

Edwards Sheets,

Executive Director.

[FR Doc. 87–14886 Filed 6–26–87; 11:35 am]

BILLING CODE 0000–00–M

Corrections

Federal Register
Vol. 52, No. 125
Tuesday, June 30, 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 ENERGY

Western Area Power Administration

Boulder Canyon Project; Rate Order; Confirmation and Approval

Correction

In notice document 87-12816 beginning on page 21351 in the issue of Friday, June 5, 1987, make the following correction:

On page 21359, in the third column, in the second paragraph from the bottom, in the second line ".3410" should read "3.410".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AD-FRL-3044-2]

Air Quality Implementation Plans; Restructuring SIP Preparation Regulations

Correction

In rule document 86-24433 beginning on page 40656 in the issue of Friday, November 7, 1986, make the following corrections:

PART 52—[CORRECTED]

1. On page 40676, in amendatory instruction 15, in the second column:

a. In the seventh line, after "(a)(10)(ii),", insert "(a)(11)(i),".

b. In the eighth line, remove "(a)(11)(i),".

c. In the 10th line, after "§ 52.1275(b)", insert "§ 52.1325".

2. In the same column, in amendatory instruction 16, in the fourth line, "§ 52.74(a)(2)(iv)" should read "§ 52.74(a)(2)(vi)".

3. On the same page, in the third column, in amendatory instruction 28, in the fourth line, "§ 52.828(1)(i)" should read "§ 52.828(b)(1)(i)".

4. On page 40677, in amendatory instruction 30, in the first column, in the third line, after "§ 52.2223", insert "(a)(7),".

5. On the same page, in amendatory instruction 38, in the second column, in the second line, "§ 52.24(j)(2)" should read § 52.24(i)(2)".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[PP 4G3138/T538; FRL-3196-2]

E.I. DuPont de Nemours and Co., Inc.; Extension of Temporary Tolerances

Correction

In notice document 87-10267 beginning on page 16905 in the issue of Wednesday, May 6, 1987, make the following correction:

On page 16905, in the second column, in the **SUPPLEMENTARY INFORMATION**, in the seventh line, "methoxy" was misspelled.

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 86P-0369]

Canned Pacific Salmon Deviating From Identity Standard; Amendment of Temporary Marketing Permit

Correction

In notice document 87-12229 appearing on page 20147 in the issue of Friday, May 29, 1987, make the following corrections:

1. In the first column, under **SUPPLEMENTARY INFORMATION**, in the eighth line, "store" should read "style".

2. In the second column, in the third line, "cans and" should read "cans each and".

3. Also, in the second column, in the 12th line, "produce" should read "product".

BILLING CODE 1505-01-D

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 33

Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Labor

Correction

In rule document 87-7883 beginning on page 11600 in the issue of Thursday, April 9, 1987, make the following corrections:

1. On page 11603, in the third column, in the last paragraph, in the 11th line, before "regulations" insert "requirements and procedures of section 501 as established in".

§ 33.11 [Corrected]

2. On page 11609, in the second column, in § 33.11(e)(1), in the 10th line, "or" should read "for".

BILLING CODE 1505-01-D

DEPARTMENT OF STATE

[Public Notice 1013]

Certain Nonimmigrant Visas; Validity

Correction

In notice document 87-13306 appearing on page 22408 in the issue of Thursday, June 11, 1987, make the following correction:

In the second column, in the second paragraph, in the first line, "deleted" should read "deletes".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: DeSoto County, MS

Correction

In notice document 87-13307 beginning on page 22411 in the issue of Thursday, June 11, 1987, make the following correction:

On page 22411, in the third column, in the **SUPPLEMENTARY INFORMATION**, in the sixth line, "MS 391" should read "MS 301".

BILLING CODE 1505-01-D

federal register

Tuesday
June 30, 1987

Part II

Federal Emergency Management Agency

44 CFR Parts 59 and 60

National Flood Insurance Program; Evaluation Requirements for Manufactured Homes in Existing Mobile Home Parks or Subdivisions; Suspension of Rule and Amendment of Rule With Request for Comments

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Parts 59 and 60

[Docket No. FEMA-FIA]

National Flood Insurance Program; Elevation Requirements for Manufactured Homes in Existing Mobile Home Parks or Subdivisions; Suspension of Rule and Amendment of Rule With Request for Comments

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Suspension of Rule; Amendment of Rule with Request for Comments.

SUMMARY: This notice suspends revisions to National Flood Insurance Program (NFIP) regulations regarding the elevation of manufactured homes placed in existing mobile home parks and subdivisions in special flood hazard areas which became effective on October 1, 1986 until March 31, 1988 and restores certain prior provisions. In order to seek additional public input, comments are requested on the impacts of the October 1, 1986 rule revision on owners of existing mobile home parks, owners and renters of individual mobile homes, government expenditures, and public safety.

EFFECTIVE DATE: Suspension of the rule and amendment of the rule are effective from June 30, 1987 until March 31, 1988.

Date for comments: Comments must be received on or before August 31, 1987.

ADDRESS: Send comments to: Rules Docket Clerk, Office of General Counsel, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Michael F. Robinson, Federal Emergency Management Agency, Federal Insurance Administration, 500 C Street, SW., Washington, DC 20472; telephone number (202) 646-2717.

SUPPLEMENTARY INFORMATION: The revisions to National Flood Insurance Program (NFIP) criteria which became effective on October 1, 1986 in part required the elevation to or above the base flood elevation of new placements, replacements and substantial improvements of manufactured homes in existing mobile home parks or subdivisions (those mobile home parks and subdivisions established prior to the adoption by communities of floodplain management regulations). This notice suspends implementation of this provision until March 31, 1988 and in the interim restores prior requirements regarding these existing mobile home parks or subdivisions. These prior requirements are restored by adding two definitions to § 59.1 and by adding § 60.3(c)(12) which establishes the elevation requirements for manufactured homes. Comments are requested on the impacts of the October 1, 1986, rule revision on owners of existing mobile home parks or subdivisions, owners and renters of individual manufactured homes, government expenditures, and public safety as well as on alternative approaches for the resolution of problems related to the hazards posed by the location of these existing mobile home parks and subdivisions in floodplain areas.

Background

The October 1, 1986 revision eliminated a provision in NFIP floodplain management criteria which allowed for the replacement, new placement or substantial improvement of mobile homes in existing mobile home parks or subdivisions without meeting any elevation requirements. This provision had been added to NFIP criteria in a rule revision which became effective on December 1, 1976 (41 FR 46968). From December 1, 1976 until October 1, 1986 mobile homes placed in existing mobile home parks and subdivisions constituted the only form of housing not required to have the lowest floor elevated to or above the base flood elevation where such elevations were provided to the community. This provision has been commonly referred to as the "grandfathering of existing mobile home parks and subdivisions". Conventional residential structures and mobile homes placed on lots outside of mobile home parks or subdivisions, in new mobile home parks or subdivisions, in expansions to existing mobile home parks and subdivisions and in existing mobile home parks in which the park infrastructure was repaired, reconstructed or improved in excess of 50 percent of its value all had to meet the elevation requirement. New non-residential structures have to be either elevated or floodproofed to the base flood elevation. The rationale for this special treatment of existing mobile home parks was that the mobile home park operator's investment was in the roads, utilities, accessory structures and mobile home pads and not the mobile homes themselves, which are usually owned by individuals who rent sites. In many older mobile home parks the sites were so crowded together that there was concern that the elevation of individual replacement mobile homes would not be feasible and sites would have to be eliminated. On March 28, 1986, FEMA published a proposed rule in the **Federal Register** (51 FR 10742) that included a series of changes to NFIP criteria that would incorporate the term "manufactured home" in lieu of "mobile home" and that would eliminate most of the distinctions between mobile homes and conventional structures such as the prohibitions on the placement of manufactured homes in the floodway and in coastal high hazard areas (V-zones). As part of this overall revision, the proposed rule removed the provisions that had allowed the replacement, new placement or substantial improvement of mobile homes in existing mobile home parks or subdivisions without elevation to the base flood elevation. All newly placed or substantially improved "manufactured homes" would have to be elevated to or above the base flood elevation regardless of whether or not the mobile home park or subdivision was in existence prior to the adoption of the local floodplain management measures.

The rationale for elimination of these grandfather provisions was expressed in the Supplementary Information in the proposed rule as follows:

> The elimination of these grandfather provisions will not only make the NFIP treatment of "manufactured homes" consistent with that accorded to conventional structures, but will also result in reduced flood losses to owners of "manufactured homes." In addition, there will be savings to the Federal government through reduced flood insurance claims payments and disaster assistance. Post-disaster Interagency Hazard Mitigation Teams chaired by FEMA have identified a number of instances where large numbers of mobile homes in mobile home parks have been destroyed by floods and then replaced by new non-elevated mobile homes. These mobile homes in turn were destroyed by floods and again were replaced by non-elevated mobile homes. Three of the reports of these Hazard Mitigation Teams have recommended that this cycle be broken by eliminating NFIP grandfather provisions for existing mobile home parks. This conclusion is supported by NFIP insurance claims information which included numerous examples of multiple claims paid to a single policyholder for mobile homes. On a number of occasions the claims payments have been used to purchase a more expensive mobile home, increasing the potential for larger flood losses. These documented examples of repetitive losses due to the grandfather provisions were limited since only eight years of claims can be analyzed. The problem could become more serious due to the large number of mobile homes in existing mobile home parks that have not yet been flooded but are likely to be in the future. For example, one Florida county has approximately 7,000 "manufactured homes," most of which are in

existing mobile home parks and under the grandfather provision.

All of these structures are located in areas that are likely to be flooded by hurricane storm surges. Although some of these structures are now insured by private insurers, they are generally eligible for NFIP flood insurance coverage. These structures and those the NFIP currently insures represents a significant liability to the taxpayer unless the grandfather provisions are eliminated.

Copies of the proposed rule were mailed to approximately 17,000 participating communities and made available to various organizations with interests in floodplain development. Of the 61 comments that were received on the rule only 14 specifically addressed the elimination of the grandfathering of existing mobile home parks. Of the 14 comments, 6 supported and 7 opposed the change and 1 comment was unclear. Although comments were received from two organizations representing various aspects of the manufactured home industry, no comments were received from the owners of individual mobile home parks. In addition, no comments raised issues related directly to potential adverse economic impacts on the owners of existing mobile home parks or subdivisions. Based on its belief that the continuation of the grandfather provision could no longer be justified and on the minimal comment, FEMA published a final rule on August 25, 1986 (51 FR 30291) with an effective date of October 1, 1986. Subsequent to that October 1, 1986 effective date, concerns were raised about the potential adverse economic impacts of the rule provision on the owners of existing mobile home parks and subdivisions. The purpose of this notice is to suspend implementation of the provision to allow for additional comment and analysis to address these concerns.

Description of Action

This notice of suspension has the effect of suspending those provisions of the October 1, 1986 revisions to NFIP regulations which require the elevation of new, replacement and substantially improved manufactured homes in existing mobile home parks and subdivisions until March 31, 1988. The October 1, 1986 revisions contained extensive amendments to regulations affecting all aspects of the NFIP including a number of changes affecting manufactured homes that are not currently at issue. FEMA cannot restore the grandfathering of existing mobile home parks and subdivisions merely by suspending specific items in the October 1, 1986 revisions without introducing conflicts in terminology into the regulations or rescinding new requirements that apply to conventional construction. In particular, the term "mobile home" has been replaced by "manufactured home" throughout NFIP criteria and a provision regulating mobile home parks at paragraph 60.3(c)(5) has been replaced by a provision requiring that openings be placed in the walls of enclosures below the base flood elevation.

As a result, FEMA has developed a new § 60.3(c)(12) that has the effect of restoring the grandfather requirement without introducing other conflicts to the regulations. First, a definition of "existing manufactured home park or subdivision" is being added to Section 59.1. "Existing manufactured home park or subdivision" is defined as a manufactured home park or subdivision for which the construction of facilities including utilities, final grading or pouring of pads and the construction of streets is completed before the effective date of the floodplain management regulations adopted by the community. The term "existing manufactured home park or subdivision" includes the same parks and subdivisions as were included in the term "existing mobile home park or mobile home subdivision" prior to the October 1, 1986 rule revision.

In addition, a definition of an "expansion to an existing manufactured home park or subdivision" has been added. This term means the preparation of additional manufactured home sites in an existing manufactured home park or subdivision beyond those that had been completed prior to the effective date of the local floodplain management regulations. The definition of "expansion to an existing manufactured home park or subdivision" is the same as that of "expansion to an existing mobile home park or mobile home subdivision" as defined prior to the October 1, 1986 rule revision.

Finally, a new § 60.3(c)(12) is added which requires that all manufactured homes to be placed or substantially improved in zones A1–30, AE and AH have their lowest floors elevated to or above the base flood elevation. First, a sentence has been added clearly stating that the elevation requirement in that paragraph applies to manufactured homes placed or substantially improved in expansions to existing manufactured home parks and subdivisions. Second, a sentence has been added that states that the requirements of the paragraph do not apply to other manufactured homes placed or substantially improved in existing manufactured home parks or subdivisions except where the repair, reconstruction, or improvement of the streets, utilities or pads in the existing manufactured home parks equals or exceeds 50 percent of the value of the streets, utilities, or pads. These provisions were contained in § 60.3(c)(5) of NFIP criteria prior to the October 1, 1986 effective date of the rule revisions.

The addition of the two definitions and the new § 60.3(c)(12) will have the affect of temporarily restoring the grandfather provision to that which existed prior to October 1, 1986. It must be emphasized that the elevation requirement continues to apply to all manufactured homes placed or substantially improved outside of manufactured home parks as well as those placed in manufactured home parks established after the date of adoption of the floodplain management regulations of a community. In addition, all manufactured homes placed or substantially improved in existing mobile home parks and subdivisions continue to be subject to the anchoring provisions at § 60.3(b)(8).

Impacts of the Suspension of the Rule Revision on Communities

The provisions in the preceding paragraphs will impact on certain communities. NFIP criteria at § 60.7 require that communities revise their floodplain management ordinances to comply with revisions to NFIP regulations within six months of their effective date. The deadline for adoption of the October 1, 1986 revisions was April 1, 1987. Many communities completed adoption of the revisons by this date. These communities have the option of either retaining the new provisions at § 60.3(c)(6) of the October 1, 1986 rule or restoring the grandfather provision by again revising their ordinance to include the provisions of § 60.3(c)(12) contained in this rule. FEMA strongly recommends that communities which do not currently contain existing mobile home parks or subdivisions and which are unlikely to annex areas containing such parks or subdivisions, retain the October 1, 1986 provisions. Those communities which have not yet incorporated the October 1, 1986 rule revisions into their ordinances should initiate action to do so immediately since they are in violation of NFIP criteria and subject to suspension from the program. With respect to regulations applying to existing manufactured home parks and subdivisions, these communities may either adopt the provisions meeting § 60.3(c)(12) of the October 1, 1986 rule revision or adopt provisions that meet the provision as modified by this notice. Communities are reminded that FEMA

indicated in the Supplementary Information in the final rule which became effective October 1, 1986, that subsequent to April 1, 1987 they would be suspended from the Program on 90 days prior written notice for failure to adopt the rule revisions. FEMA will be proceeding with the review of local ordinances to ensure compliance with provisions of the October 1, 1986 revisions other than those dealing with existing mobile home parks and subdivisions. FEMA will begin issuing 90-day and 30-day suspension letters to ensure adoption.

Request for Comments

During the period that this suspension is in effect, FEMA will be analyzing the impacts of applying the elevation requirement to manufactured homes placed or substantially improved in existing manufactured home parks and subdivisions. In addition, FEMA will be evaluating alternative means for addressing the hazards and threats to lives and property related to existing manufactured home parks that are located in flood hazard areas. FEMA encourages organizations, individuals and units of government to submit data and other information, as well as suggestions for alternative actions during the 60-day comment period provided in this notice. Data and other information should include statistical data, information on specifically how the end to the grandfather provision would impact on individual manufactured home parks owners, on individual manufactured home owners or renters, or on units of government, or on how this provision would interrelate with manufactured home financing, insurance, or other regulations of the industry. This information will be reviewed and analyzed along with other information developed by FEMA or provided to it both before and after October 1, 1986. At this time FEMA will also review possible alternative means of addressing the problem of the exposure to hazards to life and property of existing mobile home parks located in flood hazard areas. However, FEMA currently believes that a permanent return to the grandfather provision as it existed prior to October 1, 1986 is not justified and would be contrary to the purposes of the program's legislation.

FEMA has determined that, since this notice suspends a requirement that has been recently imposed, an environmental assessment need not be prepared. An environmental impact statement was prepared on the rule which became effective on December 1, 1976 and an environmental assessment was prepared on the revisions which became effective on October 1, 1986. Both contain an analysis of the impacts of the revisions in this rule. An environmental assessment will be prepared on any future rulemaking which results from FEMA's review of the impacts of the October 1, 1986 rule revision.

Since this notice suspends a requirement on small entities that has only recently been imposed, it will not have a significant economic affect on a substantial number of those entities and has not undergone a regulatory flexibility analysis. If, as a result of comments received, it appears that such an analysis is desirable, it will be performed for any future rulemaking on this issue.

This notice of suspension is not a "major rule" as defined in Executive Order 12291, dated February 27, 1981, and hence no regulatory analysis has been prepared.

FEMA has determined that this notice of suspension does not contain a collection of information requirements as described in section 3504(h) of the Paperwork Reduction Act.

List of Subjects in 44 CFR Parts 59 and 60

Flood insurance.

Accordingly, Title 44, Code of Federal Regulations is amended as follows:

PART 59—GENERAL PROVISIONS

The authority citation for Part 59 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978; E.O. 12127.

§ 59.1 [Amended]

1. Section 59.1 is amended as follows:

a. By adding alphabetically, a definition of "existing manufactured home park or subdivision" to read as follows: "Existing manufactured home park or subdivision" means a manufactured home park for which the construction of facilities for servicing the lot on which the manufactured homes are to be affixed (including, at a minimum, the installation of utilities, either final site grading or the pouring of concrete pads, and the construction of streets) are completed before the effective date of floodplain management regulations adopted by a community.

b. By adding alphabetically, a definition of "Expansion to an existing manufactured home park or subdivision" to read as follows:

"Expansion to an existing manufactured home park or subdivision" means the preparation of additional sites by the construction of facilities for servicing the lots on which the manufactured homes are to be affixed (including the installation of utilities, either final site grading or pouring of concrete pads, or the construction of streets).

PART 60—CRITERIA FOR LAND MANAGEMENT AND USE

The authority citation for Part 60 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978; E.O. 12127.

§ 60.3 [Amended]

2. Section 60.3(c)(6) is suspended.

3. Section 60.3(c)(12) is added to read as follows:

§ 60.3 Floodplain management criteria for flood-prone areas.

* * * * *

(c) * * *

(12) Require that all manufactured homes to be placed or substantially improved within Zones A1–30, AH, and AE on the community's FIRM be elevated on a permanent foundation such that the lowest floor of the manufactured home is at or above the base flood elevation; and be securely anchored to an adequately anchored foundation system in accordance with the provisions of paragraph (b)(8) of this section. This paragraph applies to manufactured homes to be placed or substantially improved in an expansion to an existing manufactured home park or subdivision. This paragraph does not apply to manufactured homes to be placed or substantially improved in an existing manufactured home park or subdivision except where the repair, reconstruction, or improvement of the streets, utilities and pads equals or exceeds 50 percent of the value of the streets, utilities and pads before the repair, reconstruction or improvement has commenced.

Dated: June 18, 1987.

Harold T. Duryee,

Federal Insurance Administrator.

[FR Doc. 87–14527 Filed 6–29–87; 8:45 am]

BILLING CODE 6718–05–M

federal register

Tuesday
June 30, 1987

Part III

Department of Labor

Mine Safety and Health Administration

30 CFR Parts 48 and 75
Underground Coal Mining; Self-Contained Self-Rescue Devices; Emergency Temporary Standard and Proposed Rule

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 75

Self-Contained Self-Rescue Devices; Emergency Temporary Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Emergency temporary standard.

SUMMARY: The Mine Safety and Health Administration (MSHA) is issuing an emergency temporary standard (ETS) which requires persons using self-contained self-rescue (SCSR) devices to receive training in the opening and activation of the device; insertion or simulated insertion of the mouthpiece; and the wearing of the nose clip. This training, commonly referred to as "hands-on" training, will be required after September 28, 1987 for all persons entering underground coal mines.

The basis for this ETS is MSHA's determination that "hands-on" training in SCSR units is necessary in the particular circumstances presented by this situation to avoid grave danger to underground miners from suffocation or poisoning from toxic products of combustion in the event of a mine fire or explosion. The Agency has further determined that immediate implementation of a "hands-on" training requirement is necessary to protect persons in underground coal mines from this grave danger. In accordance with section 101(b)(3) of the Mine Act this ETS will also serve as the basis for the Agency's final rule on the same subject. Elsewhere in this issue of the **Federal Register**, MSHA is proposing to implement on a permanent basis the requirement for "hands-on" training in the use of SCSR units.

DATES: Emergency Temporary Standard: The ETS is effective on June 30, 1987.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Acting Associate Assistant Secretary for MSHA, 4015 Wilson Boulevard, Room 627, Arlington, Virginia 22203; phone (703) 235–1910.

SUPPLEMENTARY INFORMATION:

I. Background

This ETS is issued in accordance with section 101(b) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 811. The ETS is effective immediately and revises the existing safety standard for self-contained self-rescue (SCSR) devices, 30 CFR 75.1714.

Existing safety standards in 30 CFR 75.1714 require that all persons going into underground coal mines have SCSR devices available to them and that they be instructed and trained in the use of such devices. These devices are closed-circuit breathing apparatuses that provide a source of oxygen and greatly increase a person's chance of surviving a mine emergency involving an irrespirable atmosphere. In the event of such a mine emergency, the SCSR device provides miners with the last protection allowing escape. For successful escape, miners must be able to rapidly and properly use the devices. In order to protect persons who go into underground coal mines from the grave danger of being unable to protect themselves with SCSR devices in the event of a mine emergency, the ETS specifies "hands-on" training in the use of SCSR's.

The decision to require "hands-on" training reflects the Agency's evaluation of SCSR training programs at underground coal mines and the results of an investigation of a mining accident where victims did not know how to properly use their SCSR devices. MSHA has also reviewed, and is guided by, recommendations from studies conducted by the U.S. Department of the Interior, Bureau of Mines, in conjunction with the University of Kentucky.

MSHA estimates that there are 93,000 workers affected by this ETS. An informal Agency evaluation of existing training programs indicated that a significant number of these miners, as many as half of them, have not had "hands-on" training in the use of SCSR's. Because the effective use of SCSR devices is essential to successful evacuation in an immediately life-threatening situation, the Agency believes that the lack of "hands-on" training demands immediate regulatory action.

The ETS applies to miners and visitors who go underground and requires that they receive "hands-on" training in the use of the SCSR units provided at the mine. Under the ETS, this training must include each person properly opening the device, activating it, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clips. After September 28, 1987, persons who have not received this training will not be permitted to enter an underground coal mine. Persons who have received "hands-on" training specified by the ETS within the preceding nine months or who have had this "hands-on" training in accordance with training programs approved under 30 CFR Part 48 do not have to be retrained to comply with the ETS.

In accordance with the Mine Act, the provisions of the ETS also serve as the basis for a proposed rule. Elsewhere in this issue of the **Federal Register**, MSHA proposes to revise the existing requirements in 30 CFR Part 48 and 30 CFR 75.160–1 to include "hands-on" training with SCSR devices as part of miners' and supervisors' regular training. Under the Mine Act, MSHA must promulgate final standards no later than nine months after publication of this ETS.

As an alternative to this ETS, MSHA considered implementing the "hands-on" training provisions of the ETS through the Agency's existing training regulations in 30 CFR Part 48. Under the Part 48 regulations, mine operators are required to develop and administer training programs for miners (with the exception of supervisory personnel subject to MSHA-approved State certification requirements) and for visitors. These programs are required to provide for a wide range of mine safety and health training, including instruction in the use, care and maintenance of SCSR devices.

The training programs required by Part 48 are subject to approval by MSHA District Managers. As part of this approval function, District Managers are authorized to require revisions to operators' training programs in accordance with certain notice and consultation provisions (30 CFR 48.3(j)(1)). Using this process, MSHA considered administratively requiring existing training programs to be amended to include "hands-on" training with SCSR devices.

However, this approach was not adopted for two primary reasons. The Part 48 training regulations do not require training for supervisory personnel subject to MSHA-approved State certification requirements (30 CFR 48.2(a)(1)(ii)). In the underground coal mining industry, a substantial majority of supervisory personnel are trained and "certified" in safety-related matters such as roof control, mine ventilation, gas measurements and first-aid. In addition to the State certification programs, MSHA standards address the training and retraining of these persons (30 CFR 75.160–1). Training in the use of SCSR devices is not, however, among the required courses of instruction and, consequently, "hands-on" training with SCSR devices could not be required for most supervisory personnel without some regulatory action.

Another deficiency with this approach is that it would not assure that all persons who go into underground coal mines would receive "hands-on" training with SCSR devices on a schedule commensurate with the danger

posed. In accordance with the Part 48 training regulations and existing MSHA-approved training programs, miners are trained before they begin working and before undertaking new tasks. Thereafter, on an annual basis, they must receive "refresher training," which includes instruction in the use, care and maintenance of SCSR devices. With this existing structure for training miners, mandatory "hands-on" training with SCSR devices would be delayed by the process of amending and approving existing training programs. In addition, depending on when a training program amendment specifying "hands-on" SCSR training became effective relative to the annual cycle of refresher training at a mine, as much as an additional 12 months could pass before a miner received the "hands-on" SCSR training specified by the ETS.

The Agency also considered addressing the subject of additional SCSR training through the regular rulemaking process (Section 101(a) of the Mine Act). These procedures ordinarily involve several months for the submission of comments and public hearings, followed by the time necessary for development and publication of final rules. Postponing mandatory "hands-on" training for this amount of time would not be responsive to the degree of danger.

II. Basis for the Emergency Temporary Standard

A. Regulatory Authority

Section 101(b) of the Mine Act provides that:

(1) The Secretary shall provide, without regard to the requirements of Chapter 5, Title 5, United States Code, for an emergency temporary mandatory health or safety standard to take immediate effect upon publication in the **Federal Register** if he determines (A) that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and (B) that such emergency standard is necessary to protect miners from such danger.

(2) A temporary mandatory health or safety standard shall be effective until superseded by a mandatory standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the **Federal Register**, the Secretary shall commence a proceeding in accordance with section 101(a), and the standards as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a mandatory health or safety standard under this paragraph no later than nine months after publication of the emergency temporary standard as provided in paragraph (2).

Issuance of a temporary mandatory standard is an extraordinary measure provided for by the Mine Act to enable MSHA to "react quickly to grave dangers which threaten miners before those dangers manifest themselves in serious or fatal injuries or illnesses." S.Rept. 181, 95th Cong., 1st sess. 23 (1977). The language authorizing the issuance of a temporary mandatory standard for these purposes indicates that it is appropriate to address miner exposure to "other hazards", as well as toxic substances or harmful agents. This broad scope is further indicated in the legislative history, which states that "[t]o exclude any kind of grave danger would contradict the basic purpose of emergency temporary standards—protecting miners from grave dangers." *Id.* The suggestion that a temporary mandatory standard is limited to new dangers in the mining industry is also dispelled in the legislative history which explains: "That a danger has gone unremedied should not be a bar to issuing an emergency standard. Indeed, if such is the case, the need for prompt action is that much more pressing." *Id.* In addition, the legislative history emphasizes that a record of fatalities or serious injuries is not necessary before an emergency temporary standard can be issued because "[d]isasters, fatalities, and disabilities are the very thing this provision is designed to prevent." "Waiting until those dangers manifest themselves as fatalities or disabling injuries or illnesses, frustrates the purpose of this [ETS] provision." *Id.* at 23–24.

B. Grave Danger

Diligent compliance with safety standards and safety-conscious work practices provide a substantial measure of protection against fires and explosions in underground coal mines. However, in this high-hazard work environment, the danger of a fire or explosion is ever present. Electricity or other sources of power can ignite coal dust or methane gas resulting in an explosion. Equipment can also be the source of a fire, which may involve fuel, lubricants and the surrounding coal. In caved, mined-out areas, which contain coal and accumulated gas, explosions can be caused by rock falls and in some instances fires are started by spontaneous combustion. When active mine areas are connected into previously mined-out areas, there is also the risk of exposure to an oxygen-deficient atmosphere.

MSHA standards are designed to prevent these hazards, but if an emergency occurs because other measures have failed, the SCSR is the last protection that allows escape. Rapid and proper donning of an SCSR under such extreme adverse circumstances is essential to survival.

The Secretary has therefore determined that miners are exposed to a grave danger when they enter underground coal mines without being prepared to properly use the SCSR devices provided for their protection in the event of a fire or explosion.

C. The Need for "Hands-On" Training in the Use of SCSR Devices

Existing MSHA standards in 30 CFR 75.1714 require that underground coal mine operators make SCSR devices available to the miners employed at their mines who go underground, and to the visitors which operators authorize to go underground. The existing standards also specify that mine operators instruct and train miners and visitors in the use and location of the self-rescue devices made available to them. Miner training is required to include use, care and maintenance of the units, and is required to be conducted in accordance with MSHA training regulations in 30 CFR Part 48.

The Part 48 regulations set forth requirements for operator-administered programs that address a wide-range of mine safety and health instruction and training. They include SCSR use instruction for visitors, new underground miners and annual refresher training for underground miners. The Part 48 training regulations do not cover supervisors who are subject to MSHS-approved State certification requirements. The supervisory personnel issue is discussed in section IV of this preamble.

The death of 27 miners in a mine fire on December 19, 1984, raised serious questions about the sufficiency of miner training in the use of SCSR devices. MSHA's investigation into the accident was protracted by problems of extinguishing the fire, and later by the hazardous conditions created by the fire damage. However, evidence gathered during the investigation *(Preliminary Report of Investigation, Underground Coal Mine Fire, Wilberg Mine,* issued April 27, 1987) indicated that some of the 27 victims did not have basic knowledge about how to start and use the SCSR devices available to them, and they were unaware of the critical need to protect their lungs from the smoke

and carbon monoxide contaminated atmosphere created by the fire.

MSHS is aware that miners have in several instances successfully used SCSR devices to escape from mines following a mine fire or explosion. However, in November 1986, MSHA completed a nationwide evaluation of the effectiveness of SCSR training covering 1,174 underground coal mines. At each mine, a representative number of miners and supervisors were asked to respond to a series of questions concerning SCSR use and storage at the mine. The same miners and supervisors were then asked to don an SCSR unit provided by MSHS. When the evaluation was completed, a total of 8,904 persons had been interviewed and tested. Of this group nearly 20 percent, or 1,780, persons were graded as failing. At 243 mines where the evaluation indicated ineffective SCSR training, additional retraining was required for all underground personnel.

In addition to this evaluation, researchers from the University of Kentucky and the Bureau of Mines have recently reported their findings based on a series of SCSR donning studies. (Cole and Vaught, "Training in the use of self-contained self-rescuers," and Vaught and Cole, "Problems in donning the self-contained self-rescuer" (USBM project H0034800040)). In cooperation with two coal companies, studies were made of miners' skill in the correct use of SCSR devices. Problem areas pointed out by the studies included heavy reliance by the industry on teaching methods that do not provide individual performance simulation. MSHA experience confirms that training in the use of SCSR devices typically consists of a film, slide or tape presentation, or demonstration by an instructor to either a class or an individual. "Hands-on" training, which would familiarize miners with the skills necessary to successfully use the units in an emergency, has not been industry-wide practice.

More recently, as the industry become aware of shortcomings in miners' training, some operators have taken the initiative to introduce "hands-on" training in the use of SCSR devices through their annual miner training programs or by other means. However, as stated above, approximately one-half of all coal miners currently working underground, or 46,000 persons, may not have had "hands-on" SCSR training.

"Hands-on" training is widely recognized in the training field as important to the development of task-oriented skills. Practice that closely duplicates the procedures that must be performed for survival during actual emergency situations is an essential part of task-oriented training. It also provides feedback to the instructor and the trainee about which procedural steps have been correctly performed as well as identifying those areas in which additional training is needed. (Hagman and Rose, "Retention of Military Tasks: A Review," Human Factors (1983)).

D. The Need for an Emergency Temporary Standard

SCSR devices provide the last means of protection to miners in an emergency escape situation. Miners are exposed to grave danger when they enter underground coal mines without being prepared to rapidly and properly use the SCSR device provided for their protection in the event of a mine emergency. "Hands-on" training will provide miners with the skills necessary to successfully use the units in an emergency. This is an effective, yet simple, method of assuring that miners will have the skills necessary to avoid the dangers posed by an emergency escape situation. As discussed previously, regularly rulemaking would not be immediately responsive to the degree of danger posed to underground miners. Given this particular circumstance presented in this situation, the Secretary has determined that an emergency temporary standard requiring "hands-on" training is necessary to immediately protect miners.

III. Discussion of the Emergency Temporary Standard

The ETS requires that each mine operator administer a basic level of "hands-on" training with the SCSR devices provided at the mine, and that this training be completed within 90 days after publication of this ETS. In accordance with existing 30 CFR 75.1714 this training is required for all miners employed by the operator who go undergound and for all visitors authorized by the operator to go underground. The ETS does not require retraining of persons who received this "hands-on" training within the nine-month period proceeding the effective date of this ETS, or who have received such training in accordance with a program approved by MSHA under 30 CFR Part 48.

The ETS specifies four task-oriented elements that must be included in SCSR training: (1) Opening the device; (2) activating the device; (3) inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece; and (4) putting on the nose clip. These steps are critical to isolating the lungs from a contaminated atmosphere and they are required to be performed by each person being trained. This "hands-on" training is to be made a part of the overall instruction and training provided miners and visitors in the location, use, care and maintenance of SCSR devices.

The effective date of this ETS is June 30, 1987 and it requires that operators administer the required training to their work force and visitors who go underground by no later than September 28, 1987. After September 28, 1987 miners and visitors will not be permitted to go underground without having received the required SCSR training.

MSHA recognizes that some mines may experience difficulty in meeting the requirements of this ETS within the time permitted. Influencing factors include the size of the mine's work force, the nature of prior SCSR training administered, and the availability of SCSR devices that can be used for training exercises. Accordingly, all underground coal mine operators are urged to make arrangements for and begin administering the required SCSR training without delay.

IV. Drafting Information

The principal persons responsible for preparing this document are: Douglas C. Altizer, Jr., Coal Mine Safety and Health, MSHA; Frank Schwamberger, Education Policy and Development, MSHA; Earnest C. Teaster, Jr., Office of Standards, Regulations and Variances, MSHA; and Edward C. Hugler, Office of the Solicitor, Department of Labor.

V. Executive Order 12291 and the Regulatory Flexibility Act

In accordance with Executive Order 12291, MSHA has prepared an initial analysis to identify potential costs and benefits associated with the emergency temporary standard. The Agency has incorporated this analysis into the Initial Regulatory Flexibility Analysis required by the Regulatory Flexibility Act. In this analysis, MSHA has determined that the emergency temporary standard would not result in major cost increases nor have an effect of $100 million or more on the economy. Therefore, the rule is not within the criteria for a major rule and a Regulatory Impact Analysis is not required.

The Regulatory Flexibility Act requires that agencies evaluate and include, whenever possible, compliance alternatives that minimize any adverse impact on small businesses when developing regulations. MSHA has determined that compliance alternatives are not available for small mines for the "hands-on" training requirement of this emergency temporary standard.

In the following summary of the Initial Regulatory Flexibility Analysis MSHA addressed the cost impact on industry by factoring in, where applicable, all direct and indirect costs for equipment and labor. MSHA estimates are based primarily upon the expertise of senior MSHA personnel who provided estimates for the time required to perform specific tasks and the compliance level of the industry.

MSHA estimates that the total compliance cost for the ETS is $834,355. The cost for SCSR training devices ($529,500) comprises about 63 percent of this cost. The remaining cost ($304,855) is attributed to labor for the miners taking the training, for the instructors giving the training and for persons revising the training plans. A copy of the full analysis is available upon request.

VI. Paperwork Reduction Act

The emergency temporary standard does not contain recordkeeping or reporting requirements.

List of Subjects in 30 CFR Part 75

Administrative practice and procedure, Education, Mine safety and health, Self-contained self-rescue devices.

Dated: June 25, 1987.

Alan C. McMillan,

Deputy Assistant Secretary for Mine Safety and Health.

PART 75—MANDATORY SAFETY STANDARDS—UNDERGROUND COAL MINES

30 CFR Part 75 is amended as follows:

1. The authority citation for 30 CFR Part 75 is revised to read as follows:

Authority: 30 U.S.C. 811, 957, and 961.

2. The authority citations following any Subpart heading or section are removed.

3. New paragraph (c) is added to § 75.1714 Part 75, Subchapter O, Chapter I, Title 30 of the Code of Federal Regulations to read as follows:

§ 75.1714 Availability of approved self-rescue devices; instruction in use and location.

* * * * *

(c)(1) After September 28, 1987 no miner employed by the operator or visitor authorized by the operator to enter the mine shall go underground without having received the training required by paragraph (2) of this section within the preceding nine months or in accordance with the training program required by 30 CFR Part 48.

(2) Training in the use of self-contained self-rescue devices shall include each person properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clip.

[FR Doc. 87-14764 Filed 6-25-87; 3:54 pm]

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DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 48 and 75

Self-Contained Self-Rescue Devices

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Proposed rule.

SUMMARY: The Mine Safety and Health Administration (MSHA) is proposing to require persons using self-contained self-rescue (SCSR) devices to receive training in the opening and activation of the device; insertion or simulated insertion of the mouthpiece; and the wearing of the nose clip. This training, commonly referred to as "hands-on" training, would be required for all persons entering underground coal mines. "Hands-on" training in the use of SCSR units is necessary to avoid danger to underground miners from suffocation or poisoning from toxic products of combustion in the event of a mine fire or explosion. Elsewhere in this issue of the **Federal Register**, MSHA is publishing an Emergency Temporary Standard requiring "hands-on" training in the use of SCSR units for all persons entering an underground coal mine after September 28, 1987.

DATES: Comments on this proposed rule and requests for public hearings must be received by August 14, 1987.

ADDRESS: Send written comments and requests for public hearings to the Mine Safety and Health Administration, Office of Standards, Regulations and Variances, Room 631, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Acting Associate Assistant Secretary for MSHA, 4015 Wilson Boulevard, Room 627, Arlington, Virginia 22203; phone (703) 235–1910.

SUPPLEMENTARY INFORMATION:

I. Background

Diligent compliance with safety standards and safety-conscious work practices provide a substantial measure of protection against fires and explosions in underground coal mines. However, in this high-hazard work environment, the danger of a fire or explosion is ever present. Electricity or other sources of power can ignite coal dust or methane gas resulting in an explosion. Equipment can also be the source of a fire, which may involve fuel, lubricants and the surrounding coal. In caved, mined-out areas, which contain coal and accumulated gas, explosions can be caused by rock falls and in some instances fires are started by spontaneous combustion. When active mine areas are connected into previously mined-out areas, there is also the risk of exposure to an oxygen-deficient atmosphere.

MSHA standards are designed to prevent these hazards, but if an emergency occurs because other measures have failed, the SCSR is the last protection that allows escape. Rapid and proper donning of an SCSR under such extreme adverse circumstances is essential to survival. MSHA has issued an emergency temporary standard (ETS) effective today that requires all persons who enter an underground coal mine after September 28, 1987, to have had "hands-on" training in the use of self-contained self-rescue devices (SCSRs). This training includes properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clip. The ETS was issued in accordance with section 101(b) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 811. The ETS revised the existing safety standard for SCSRs, 30 CFR 75.1714. The ETS will be superseded by this rule when promulgated in final form.

Prior to the ETS, 30 CFR 75.1714 required that underground coal mine operators make SCSR devices available to the miners employed at their mines who go underground, and to the visitors which operators authorize to go underground. The standard also specified that mine operators instruct and train miners and visitors in the use and location of the self-rescue devices made available to them. It required miner training to include use, care and maintenance of the units, which had to be conducted in accordance with MSHA training regulations in 30 CFR Part 48. However, the standard did not require "hands-on training."

The death of 27 miners in a mine fire on December 19, 1984, raised serious questions about the sufficiency of miner training in the use of SCSR devices. MSHA's investigation into the accident was protracted by problems of extinguishing the fire, and later by the hazardous conditions created by the fire damage. However, evidence gathered during the investigation (*Preliminary Report of Investigation, Underground Coal Mine Fire, Wilberg Mine*, issued April 27, 1987) indicated that some of the 27 victims did not have basic knowledge about how to start and use the SCSR devices available to them, and they were unaware of the critical need to protect their lungs from the smoke and carbon-monoxide contaminated atmosphere created by the fire.

MSHA is aware that miners have in several instances successfully used SCSR devices to escape from mines following a mine fire or explosion. However, in November 1987, MSHA completed a nationwide evaluation of the effectiveness of SCSR training covering 1,174 underground coal mines. At each mine, a representative number of miners and supervisors were asked to respond to a series of questions concerning SCSR use and storage at the mine. The same miners and supervisors were then asked to don an SCSR unit provided by MSHA. When the evaluation was completed, a total of 8,904 persons had been interviewed and tested. Of this group nearly 20 percent, or 1,780, persons were graded as failing. At 243 mines where the evaluation indicated ineffective SCSR training, additional retraining was required for all underground personnel.

In addition to this evaluation, researchers from the University of Kentucky and the Bureau of Mines have recently reported their findings based on a series of SCSR donning studies. (Cole and Vaught, "Training in the use of self-contained self-rescuers," and Vaught and Cole, "Problems in donning the self-contained self-rescuer" (USBM project H003408040)). In cooperation with two coal companies, studies were made of miners' skill in the correct use of SCSR devices. Problem areas pointed out by the studies included heavy reliance by the industry on teaching methods that do not provide individual performance simulation. MSHA experience confirms that training in the use of SCSR devices typically consists of a film, slide or tape presentation, or demonstration by an instructor to either a class or an individual. "Hands-on" training, which would familiarize miners with the skills necessary to successfully use the units in an emergency, has not been industry-wide practice.

More recently, as the industry has become aware of short-comings in miners' training, some operators have taken the initiative to introduce "hands-on" training in the use of SCSR devices through their annual miner training programs or by other means. MSHA estimates that there are 93,000 workers affected by the ETS. An informal Agency evaluation of existing training programs indicated that a significant number of these miners, as many as half of them, have not had "hands-on" training in the use of SCSR's.

"Hands-on" training is widely recognized in the training field as important to the development of task-

oriented skills. Practice that closely duplicates the procedures that must be performed for survival during actual emergency situations is an essential part of task-oriented training. It also provides feedback to the instructor and the trainee about which procedural steps have been correctly performed as well as identifying those areas in which additional training is needed. (Hagman and Rose, "Retention of Military Tasks: A Review," Human Factors (1983)).

SCSRs are closed-circuit breathing apparatuses that provide a source of oxygen and greatly increase a person's chance of surviving a mine emergency involving an irrespirable atmosphere. In the event of such a mine emergency, the SCSR device provides miners with the last protection allowing escape. For successful escape, miners must be able to rapidly and properly use the devices. Because the effective use of SCSR devices is essential to successful evacuation in an immediately life-threatening situation, the Agency addressed the lack of "hands-on" training demands through the immediate regulatory action of the ETS.

In accordance with the Mine Act, the provisions of the ETS must be replaced by a final rule within nine months of its publication. This proposed rule initiates section 101(a) rulemaking to accomplish that requirement. Under the proposal, the existing requirements in 30 CFR Part 48 and 30 CFR 75.160–1 would be revised to include "hands-on" training with SCSR devices as part of miners' and supervisors' regular training.

II. Discussion of the Proposed Rule

The ETS revises 30 CFR 75.1714 which applies to all miners and visitors authorized by the operator to go underground. It requires that "hands-on" training be provided to such persons prior to September 28, 1987. To integrate the safety protection afforded by this training into the framework of existing Agency standards, MSHA is proposing that the "hands-on" training required by the ETS be codified in the training regulations for 30 CFR Part 48, and also be codified in the training requirements for "certified persons" in 30 CFR 75.160–1.

With this approach, the majority of MSHA training requirements would be maintained within 30 CFR Part 48 which is consistent with MSHA's goal to provide a comprehensive miner training program. However, in accordance with § 48.2(a)(1)(ii), supervisory personnel subject to MSHA-approved State certification requirements are not covered by Part 48. The regular training of these individuals is addressed by 30 CFR 75.160–1. Therefore, MSHA is also proposing to revise § 75.160–1 to include the added training requirements to assure that all miners, including supervisors, receive "hands-on" training as an integral component of their training in the use, care and maintenance of SCSR's. These proposed changes, which are separately discussed below, would replace the amendments made by the ETS to § 75.1714.

A. Part 48—Training and Retraining of Miners

Subpart A of 30 CFR Part 48, prescribes requirements for submitting and obtaining MSHA approval of operator-administered programs for training and retraining underground miners. Each mine must have an approved training program for training new miners and newly-employed experienced miners, as well as training miners for new tasks, providing annual refresher training and giving certain persons, including visitors, hazard training.

Under this proposal, the existing training requirements for new miners (§ 48.5), newly-employed experienced miners (§ 48.6), annual refresher training (§ 48.8), and hazard training (§ 48.11) would be revised to specify "hands-on" training in the use of SCSR devices. As with the ETS, "hands-on" training would include each person properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and wearing the nose clip.

The Agency specifically requests comment on the prescribed "hands-on" training. MSHA's goal is to develop an SCSR training program which will best assure that persons can properly use the device in the event of an emergency. The Agency is also interested in comment on revising the existing training requirements in 30 CFR Part 48 and § 75.160–1 to reflect "hands-on" training. Because the Part 48 training requirements do not cover training and retraining of supervisors who are certified in accordance with state requirements, MSHA is also proposing to revise § 75.160–1 (training and retraining of qualified and certified persons) to also include "hands-on" training.

B. Section 75.160–1—Plans for Training and Retraining of Qualified and Certified Persons

Section 75.160 requires each operator to provide a program, approved by the Secretary, for training and retraining qualified and certified persons. This standard, published in 1970, addresses the training of persons who perform certain functions prescribed by the Mine Act and MSHA standards. The Part 48 training regulations published in 1978, included the training and retraining of qualified persons, but not certified persons. Thus, the requirements of §§ 75.160 and 75.160–1 were retained. The vast majority of supervisors at underground coal mines are certified persons.

Section 75.160–1 sets forth the courses that must be included in the training program required by § 75.160. It does not, however, require that the program include a course in the use, care and maintenance of SCSR devices. MSHA believes that all miners, including certified persons, need proper training and retraining in the use of SCSR devices. Therefore, the Agency is proposing to revise this standard to require that training programs for certified persons address use of SCSR devices, including "hands-on" training.

The proposed rule would redesignate § 75.160–1 as § 75.161 to facilitate codification in the Code of Federal Regulations.

III. Drafting Information

The principal persons responsible for preparing this document are: Douglas C. Altizer, Jr., Coal Mine Safety and Health, MSHA; Frank Schwamberger, Education Policy and Development, MSHA; Earnest C. Teaster, Jr., Office of Standards, Regulations and Variances, MSHA; and Edward C. Hugler, Office of the Solicitor, Department of Labor.

IV. Executive Order 12291 and the Regulatory Flexibility Act

In accordance with Executive Order 12291, MSHA has prepared an initial analysis to identify potential costs and benefits associated with the proposed rule. The Agency has incorporated this analysis into the Initial Regulatory Flexibility Analysis required by the Regulatory Flexibility Act. In this analysis, MSHA has determined that the proposed rule would not result in major cost increases nor have an effect of $100 million or more on the economy. Therefore, the rule is not within the criteria for a major rule and a Regulatory Impact Analysis is not required.

The Regulatory Flexibility Act requires that agencies evaluate and include, whenever possible, compliance alternatives that minimize any adverse impact on small businesses when developing regulations. MSHA has determined that compliance alternatives are not available for small mines for the "hands-on" training requirement of this proposed rule.

In the following summary of the Initial Regulatory Flexibility Analysis MSHA addressed the cost impact on industry by factoring in, where applicable, all direct and indirect costs for equipment and labor. MSHA estimates are based primarily upon the expertise of senior MSHA personnel who provided estimates for the time required to perform specific tasks and the compliance level of the industry.

MSHA estimates that the total compliance cost for the ETS is $834,355. The cost for SCSR training devices ($529,500) comprises about 63 percent of this cost. The remaining cost ($304,855) is attributed to labor for the miners taking the training, for the instructors giving the training and for persons revising the training plans. A copy of the full analysis is available upon request.

V. Paperwork Reduction Act

Codification of the "hands-on" training provision in 30 CFR Part 48 and in the training requirements for certified persons specified in 30 CFR 75.160–1 would require operators of underground coal mines to submit revised training plans and programs to MSHA for approval. MSHA estimates that it would take 30 minutes for each of the 2016 underground coal mines to revise the training plan and program.

MSHA will submit the paperwork requirements contained in this document to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act of 1980. Comments on the paperwork provisions should be sent directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for MSHA, Room 3208, 726 Jackson Place, NW, Washington, DC 20746.

List of Subjects in 30 CFR Parts 48 and 75

Administrative practice and procedure; Education; Mine safety and health; Self-contained self-rescue devices.

Dated: June 26, 1987.

Alan C. McMillan,

Deputy Assistant Secretary for Mine Safety and Health.

Accordingly, it is proposed to amend Parts 48 and 75 of Chapter I, Title 30 of the Code of Federal Regulations as follows:

PART 48—TRAINING AND RETRAINING OF UNDERGROUND MINERS

1. The authority citation to 30 CFR Part 48 is revised to read as follows:

Authority: 30 U.S.C. 811 and 825.

2. Section 48.5 is amended by revising paragraph (b)(2) to read as follows:

§ 48.5 Training of new miners; minimum courses of instruction; hours of instruction.

* * * * *

(b)(2) *Self-rescue and respiratory devices.* The course shall include instruction and demonstration in the use, care, and maintenance of self-rescue and respiratory devices used at the mine. Training in the use of self-contained self-rescue devices shall include each person properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clip. The course shall be given before the new miner goes underground.

* * * * *

3. Section 48.6 is amended by redesignating paragraph (b)(8) as (b)(9) and adding a new paragraph (b)(8) to read as follows:

§ 48.6 Training of newly employed experienced miners; minimum courses of instruction.

* * * * *

(b)(8) *Self-rescue and respiratory devices.* Training in the use of self-contained self-rescue devices shall include each person properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clip.

* * * * *

4. Section 48.8 is amended by revising paragraph (b)(8) to read as follows:

§ 48.8 Annual refresher training of miners; minimum courses of instruction; hours of instruction.

* * * * *

(b)(8) *Self-rescue and respiratory devices.* The course shall include instruction in the use, care, and maintenance of self-rescue and respiratory devices. Training in the use of self-contained self-rescue devices shall include each person properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clip.

* * * * *

5. Section 48.11 is amended by revising paragraph (a)(4) to read as follows:

§ 48.11 Hazard training.

* * * * *

(a)(4) Self-rescue and respiratory devices. Training in the use of self-contained self-rescue devices shall include each person properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clip.

* * * * *

PART 75—MANDATORY SAFETY STANDARDS—UNDERGROUND COAL MINES

1. The authority citation to 30 CFR Part 75 continues to read as follows:

Authority: 30 U.S.C. 811, 957, and 961.

2. Section 75.160–1 is redesignated as § 75.161 and is revised to read as follows:

§ 75.161 Plans for training programs.

Each mine operator shall submit to the District Manager a program or plan setting forth what, when, how, and where the operator will train and retrain persons whose work assignments require that they be certified or qualified. The program shall provide—

(a) For certified persons, annual training courses in methane measurement and oxygen deficiency testing, roof and rib control, ventilation, first aid, principles of mine rescue, and the provisions of this Part 75;

(b) For qualified persons, annual courses in performance of the tasks which they perform and qualified persons; and

(c) For qualified and certified persons, annual training in the use of self-contained self-rescue devices used at the mine. This training shall include each person properly opening the device, activating the device, inserting the mouthpiece or simulating this task while explaining proper insertion of the mouthpiece, and putting on the nose clip.

§ 75.1714 [Amended]

3. Section 75.1714 is amended by removing paragraph (c).

[FR Doc. 87–14977 Filed 6–29–87; 8:45 am]

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Tuesday
June 30, 1987

Part IV

Department of Housing and Urban Development

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 888

Section 8 Housing Assistance Payments Program; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 888

[Docket No. N-87-1644; FR-2292]

Section 8 Housing Assistance Payments Program; Fair Market Rent Schedules for Use in the Existing Housing Certificate Program, Housing Voucher Program, Loan Management and Property Disposition Programs, and Moderate Rehabilitation Program

AGENCY: Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final notice.

SUMMARY: Section 8(c)(1) of the United States Housing Act of 1937 requires the Secretary to publish Fair Market Rents (FMRs) periodically, but not less frequently than annually. On April 29, 1987 (52 FR 15630), the Department published FMR schedules for the Section 8 Existing Housing Program covering 2,645 of 2,760 rental areas. Today's document publishes FMRs for the remaining 115 rental areas.

EFFECTIVE DATE: June 30, 1987.

FOR FURTHER INFORMATION CONTACT: Cecelia D. Livingston, Housing Voucher Division, Officer of Elderly and Assisted Housing, telephone (202) 755-6477. For technical information on the development of schedules for specific areas or the method used for the rent calculations, contact Michael R. Allard, Economic and Market Analysis Division, Office of Economic Affairs, telephone (202) 755-5577. (These phone numbers are not toll-free.).

SUPPLEMENTARY INFORMATION:

Background

Section 8 of the United States Housing Act of 1937 (the Act) (42 U.S.C. 1437f) authorizes a housing assistance program to aid lower income families in renting decent, safe, and sanitary housing. Assistance payments are limited by Fair Market Rents established by HUD for different areas. The final FMRs contained in this document apply to the Section 8 Existing Housing Certificate Program, including space rentals by owners of manufactured homes (Part 882, Subparts A, B, and F), for the Section 8 Moderate Rehabilitation Program (Part 882, Subparts D and E), and for Section 8 existing housing assisted under Part 886, Subparts A and C (Section 8 Loan Management and Property Disposition Programs). FMRs are also used in determining the amount of subsidy for families under the Housing Voucher Program.

FMRs are also used to calculate the administrative fee paid to PHAs under the covered Section 8 programs. (Administrative fees are not provided under the Property Disposition and Loan Management Programs (Part 886, Subpart A and C) because HUD, rather than the PHA, administers these programs.)

1987 Proposed Fair Market Rent Schedules

Proposed FMRs

The Department proposed fiscal year 1987 FMRs for Section 8 existing housing on December 8, 1986 (51 FR 44198). These FMRs reflected estimated rent levels as of April 1, 1987. The criteria and methodology used by HUD in developing the proposed FMRs appear at 24 CR Part 888, Subpart A and have been in use since 1983. The criteria used to compute FMRs are as follows: (1) The 45th percentile rent of standard quality rental units (*i.e.*, the rent below which 45 percent of the standard quality rental housing units in a market area are distributed); (2) Rents for units occupied by recent movers (households who moved within two years preceding the date of the survey data used in these calculations); and (3) Exclusion from the data base of all public housing units and recently completed housing (units built within two years of the survey dates). The FMRs for manufactured home spaces are based on the 45th percentile rent for manufactured home spaces. (See 24 CFR 888.113(a)).

Section 888.113(d) provides that HUD will use the most recent Census and American Housing Survey (AHS) data to compute base rents and will update these base rents through the use of the most current available Consumer Price Index (CPI) data. Last year, the Department completely revised the FMRs for all areas using 1980 Census data and post-1980 AHS data which were available for the first time. This year's FMRs built upon this recently completed process by considering more current CPI data. (A more complete description of HUD's calculations may be found at 51 FR 44198-99, December 8, 1986).

In the December 8, 1986 notice, the Department indicated that it would develop its FMRs by publishing proposed FMRs for public comment, analyzing and reestimating rents based on the public comments, and publishing final FMRs. (See 24 CFR 888.115). Accordingly, in the proposed notice, the Department sought public comment for specific areas and described the documentation required to justify the proposed changes.

Final FMRs

In response to the request for public comments, HUD received 137 comments. The Department used these comments to assist in determining which FMRs could be published for effect without waiting to complete the analysis of all of the submitted comments. Accordingly, on April 29, 1987 (52 FR 15630), HUD announced final FMRs for 2,645 of the 2,760 rental areas. These 2,645 areas included areas for which no public comments were received, or for which all public comments received supported the proposed FMRs. (In the April 29, 1987 publication, HUD stated that it was publishing FMRs for 2,647 areas. The schedules attached to the April 29, 1987 notice, however, correctly published FMRs for the 2,645 uncontested areas.) The Department stated that it would publish a second notice announcing the final FMRs for effect in the remaining market areas and that the second publication would contain an analysis and response to all public comments received.

Today's document announces FMRs for the remaining 115 rent market areas and contains an analysis of public comments. The FMRs are listed in two parts—Schedule B (Fair Market Rents for Existing Housing) and Schedule D (Fair Market Rents for Manufactured Home Spaces in Section 8 Existing Housing Certificate Program).

For the purpose of establishing assistance payments under the affected programs, the FMRs published in this document are effective today. For the purposes of computing the administrative fee for a PHA administering a Section 8 program in a jurisdiction where the two-bedroom FMR has been increased by this notice, the administrative fee will be computed as if the FMRs published today were in effect on April 29, 1987 (the effective date of FMRs published for the 2,645 uncontested areas). For PHAs administering a Section 8 program in the area where the two-bedroom FMR is decreased, the PHA's administrative fee will be adjusted as of the first day of the PHA's fiscal year that begins after the effective date (today) of the FMRs appearing in this document.

Public Comments

As noted above, 137 comments were received on the proposed notice. Approximately two-thirds of these comments were submitted by PHAs. Of the remainder, 30 were from State and

local governments, 19 were from management companies, development corporations, realtors, and owners, and four were from others.

Almost every commenter stated that the FMRs published for the commenter's area were too low. Fourteen commenters, however, supported the proposed FMRs for their areas and one commenter argued that the FMRs for its area were too high. The Department has evaluated all comments carefully and has sought to look behind the information presented when the data appeared to have merit but were incompletely or poorly represented. As a result of HUD's evaluation, modifications have been made in 46 of the 115 contested FMR areas.

Computation of FMRs

a. *Geographic area.* Section 888.113 provides that FMRs are established for all Metropolitan Statistical Areas (MSAs), Primary Metropolitan Statistical Areas (PMSAs), nonmetropolitan counties and county equivalents. Some commenters believed that these FMR areas in general are too large. Thirty-one commenters felt, given the actual markets existing in their specific area, that it would be more appropriate for their jurisdiction to be included in an adjacent FMR area (with higher FMRs), to recompute the FMRs for their areas to reflect adjacent FMR areas (with higher FMRs), or to exclude certain lower cost areas from their FMR areas.

An FMR published for Section 8 Existing Housing is established on a market area basis (*i.e.*, a geographic area within which housing units are in mutual competition). The factors used by the Office of Management and Budget (OMB) to define metropolitan and nonmetropolitan areas include commuting patterns and population densities. These factors are also appropriate to define housing market areas. The Department believes that these OMB determinations constitute a rational basis for determining housing market areas and will continue to use the definitions of metropolitan and nonmetropolitan areas adopted by OMB.

Since FMRs in any geographic area reflect the rent level below which 45 percent of the rents will fall, actual rents will vary within each area. Thus, portions of a FMR area may have rent levels that exceed the FMR. For such areas within FMR market areas that have active Section 8 Existing programs and also have rent levels that are on average higher than the published FMRs, HUD's regulations permit, under specified conditions, PHAs to approve rents that exceed FMRs. (See e.g., 24 CFR 882.106(a).) HUD has found that these exception rents usually will be sufficient to achieve their program objectives.

b. *Data base.* As noted above, HUD computes FMRs by a combination of 1980 Census, AHS and CPI data. Several commenters argued that the use of these data failed to reflect accurately the cost of rental housing. Census data were questioned on the following grounds: (1) The Census data are seven years old and do not reflect expansions and contractions in rental markets during this period; (2) the Census definition of substandard is too limited and does not reflect Section 8 housing quality standards; (3) the average rents that are reported in the Census are typically lower than those derived through other surveys; (4) publicly assisted units may not always be excluded from Census data; and (5) Census data do not appear to exclude minority impacted or economically depressed areas. AHS data were questioned because: (1) The data do not consist entirely of recent moves and permits old rents to be averaged in the rental calculation; (2) AHS data are limited to approximately 50 metropolitan areas; (3) HUD uses an extremely small subset of AHS data to calculate rents; and (4) the housing quality standards of the AHS do not match the Section 8 housing quality standards. CPI data were questioned because: (1) It is not limited to recent moves; (2) the geographic areas used to calculate the CPI are not the same as the FMR areas; and (3) there is a significant time lag between the collection and use of the data. One commenter suggested that HUD's data bases should exclude data for all assisted housing.

HUD continues to believe that the estimates resulting from the application of the Census, AHS, and CPI data provide FMRs that generally reflect local market conditions and changes. However, HUD also relies on the public comment process to identify areas where the use of these data is not appropriate or where there have been abrupt changes in local market conditions.

With the exception of the issues specifically addressed below, most of the questions regarding the accuracy of the HUD data base were discussed at length in HUD's August 29, 1986 publication of FMRs for fiscal year 1986 (51 FR 31014, 31015–16). Responses to these issues will not be repeated here. Additional issues raised are discussed below.

Commenters argued that the application of the AHS data was inappropriate because the surveys cover only 54 metropolitan areas. In establishing FMRs, HUD attempts to use the most reliable data available. Absent reliable local data submitted by commenters, AHS data represent the best recurring data source for the computation of FMRs within the MSAs–PMSAs covered by these surveys. The AHS provides HUD with specific information on local rental trends occurring between decennial Censuses for 54 of the largest market areas. These market areas have a rental inventory equal to over one-half of the nation's rental properties. It would be inappropriate to exclude these reliable data merely because they do not extend to all market areas.

Other commenters argued that the use of AHS data is inappropriate because HUD uses an extremely small subpart of the AHS data to calculate the FMRs. The AHS is a scientifically developed sample of households and has been designed by HUD and the Bureau of Census to derive statistically reliable rent estimates for metropolitan areas. Our regulations provide that FMRs must be based on the 45th percentile rent for standard quality rental housing units, must exclude public housing units and recently completed housing, and may include only recent mover rents. Accordingly, HUD uses only that portion of the AHS sample that reflects these standards. While HUD, thus, does not use all of the unit data collected in the AHS sample, HUD has sought to assess the accuracy of Census- and AHS-based rent estimates for localities where surveys were conducted at about the same time. These comparisons strongly suggest that errors are within a statistically reasonable range.

One commenter objected to the AHS data because they do not consist entirely of rents of recent movers and may permit old rents to be averaged into the computation. This commenter has misunderstood HUD's use of AHS survey data, which appropriately excludes old rents and consists of only rents of recent movers.

A commenter noted that Census data are not appropriate since they are seven years old and do not reflect recent expansions and contractions of the rental market. Both the Census data and the AHS are updated to April 1, 1987 by the application of regional and local CPI data. As noted above, HUD relies on the public comment process to identify those areas where the CPI adjustment does not adequately reflect local changes.

Some commenters suggested that CPI data are suspect because the CPI areas are not coextensive with the FMR areas.

CPI surveys are prepared for 77 selected metropolitan areas and for Census regions. The geographic boundaries of the 77 selected metropolitan areas are the same as the FMR areas for those locations. For the remaining FMR areas not covered by the area-specific CPI data, HUD applies the appropriate CPI for the Census region. HUD's analysis indicates that over time the rent estimates derived from these sources fall within a statistically reasonable range of acccuracy.

c. *Trending*. The proposed FMRs were trended to April 1, 1987, the proposed effective date. One commenter urged HUD to trend FMRs to the midpoint of the year because "Beginning the FMR year with units at or below the 45th percentile really means that a far smaller supply of units is available at the end of the FMR year." Another commenter suggested that if there is a delay in the promulgation of a final notice beyond April 1, 1987, HUD should make further trending adjustments to the FMRs to ensure that FMRs established will retain the same fairness and reasonableness as those proposed for April 1, 1987.

Given the relatively low inflation rates of recent years, HUD does not share the commenters' concern that the supply of rental units will be sufficiently diminished by our failure to trend beyond April 1, 1987. The purpose of establishing the FMRs with a date of April 1st is to have them set at the mid-point of the fiscal year for which they will be in use. Because of the technical complexities involved in developing FMR schedules, the Department does not have the capacity to revise these estimates every time the publication schedule is changed. Our objective is to publish FMRs as early in the program year as possible. We anticipate that much of the delay in the publication of FMRs past the beginning of the fiscal year will be eliminated in future publications.

d. *Local conditions*. Numerous commenters argued that HUD's formulation ignored local conditions that mandate higher FMRs. Commenters cited factors that create a high demand for, and low supply of, suitable rental properties in the area. These factors included the location or expansion of universities, military bases or industries in their areas, the loss of suitable housing because of condominium and cooperative conversions in the area, gentrification, high demand for seasonal rentals, condemnation and demolition of existing rental units, rapid population increases, and declines in new construction. Other commenters cited dramatic increases in utility costs, insurance expenses, debt servicing costs (usually caused by property changing hands), and sales and property taxes.

We agree that HUD's development of the proposed FMRs may not keep pace with dynamic shifts in local rental housing conditions. As stated earlier, however, we rely on local data submitted during the public comment period to identify these changes. To the extent that commenters have presented sufficient evidence that the proposed FMRs do not reflect these shifts, the FMRs published for effect today have been revised.

Several commenters noted that increases in utility costs have caused, or will soon cause, PHAs to increase the amount of the applicable utility allowances. These commenters noted that these increased allowances will effectively reduce the amount available for contract rent. They urged HUD to permit FMR increases necessary to offset these increases to the allowances. The FMRs developed under Part 888 are intended to include the cost of contract rent *and* utilities (except telephones). In market areas for which data were submitted to demonstrate utility *cost* increases beyond the level reflected in the proposed FMRs, HUD has made appropriate adjustments.

e. Tax code changes. Several commenters predicted that the new tax code will increase ownership costs. (E.g., one commenter stated that the new code would require landlords to operate under different depreciation schedules that would lower tax deductions and increase their tax burden.) These commenters argued that the 1987 FMRs should reflect these expected changes.

Like all increases to expenses associated with the ownership of rental housing, if the projected increases in taxes occur, the increases will result in higher rents and will be reflected by an increase in the 45th percentile, standard quality, recent-mover FMR standard. To the extent these tax increases occur and are reflected in the 45th percentile rents in future years, HUD will make appropriate increases in FMR levels.

f. *FMRs and contract rents adjusted by the AAF*. Some commenters noted that the annual adjustment factor (AAF) has not kept up with private market increases or increases to the FMR. They argued that difference between the adjusted contract rents and the new FMRs, and the adjusted contract rents and private market rents, are causing the loss of many units from the Program on the anniversary date. Other commenters noted that, in their area, the reverse is true (*i.e.*, adjusted contract rents exceed FMRs). These commenters noted that this disparity results in newly vacant units not qualifying for the Program because of high rents, while occupied units in the same building continue to be assisted.

HUD's procedures do not require that adjusted contract rents and FMRs be equivalent. As noted above, FMRs are based on the 45th percentile, standard quality rental unit, recent mover rents, and exclude consideration of public housing units and recently completed housing. This computation differs from the AAF computation which is designed *only* to reflect changes in local rent and utility cost levels. Units under lease may, thus, rent at levels above or well below the revised 45th percentile, but this does not mean that the FMR or the adjusted rents are incorrect or should be changed.

Impact on the Section 8 Existing Housing Program

Approximately one-half of the commenters discussed the impact that low FMRs would have on the Section 8 Existing Housing Certificate Program. The primary concern voiced was that the proposed FMRs would not insure an adequate supply of decent, safe and sanitary housing.

Specific negative impacts cited by commenters included the following: Low FMRs: (1) Would not provide a sufficient economic incentive to owners to participate or continue to participate in the Program; (2) would severely limit the options of Certificate holders, making it difficult or impossible for these families to exercise their Certificates within the prescribed time limits; (3) would cause the clustering of assisted families in areas of low income or minority concentration, contrary to the purposes of the Section 8 program; (4) would reduce the quality of housing by limiting family options to marginally acceptable units and by failing to provide the owner with sufficient revenues to maintain and rehabilitate deteriorating units; (5) would increase homelessness; (6) would have negative impact on the Housing Voucher Program by increasing the percentage of family income necessary to rent an acceptable unit; and (7) would make it easier for owners to discriminate against low income and minority individuals.

When HUD established the FMR methodology, the Department balanced many competing factors. HUD recognized that setting FMRs at a level higher than the 45th percentile rent level would provide a broader range of locations and amenities to assisted families and would have a beneficial

impact on family mobility and placement rates. HUD, however, also recognized that a higher FMR level would reduce the number of households that could be assisted.

Use of the 45th percentile of recent mover rents as the FMR standard represents a compromise. When properly applied, it ensures that an adequate supply of standard quality units will be available to assisted families and that there will be a wide choice of housing types and locations. It provides a reasonable range of housing opportunities, but is not so high as to constrict unreasonably the size of the Program or to permit subsidization of units that exceed modest, nonluxury levels.

While some commenters advocated the return to the 50th percentile rent standard, the Department continues to believe that the 45th percentile rent standard, as established by the application of Census, AHS and CPI data as well as local data submitted by public commenters, generally provides an adequate supply of decent, safe and sanitary housing units and is sufficient to avoid the negative impacts predicted by the commenters. HUD notes that FMRs established under this methodology have been sufficient to avoid the negative consequences predicted by the public commenters. For example, while 45th percentile rents have been used since 1983, HUD is not aware of decreases in the quality of housing to date. In fact, there have been improvements in the enforcement of Housing Quality Standards which have resulted in increases in the quality of leased units.

In addition to commenters addressing the impact of low FMRs on the Section 8 Certificate Program, two commenters discussed the impact on the Rental Rehabilitation Grants Program. One commenter claimed that the rents permitted under the new FMRs would not be high enough to cover debt service. Another claims that present owners participating in the Rental Rehabilitation Grants Program will pay off loans to avoid the application of "rental rehabilitation market rents."

FMRs are used to determine rent "affordability" in the Rental Rehabilitation Grants Program and thus affect the selection of properties for eligibility in the program and the eligibility of tenants for various forms of rental or relocation assistance. FMRs, however, do not have a direct impact on the rents that may be charged in a rehabilitated project. After rehabilitation such rents are set by owners at makret rates and are not limited by FMRs. To the extent that FMRs affect the rent affordability determination and the selection of projects for assistance, we note that local officials are responsible for selecting appropriate buildings and neighborhoods and for developing methods to finance rehabilitations that ensure affordability under the Rental Rehabilitation Program. As to projects already completed and occupied, the FMR changes will not affect the owner's ability to raise rents; it will only affect the ability of Certificate and Voucher holders to live in projects with rents in excess of the FMRs.

Administrative Fee

Seven commenters objected that the administrative fee calculated from the proposed FMRs will be inadequate. Commenters noted that the factor used to calculate the administrative fee was reduced in 1986 and that this reduction, coupled with the reduction of FMRs in some areas for 1986 and the modest revisions to FMRs proposed in this proceeding, has resulted in administrative fees that are too low. Commenters claim that these fees (1) impair the PHAs' ability to administer the program; (2) have a significant impact on small PHAs' ability to administer the Program, since these PHAs may not be able to obtain funds from other sources; and (3) in some cases may jeopardize a PHA's continued operation. Two commenters noted that their fees were not sufficient when compared to other PHAs in nearby FMR areas that have similar administrative costs.

Initially, we note that the 1987 fiscal year appropriation mandates that the method of calculating administrative fees must be that percentage established by the Secretary as of September 30, 1986 (see Pub. L. 99–500 (approved October 18, 1986) and Pub. L. 99–591 (approved October 30, 1986), making appropriations as provided for in H.R. 5313, 99th Cong., 2d Sess. (1986) (as passed by the House of Representatives and by the Senate), to the extent and in the manner provided for in H. Rep. No. 977, 99th Cong., 2d Sess. (1986)).

The Department believes that the mechanism used to establish administrative fees is generally adequate—for large and small, urban and rural programs. HUD recognizes, however, that there is a point below which a program is too small to be financially viable. In such cases, we recommend that PHAs seek the cooperation and possible assistance of any county, State or Regional program, including transferring the Program to a larger PHA that can operate in the same jurisdiction.

Other Matters

A Finding of No Significant Impact with respect to the environment required by the National Environmental Policy Act (42 U.S.C. 4321–4374) is unnecessary, since the Section 8 Existing Housing program is categorically excluded from the Department's National Environmental Policy Act procedures under 24 CFR 50.20(d).

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this Notice does not have a significant economic impact on a substantial number of small entities because FMRs reflect the rents for similar quality units in the area. Therefore, FMRs do not change the rent from that which would be charged if the project were not in the Section 8 program.

This document does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 on Federal Regulation issued on February 17, 1981. Analysis of the document indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Catalog of Federal Domestic Assistance program number is 14.156, Lower-Income Housing Assistance Program (Section 8).

Accordingly, the Fair Market Rent Schedules are amended as follows.

Dated: June 24, 1987.

James E. Schoenberger,

Acting General Deputy Assistant Secretary for Housing-Federal Housing Commissioner.

Section 8 Fair Market Rent Schedules for Use in the Existing Housing Certificate Program, Loan Management and Property Disposition Programs, Moderate Rehabilitation Program and Housing Voucher Program; Schedules B and D—General Explanatory Notes

1. Geographic Coverage

a. The FMRs contained in Schedules B and D reflect 115 market areas. FMRs for the remaining 2,645 market areas were published on April 29, 1987 (52 FR 15630).

b. FMRs for Existing Housing (Schedule B) are established for Metropolitan Statistical Areas (MSAs), Primary Metropolitan Statistical Areas (PMSAs), nonmetropolitan counties, and county equivalents in the United States, District of Columbia, Puerto Rico, the Virgin Islands, and Guam. FMRs also are established for nonmetropolitan parts of counties in the New England States.

c. FMRs for Manufactured Home spaces in the Section 8 Certificate Program (Schedule D) are established for MSAs, PMSAs, selected nonmetropolitan counties, and the residual nonmetropolitan portion of each State.

d. The MSAs and PMSAs used in these schedules are those established by the Office of Management and Budget effective October 18, 1986.

2. Arrangement of FMR Areas and Identification of Constituent Parts

a. The FMR areas in Schedules B and D are listed alphabetically by MSA-PMSA and nonmetropolitan county within each State.

b. The constituent counties (and New England towns and cities) included in each MSA and PMSA are listed immediately following the MSA-PMSA names in each State listed in Schedule B. All of the constituent parts of an MSA that are in more than one State can be identified by consulting the listings for each applicable State.

c. Two nonmetropolitan counties are listed alphabetically on each line of the nonmetropolitan county listings.

d. The New England towns and cities included in a nonmetropolitan part of a county are listed immediately following the county name.

e. The FMRS are listed by dollar amount on the first line beginning with the FMR area name.

BILLING CODE 4210-27-M

* SCHEDULE B - FAIR MARKET RENTS FOR EXISTING HOUSING (INCLUDING HOUSING FINANCE AND DEVELOPMENT AGENCIES PROGRAM) 060387
FINAL FMRS
STATE: ALABAMA

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
BULLOCK	193	234	275	344	385
CRENSHAW	193	234	275	344	385
MACON	205	249	293	366	410

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
BUTLER	178	216	254	318	357
LOWNDES	193	234	275	344	385
PIKE	205	249	293	366	410

STATE: CALIFORNIA

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
SAN FRANCISCO, CA PMSA	533	646	765	953	1066

COUNTY(IES): MARIN, SAN FRANCISC, SAN MATEO

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
KINGS	289	351	412	516	578

STATE: CONNECTICUT

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
BRIDGEPORT-MILFORD, CT PMSA	381	462	545	680	763
COUNTY: FAIRFIELD TOWNS OF BRIDGEPORT, EASTON, FAIRFIELD, MONROE, SHELTON, STRATFORD, TRUMBULL					
COUNTY: NEW HAVEN TOWNS OF ANSONIA, BEACON FALLS, DERBY, MILFORD, OXFORD, SEYMOUR					
DANBURY, CT PMSA	412	501	590	737	826
COUNTY: FAIRFIELD TOWNS OF BETHEL, BROOKFIELD, DANBURY, NEW FAIRFIEL, NEWTOWN, REDDING, RIDGEFIELD, SHERMAN					
COUNTY: LITCHFIELD TOWNS OF BRIDGEWATER, NEW MILFORD					
HARTFORD, CT PMSA	388	473	553	696	776
COUNTY: HARTFORD TOWNS OF AVON, BLOOMFIELD, CANTON, EAST GRANBY, EAST HARTFOR, EAST WINDSOR, ENFIELD, FARMINGTON GLASTONBURY, GRANBY, HARTFORD, MANCHESTER, MARLBOROUGH, NEWINGTON, ROCKY HILL, SIMSBURY, SOUTH WINDSO SUFFIELD, WEST HARTFOR, WETHERSFIELD, WINDSOR, WINDSOR LOCK					
COUNTY: LITCHFIELD TOWNS OF BARKHAMSTED, NEW HARTFORD					
COUNTY: MIDDLESEX TOWNS OF EAST HADDAM					
COUNTY: NEW LONDON TOWNS OF COLCHESTER					
COUNTY: TOLLAND TOWNS OF ANDOVER, BOLTON, COLUMBIA, COVENTRY, ELLINGTON, HEBRON, SOMERS, STAFFORD, TOLLAND, VERNON WILLINGTON					
MIDDLETOWN, CT PMSA	327	398	468	586	656
COUNTY: MIDDLESEX TOWNS OF CROMWELL, DURHAM, EAST HAMPTON, HADDAM, MIDDLEFIELD, MIDDLETOWN, PORTLAND					
NEW BRITAIN, CT PMSA	346	420	494	618	692
COUNTY: HARTFORD TOWNS OF BERLIN, NEW BRITAIN, PLAINVILLE, SOUTHINGTON					
NEW HAVEN-MERIDEN, CT MSA	418	509	599	749	838
COUNTY: MIDDLESEX TOWNS OF CLINTON, KILLINGWORTH					
COUNTY: NEW HAVEN TOWNS OF BETHANY, BRANFORD, CHESHIRE, EAST HAVEN, GUILFORD, HAMDEN, MADISON, MERIDEN, NEW HAVEN NORTH BRANFO, NORTH HAVEN, ORANGE, WALLINGFORD, WEST HAVEN, WOODBRIDGE					
WATERBURY, CT MSA	336	408	480	600	672
COUNTY: LITCHFIELD TOWNS OF BETHLEHEM, THOMASTON, WATERTOWN, WOODBURY					
COUNTY: NEW HAVEN TOWNS OF MIDDLEBURY, NAUGATUCK, PROSPECT, SOUTHBURY, WATERBURY, WOLCOTT					

NONMETROPOLITAN COUNTIES OR PARTS OF COUNTIES

		0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
LITCHFIELD	COUNTY TOWNS OF CANAAN, COLEBROOK, CORNWALL, GOSHEN HARWINTON, KENT, LITCHFIELD, MORRIS, NORFOLK, NORTH CANAAN, ROXBURY, SALISBURY, SHARON, TORRINGTON, WARREN WASHINGTON, WINCHESTER	357	434	510	638	714
WINDHAM	COUNTY TOWNS OF ASHFORD, BROOKLYN, CHAPLIN, EASTFORD, HAMPTON KILLINGLY, PLAINFIELD, POMFRET, PUTNAM, SCOTLAND, STERLING, THOMPSON, WINDHAM, WOODSTOCK	342	416	489	611	686

STATE: FLORIDA

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
FORT WALTON BEACH, FL MSA	224	272	320	400	448
COUNTY(IES): OKALOOSA					
WEST PALM BEACH-BOCA RATON-DELRAY BEACH, FL MSA	342	409	476	581	640
COUNTY(IES): PALM BEACH					

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
COLUMBIA	199	243	286	357	400

NOTE: THE FMRS FOR UNIT SIZES LARGER THAN FOUR-BEDROOMS ARE CALCULATED BY ADDING 15 PERCENT TO THE FOUR-BEDROOM FMR FOR EACH ADDITIONAL BEDROOM. TO ILLUSTRATE, THE FMR FOR A FIVE-BEDROOM UNIT IS 1.15 TIMES THE FOUR-BEDROOM FMR, AND THE CALCULATION OF THE FMR FOR A SIX-BEDROOM UNIT IS 1.30 TIMES THE FOUR-BEDROOM FMR, ETC.

SCHEDULE B - FAIR MARKET RENTS FOR EXISTING HOUSING (INCLUDING HOUSING FINANCE AND DEVELOPMENT AGENCIES PROGRAM) 060387
FINAL FMRS

STATE: HAWAII

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
KAUAI	389	472	554	694	777

STATE: IDAHO

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
CANYON	259	315	371	463	519
PAYETTE	259	315	371	463	519
ELMORE	259	315	371	463	519
WASHINGTON	259	315	371	463	519

STATE: INDIANA

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
CASS	236	287	338	422	473
MIAMI	236	287	338	422	473

STATE: KENTUCKY

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
CLARKSVILLE-HOPKINSVILLE, TN-KY MSA COUNTY(IES): CHRISTIAN	256	322	403	489	543
OWENSBORO, KY MSA COUNTY(IES): DAVIESS	231	280	330	412	462

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
LAUREL	195	272	342	358	389
NELSON	208	253	297	372	416

STATE: LOUISIANA

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
ALLEN	166	202	238	298	333
WEST CARROLL	165	201	236	295	330

STATE: MAINE

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
PORTLAND, ME MSA COUNTY: CUMBERLAND TOWNS OF CAPE ELIZABE, CUMBERLAND, FALMOUTH, FREEPORT, GORHAM, GRAY, NORTH YARMOU, PORTLAND, RAYMOND SCARBOROUGH, SOUTH PORTLA, STANDISH, WESTBROOK, WINDHAM, YARMOUTH COUNTY: YORK TOWNS OF BUXTON, HOLLIS, OLD ORCHARD	354	451	569	638	766

NONMETROPOLITAN COUNTIES OR PARTS OF COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
YORK COUNTY TOWNS OF ACTON, ALFRED, ARUNDEL, BIDDEFORD, CORNISH, DAYTON KENNEBUNK, KENNEBUNKPOR, LEBANON, LIMERICK, LIMINGTON, LYMAN, NEWFIELD, PARSONSFIELD, SACO, SANFORD, SHAPLEIGH WATERBORO	339	400	504	519	629

STATE: MARYLAND

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
BALTIMORE, MD MSA COUNTY(IES): ANNE ARUNDEL, BALTIMORE, CARROLL, HARFORD, HOWARD, QUEEN ANNES, BALTIMORE	335	407	479	599	671

NOTE: THE FMRS FOR UNIT SIZES LARGER THAN FOUR-BEDROOMS ARE CALCULATED BY ADDING 15 PERCENT TO THE FOUR-BEDROOM FMR FOR EACH ADDITIONAL BEDROOM. TO ILLUSTRATE, THE FMR FOR A FIVE-BEDROOM UNIT IS 1.15 TIMES THE FOUR-BEDROOM FMR, AND THE CALCULATION OF THE FMR FOR A SIX-BEDROOM UNIT IS 1.30 TIMES THE FOUR-BEDROOM FMR, ETC.

SCHEDULE B - FAIR MARKET RENTS FOR EXISTING HOUSING (INCLUDING HOUSING FINANCE AND DEVELOPMENT AGENCIES PROGRAM) 060387
FINAL FMRS

STATE: MASSACHUSETTS

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
BOSTON, MA PMSA	508	617	727	908	1017
COUNTY: BRISTOL TOWNS OF MANSFIELD, NORTON, RAYNHAM					
COUNTY: ESSEX TOWNS OF LYNN, LYNNFIELD, NAHANT, SAUGUS					
COUNTY: MIDDLESEX TOWNS OF ACTON, ARLINGTON, ASHLAND, AYER, BEDFORD, BELMONT, BOXBOROUGH, BURLINGTON, CAMBRIDGE, CARLISLE CONCORD, EVERETT, FRAMINGHAM, GROTON, HOLLISTON, HOPKINTON, HUDSON, LEXINGTON, LINCOLN, LITTLETON, MALDEN MARLBOROUGH, MAYNARD, MEDFORD, MELROSE, NATICK, NEWTON, NORTH READIN, READING, SHERBORN, SHIRLEY SOMERVILLE, STONEHAM, STOW, SUDBURY, TOWNSEND, WAKEFIELD, WALTHAM, WATERTOWN, WAYLAND, WESTON, WILMINGTON WINCHESTER, WOBURN					
COUNTY: NORFOLK TOWNS OF BELLINGHAM, BRAINTREE, BROOKLINE, CANTON, COHASSET, DEDHAM, DOVER, FOXBOROUGH, FRANKLIN, HOLBROOK MEDFIELD, MEDWAY, MILLIS, MILTON, NEEDHAM, NORFOLK, NORWOOD, QUINCY, RANDOLPH, SHARON, STOUGHTON, WALPOLE WELLESLEY, WESTWOOD, WEYMOUTH, WRENTHAM					
COUNTY: PLYMOUTH TOWNS OF CARVER, DUXBURY, HANOVER, HANSON, HINGHAM, HULL, KINGSTON, LAKEVILLE, MARSHFIELD, MIDDLEBOROUG NORWELL, PEMBROKE, PLYMOUTH, PLYMPTON, ROCKLAND, SCITUATE					
COUNTY: SUFFOLK TOWNS OF BOSTON, CHELSEA, REVERE, WINTHROP					
COUNTY: WORCESTER TOWNS OF BERLIN, BOLTON, HARVARD, HOPEDALE, LANCASTER, MENDON, MILFORD, SOUTHBOROUGH, UPTON					
BROCKTON, MA PMSA	379	458	574	695	779
COUNTY: BRISTOL TOWNS OF EASTON					
COUNTY: NORFOLK TOWNS OF AVON					
COUNTY: PLYMOUTH TOWNS OF ABINGTON, BRIDGEWATER, BROCKTON, EAST BRIDGEW, HALIFAX, WEST BRIDGEW, WHITMAN					
FITCHBURG-LEOMINSTER, MA MSA	366	444	523	653	732
COUNTY: MIDDLESEX TOWNS OF ASHBY					
COUNTY: WORCESTER TOWNS OF ASHBURNHAM, FITCHBURG, LEOMINSTER, LUNENBURG, WESTMINSTER					
LAWRENCE-HAVERHILL, MA-NH PMSA	405	493	591	675	751
COUNTY: ESSEX TOWNS OF AMESBURY, ANDOVER, BOXFORD, GEORGETOWN, GROVELAND, HAVERHILL, LAWRENCE, MERRIMAC, METHUEN, NEWBURY NEWBURYPORT, NORTH ANDOVE, SALISBURY, WEST NEWBURY					
LOWELL, MA-NH PMSA	390	474	553	669	763
COUNTY: MIDDLESEX TOWNS OF BILLERICA, CHELMSFORD, DRACUT, DUNSTABLE, LOWELL, PEPPERELL, TEWKSBURY, TYNGSBOROUGH, WESTFORD					
✓ PAWTUCKET-WOONSOCKET-ATTLEBORO, RI-MA PMSA	326	395	465	570	651
COUNTY: BRISTOL TOWNS OF ATTLEBORO, NORTH ATTLEB, REHOBOTH, SEEKONK					
COUNTY: NORFOLK TOWNS OF PLAINVILLE					
COUNTY: WORCESTER TOWNS OF BLACKSTONE, MILLVILLE					
PITTSFIELD, MA MSA	339	410	480	596	672
COUNTY: BERKSHIRE TOWNS OF CHESHIRE, DALTON, HINSDALE, LANESBOROUGH, LEE, LENOX, PITTSFIELD, RICHMOND, STOCKBRIDGE					
SALEM-GLOUCESTER, MA PMSA	452	548	645	806	903
COUNTY: ESSEX TOWNS OF BEVERLY, DANVERS, ESSEX, GLOUCESTER, HAMILTON, IPSWICH, MANCHESTER, MARBLEHEAD, MIDDLETON, PEABODY ROCKPORT, ROWLEY, SALEM, SWAMPSCOTT, TOPSFIELD, WENHAM					
SPRINGFIELD, MA MSA	348	421	490	612	687
COUNTY: HAMPDEN TOWNS OF AGAWAM, CHICOPEE, EAST LONGMEA, HAMPDEN, HOLYOKE, LONGMEADOW, LUDLOW, MONSON, MONTGOMERY, PALMER RUSSELL, SOUTHWICK, SPRINGFIELD, WESTFIELD, WEST SPRINGF, WILBRAHAM					
COUNTY: HAMPSHIRE TOWNS OF BELCHERTOWN, EASTHAMPTON, GRANBY, HUNTINGTON, NORTHAMPTON, SOUTHAMPTON, SOUTH HADLEY					
WORCESTER, MA MSA	351	431	506	634	708
COUNTY: WORCESTER TOWNS OF AUBURN, BARRE, BOYLSTON, BROOKFIELD, CHARLTON, CLINTON, DOUGLAS, DUDLEY, EAST BROOKFI, GRAFTON HOLDEN, LEICESTER, MILLBURY, NORTHBOROUGH, NORTHBRIDGE, NORTH BROOKF, OXFORD, PAXTON, PRINCETON, RUTLAND SHREWSBURY, SPENCER, STERLING, SUTTON, UXBRIDGE, WEBSTER, WESTBOROUGH, WEST BOYLSTO, WORCESTER					

NONMETROPOLITAN COUNTIES OR PARTS OF COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
BERKSHIRE COUNTY TOWNS OF ADAMS, ALFORD, BECKET, CLARKSBURG, EGREMONT FLORIDA, GREAT BARRIN, HANCOCK, MONTEREY, MOUNT WASHIN, NEW ASHFORD, NEW MARLBORO, NORTH ADAMS, OTIS, PERU SANDISFIELD, SAVOY, SHEFFIELD, TYRINGHAM, WASHINGTON, WEST STOCKBR, WILLIAMSTOWN, WINDSOR	298	362	426	532	596
WORCESTER COUNTY TOWNS OF ATHOL, GARDNER, HARDWICK, HUBBARDSTON NEW BRAINTRE, OAKHAM, PETERSHAM, PHILLIPSTON, ROYALSTON, SOUTHBRIDGE, STURBRIDGE, TEMPLETON, WARREN, WEST BROOKFI WINCHENDON	330	389	469	575	639

NOTE: THE FMRS FOR UNIT SIZES LARGER THAN FOUR-BEDROOMS ARE CALCULATED BY ADDING 15 PERCENT TO THE FOUR-BEDROOM FMR FOR EACH ADDITIONAL BEDROOM. TO ILLUSTRATE, THE FMR FOR A FIVE-BEDROOM UNIT IS 1.15 TIMES THE FOUR-BEDROOM FMR, AND THE CALCULATION OF THE FMR FOR A SIX-BEDROOM UNIT IS 1.30 TIMES THE FOUR-BEDROOM FMR, ETC.

SCHEDULE B - FAIR MARKET RENTS FOR EXISTING HOUSING (INCLUDING HOUSING FINANCE AND DEVELOPMENT AGENCIES PROGRAM) 060387
FINAL FMRS

S T A T E: MICHIGAN	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
DETROIT, MI PMSA	341	410	478	596	664
COUNTY(IES): LAPEER, LIVINGSTON, MACOMB, MONROE, OAKLAND, ST CLAIR, WAYNE					
GRAND RAPIDS, MI MSA	248	304	356	444	501
COUNTY(IES): KENT, OTTAWA					

NONMETROPOLITAN COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
CHIPPEWA	217	263	311	388	434
MACKINAC	217	263	311	388	434

DELTA	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
	217	263	311	388	434

STATE: MISSISSIPPI

NONMETROPOLITAN COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
JONES	230	267	301	342	380

S T A T E: NEW HAMPSHIRE	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
LAWRENCE-HAVERHILL, MA-NH PMSA	405	493	591	675	751
COUNTY: ROCKINGHAM TOWNS OF ATKINSON, BRENTWOOD, DANVILLE, DERRY, EAST KINGSTO, HAMPSTEAD, KINGSTON, NEWTON, PLAISTOW SALEM, SANDOWN, SEABROOK, WINDHAM					
LOWELL, MA-NH PMSA	390	474	553	669	763
COUNTY: HILLSBOROUGH TOWNS OF PELHAM					

NONMETROPOLITAN COUNTIES OR PARTS OF COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
BELKNAP COUNTY	317	382	445	551	617
CHESHIRE COUNTY	355	430	507	633	700
HILLSBOROUGH COUNTY TOWNS OF ANTRIM, BENNINGTON, DEERING, FRANCESTOWN GREENFIELD, GREENVILLE, HANCOCK, HILLSBOROUGH, LYNDEBOROUGH, MASON, NEW BOSTON, NEW IPSWICH, PETERBOROUGH, SHARON TEMPLE, WEARE, WINDSOR	400	486	571	714	790
MERRIMACK COUNTY TOWNS OF ANDOVER, BOSCAWEN, BOW, BRADFORD, CANTERBURY CHICHESTER, CONCORD, DANBURY, DUNBARTON, EPSOM, FRANKLIN, HENNIKER, HILL, HOPKINTON, LOUDON, NEWBURY, NEW LONDON NORTHFIELD, PEMBROKE, PITTSFIELD, SALISBURY, SUTTON, WARNER, WEBSTER, WILMOT	391	474	558	698	781
ROCKINGHAM COUNTY TOWNS OF CHESTER, DEERFIELD, EPPING, FREMONT HAMPTON FALL, KENSINGTON, NORTHWOOD, NOTTINGHAM, RAYMOND, SOUTH HAMPTO	400	486	571	714	790
STRAFFORD COUNTY TOWNS OF MIDDLETON, NEW DURHAM, STRAFFORD	364	433	509	637	703

S T A T E: NEW JERSEY	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
ALLENTOWN-BETHLEHEM, PA-NJ MSA	290	352	411	518	577
COUNTY(IES): WARREN					
JERSEY CITY, NJ PMSA	330	400	471	588	659
COUNTY(IES): HUDSON					
MIDDLESEX-SOMERSET-HUNTERDON, NJ PMSA	442	537	631	790	884
COUNTY(IES): HUNTERDON, MIDDLESEX, SOMERSET					
MONMOUTH-OCEAN, NJ PMSA	397	481	567	709	794
COUNTY(IES): MONMOUTH, OCEAN					
NEWARK, NJ PMSA	371	450	530	662	742
COUNTY(IES): ESSEX, MORRIS, SUSSEX, UNION					
PHILADELPHIA, PA-NJ PMSA	334	404	474	592	662
COUNTY(IES): BURLINGTON, CAMDEN, GLOUCESTER					
TRENTON, NJ PMSA	419	508	598	748	837
COUNTY(IES): MERCER					

S T A T E: NEW YORK	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
BUFFALO, NY PMSA	274	332	391	489	547
COUNTY(IES): ERIE					
NEW YORK, NY PMSA	353	428	503	631	706
COUNTY(IES): BRONX, KINGS, NEW YORK, PUTNAM, QUEENS, RICHMOND, ROCKLAND, WESTCHESTER					
NIAGARA FALLS, NY PMSA	263	319	375	469	525
COUNTY(IES): NIAGARA					
ORANGE COUNTY, NY PMSA	350	425	500	625	700
COUNTY(IES): ORANGE					
POUGHKEEPSIE, NY MSA	402	488	575	718	805
COUNTY(IES): DUTCHESS					
SYRACUSE, NY MSA	278	332	389	486	545
COUNTY(IES): MADISON, ONONDAGA, OSWEGO					

NONMETROPOLITAN COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
SCHOHARIE	264	310	365	455	510

SULLIVAN	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
	274	335	394	481	550

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SCHEDULE B - FAIR MARKET RENTS FOR EXISTING HOUSING (INCLUDING HOUSING FINANCE AND DEVELOPMENT AGENCIES PROGRAM) 060387
FINAL FMRS

STATE: NORTH CAROLINA

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS		0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
CHATHAM	297	361	425	531	594	HAYWOOD	228	274	323	404	453
LENOIR	233	283	333	417	468	MACON	244	297	350	438	491

STATE: OHIO

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
DAYTON-SPRINGFIELD, OH MSA					
COUNTY(IES): CLARK, GREENE, MIAMI, MONTGOMERY	258	314	366	459	510

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS		0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
MUSKINGUM	236	286	337	421	471						

STATE: OKLAHOMA

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS		0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
GRADY	200	243	286	357	400	STEPHENS	200	243	286	357	400

STATE: OREGON

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
PORTLAND, OR PMSA					
COUNTY(IES): CLACKAMAS, MULTNOMAH, WASHINGTON, YAMHILL	296	361	433	560	620

STATE: PENNSYLVANIA

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
ALLENTOWN-BETHLEHEM, PA-NJ MSA					
COUNTY(IES): CARBON, LEHIGH, NORTHAMPTON	290	352	411	518	577
PHILADELPHIA, PA-NJ PMSA					
COUNTY(IES): BUCKS, CHESTER, DELAWARE, MONTGOMERY, PHILADELPHIA	334	404	474	592	662
SCRANTON--WILKES-BARRE, PA MSA					
COUNTY(IES): COLUMBIA, LACKAWANNA, LUZERNE, MONROE, WYOMING	243	299	348	429	486

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS		0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
BRADFORD	239	291	342	427	478	PIKE	277	324	400	496	540
TIOGA	239	291	342	427	478	WAYNE	266	324	381	477	534

STATE: RHODE ISLAND

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
PAWTUCKET-WOONSOCKET-ATTLEBORO, RI-MA PMSA	326	395	465	570	651
COUNTY: PROVIDENCE TOWNS OF BURRILLVILLE, CENTRAL FALL, CUMBERLAND, LINCOLN, NORTH SMITHF, PAWTUCKET, SMITHFIELD WOONSOCKET					
PROVIDENCE, RI PMSA	345	411	482	604	673
COUNTY: BRISTOL TOWNS OF BARRINGTON, BRISTOL, WARREN					
COUNTY: KENT TOWNS OF COVENTRY, EAST GREENWI, WARWICK, WEST WARWICK					
COUNTY: NEWPORT TOWNS OF JAMESTOWN					
COUNTY: PROVIDENCE TOWNS OF CRANSTON, EAST PROVIDE, FOSTER, GLOCESTER, JOHNSTON, NORTH PROVID, PROVIDENCE, SCITUATE					
COUNTY: WASHINGTON TOWNS OF EXETER, NARRAGANSETT, NORTH KINGST, RICHMOND, SOUTH KINGST					

NONMETROPOLITAN COUNTIES OR PARTS OF COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
NEWPORT COUNTY TOWNS OF MIDDLETOWN, NEWPORT, PORTSMOUTH	406	493	580	725	812
WASHINGTON COUNTY TOWNS OF CHARLESTOWN, NEW SHOREHAM	311	378	445	556	622

STATE: SOUTH DAKOTA

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS		0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS

NONMETROPOLITAN COUNTIES

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS		0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
CLARK	205	246	294	364	404						

STATE: TENNESSEE

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
CLARKSVILLE-HOPKINSVILLE, TN-KY MSA					
COUNTY(IES): MONTGOMERY	256	322	403	489	543

NOTE: THE FMRS FOR UNIT SIZES LARGER THAN FOUR-BEDROOMS ARE CALCULATED BY ADDING 15 PERCENT TO THE FOUR-BEDROOM FMR FOR EACH ADDITIONAL BEDROOM. TO ILLUSTRATE, THE FMR FOR A FIVE-BEDROOM UNIT IS 1.15 TIMES THE FOUR-BEDROOM FMR, AND THE CALCULATION OF THE FMR FOR A SIX-BEDROOM UNIT IS 1.30 TIMES THE FOUR-BEDROOM FMR, ETC.

SCHEDULE B - FAIR MARKET RENTS FOR EXISTING HOUSING (INCLUDING HOUSING FINANCE AND DEVELOPMENT AGENCIES PROGRAM) 060387
FINAL FMRS

STATE: TEXAS

NONMETROPOLITAN COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
HALE	214	261	308	381	425

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
KARNES	187	227	267	334	374

STATE: VERMONT

NONMETROPOLITAN COUNTIES OR PARTS OF COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
RUTLAND COUNTY	288	359✓	412	516	577

STATE: VIRGINIA

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
NORFOLK-VIRGINIA BEACH-NEWPORT NEWS, VA MSA COUNTY(IES): GLOUCESTER, JAMES CITY, YORK, CHESAPEAKE, HAMPTON, NEWPORT NEWS, NORFOLK, POQUOSON, PORTSMOUTH, SUFFOLK VIRGINIA BEA, WILLIAMSBURG	308	369	425	523	585
RICHMOND-PETERSBURG, VA MSA COUNTY(IES): CHARLES CITY, CHESTERFIELD, DINWIDDIE, GOOCHLAND, HANOVER, HENRICO, NEW KENT, POWHATAN, PRINCEGEORGE COLONIAL HEI, HOPEWELL, PETERSBURG, RICHMOND	294	353	413	517	579

NONMETROPOLITAN COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
CARROLL	217	263	310	388	434
FRANKLIN	222	270	318	397	445
ISLE OFWIGHT	208	253	294	367	403
SOUTHAMPTON	208	253	294	367	403
GALAX	217	263	310	388	434

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
FAUQUIER	268	325	383	479	536
HENRY	258	313	368	460	516
LOUISA	272	328	383	479	536
BEDFORD	222	270	318	397	445

STATE: WASHINGTON

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
VANCOUVER, WA PMSA COUNTY(IES): CLARK	253	308	384	500	560

STATE: WEST VIRGINIA

NONMETROPOLITAN COUNTIES	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
HARRISON	276	323	374	486	536

STATE: WISCONSIN

	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4 BEDROOMS
MADISON, WI MSA COUNTY(IES): DANE	300	366	436	529	610
MILWAUKEE, WI PMSA COUNTY(IES): MILWAUKEE, OZAUKEE, WASHINGTON, WAUKESHA	302	366	431	538	603

NOTE: THE FMRS FOR UNIT SIZES LARGER THAN FOUR-BEDROOMS ARE CALCULATED BY ADDING 15 PERCENT TO THE FOUR-BEDROOM FMR FOR EACH ADDITIONAL BEDROOM. TO ILLUSTRATE, THE FMR FOR A FIVE-BEDROOM UNIT IS 1.15 TIMES THE FOUR-BEDROOM FMR, AND THE CALCULATION OF THE FMR FOR A SIX-BEDROOM UNIT IS 1.30 TIMES THE FOUR-BEDROOM FMR, ETC.

BILLING CODE 4210-27-C

SCHEDULE D—FAIR MARKET RENTS FOR MANUFACTURED HOME SPACES (SECTION 8 EXISTING HOUSING PROGRAM) 051887

	Single wide space	Double wide space
State: California:		
Oxnard-Ventura, CA PMSA, County(ies): Ventura	198	298
State: Colorado:		
Boulder-Longmont, CO PMSA, County(ies): Boulder	220	240
Denver, CO PMSA, County(ies): Adams, Arapahoe, Denver, Douglas, Jefferson	250	270
State: New York:		
Albany-Schnectady-Troy, NY MSA, County(ies): Albany, Greene, Montgomery, Rensselaer, Saratoga, Schnectady	148	148
State: Oregon:		
Portland, OR PMSA, County(ies): Clackamas, Multnomah, Washington, Yamhill	174	193

[FR Doc. 87-14761 Filed 6-29-87; 8:45 am]

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federal register

Tuesday
June 30, 1987

Part V

Department of Transportation

Research and Special Programs Administration

Triborough Bridge and Tunnel Authority

Regulations Governing Transportation of Radioactive Materials and Explosives; Notice

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Inconsistency Ruling No. IR-20; Docket No. IRA-37]

Triborough Bridge and Tunnel Authority Regulations Governing Transportation of Radioactive Materials and Explosives

Applicant: Citizens Against Nuclear Trucking.

Regulations Affected: §§ 1074.3, 1074.6 and 1075.19 of the Triborough Bridge and Tunnel Authority (TBTA) Regulations governing the shipment and transportation of certain radioactive materials and explosives over or through seven bridges and two tunnels regulated by the TBTA.

Applicable Federal Requirements: Hazardous Materials Transportation Act (HMTA) (Pub. L. 93–633, 49 App. U.S.C. 1801 *et seq.*) and the Hazardous Materials Regulations (HMR) (49 CFR Parts 170–179) issued thereunder.

Modes Affected: Highway

Issue Date: June 23, 1987

Ruling: Sections 1074.3 and 1075.19, as well as paragraph (a) and the "permission to use" phrase in paragraph (b) of § 1074.6, of the Triborough Bridge and Tunnel Authority Regulations are inconsistent with the HMTA and the HMR and, therefore, preempted under 49 App. U.S.C. 1811(a). Paragraphs (c), (d), (e), and the "traffic permitting" phrase in paragraph (b) of § 1074.6, as construed in this ruling, are consistent with the HMTA and the HMR. The record is insufficient to make a determination concerning the consistency of the weekday time restrictions in paragraph (b) of § 1074.6.

Summary: This inconsistency ruling is the opinion of the Office of Hazardous Materials Transportation (OHMT) concerning whether §§ 1074.3, 1074.6 and 1075.19 of the Regulations of the Triborough Bridge and Tunnel Authority are inconsistent with the HMTA and regulations issued thereunder and thus preempted by section 112(a) of the HMTA. This ruling was applied for and is issued under the procedures set forth at 49 CFR 107.201–107.209.

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I. Background

A. Chronology

On July 21, 1986, Citizens Against Nuclear Trucking (CANT) filed an application for an administrative ruling seeking a determination that §§ 1074.3 and 1075.19 of the regulations of TBTA regulating the transport of certain radioactive materials and explosives are inconsistent with the HMTA and the HMR. These TBTA rules regulate carriage of certain radioactive materials and explosives over the Triborough Bridge, Bronx-Whitestone Bridge, Throgs Neck Bridge, Henry Hudson Bridge, Marine Parkway Gil Hodges Memorial Bridge, Cross Bay Veterans Memorial Bridge, and the Verrazano-Narrows Bridge and through the Queens Midtown Tunnel and the Brooklyn-Battery Tunnel. They prohibit certain transport unless U.S. Department of Transportation (DOT) requirements have been met and prior permission has been obtained from TBTA. Section 1074.3 cross-references § 1074.6, which contains related requirements.

On October 20, 1986, the Office of Hazardous Materials Transportation (OHMT) published a Public Notice and Invitation to Comment on CANT's application. [51 FR 37248]. A correction was published on November 5, 1986 [51 FR 40294]. No comments were received in response to the Public Notice and Invitation to Comment.

B. Preemption under the HMTA

The HMTA at section 112(a) (49 App. U.S.C. 1811(a)) preempts ". . . any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA], or in a regulation issued under [the HMTA]." This express preemption provision makes it evident that Congress did not intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any state or local action. The HMTA preempts only those state and local requirements that are "inconsistent."

Although advisory in nature, inconsistency rulings issued by the Department under 49 CFR Part 107, Subpart C provide an alternative to litigation for a determination of the relationship between Federal requirements and those of a state or political subdivision thereof. If a state or political subdivison requirement is found to be inconsistent, the state or local government then may apply to the Secretary of Transportation for a determination as to whether preemption will be waived (49 App. U.S.C. 1811(b); 49 CFR 107.215–107.225).

Since these proceedings are conducted pursuant to the HMTA, only the question of statutory preemption under the HMTA will be considered. A Federal court might find a non-Federal requirement statutorily preempted under another statute or preempted by the Commerce Clause of the U.S. Constitution because of an undue burden on interstate commerce. However, the Department of Transportation does not make such determinations in the context of an inconsistency ruling.

OHMT has incorporated into its procedures (49 CFR 107.209(c)) the following case law criteria for determining whether a state or local requirement is consistent:

(1) Whether compliance with both the non-Federal requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the non-Federal requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

The first criterion, commonly called the "dual compliance" test, concerns those non-Federal requirements which are irreconcilable with Federal requirements; that is, compliance with the non-Federal requirement causes the Federal requirement to be violated, or *vice versa*. The second criterion, the "obstacle" test, requires an analysis of the non-Federal requriement in light of the requirements of the HMTA and the HMR, as well as the purposes and objectives of Congress in enacting the HMTA and the manner and extent to which those purposes and objectives have been carried out through the OHMT's regulatory program.

Certain areas of transportation safety do demand a strong, predominant Federal role. In the HMTA's Declaration of Policy Section 102 and in the Senate Commerce Committee language reporting out what became Section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation. Congress inserted the preemption language in Section 112(a) "in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation" S. Rep. 1192, 93rd Cong., 2d Sess., 37–38 (1974). Through its enactment of the HMTA, Congress gave the Department the authority to promulgate uniform national standards. While the HMTA did not totally preclude state or local action in this area, Congress apparently

intended, to the extent possible, to make such state or local action unnecessary. The comprehensiveness of the HMR severely restricts the scope of historically permissible state or local activity. The nature, necessity and number of hazardous materials shipments make uniform standards extremely important.

There is a longstanding Federal-state relationship in the field of highway transportation safety which recognizes the legitimacy of state action taken to protect persons and property within the state, even where such action impacts upon interstate commerce. Despite the dominant role that Congress intended for the standards of the Department, there are certain aspects of hazardous materials tansportation that are not amenable to exclusive nationwide regulation. One example is traffic control. Although the Federal Government can regulate in order to establish certain national standards promoting the safe, smooth flow of highway traffic, maintaining that flow in the face of short-term disruptions is necessarily a predominantly local reasponsibility. Another aspect of hazardous materials transportation that is not amenable to effective nationwide regulation is the problem of safety hazards which are peculiar to a local area. To the extent that nationwide regulations do not adequately address a uniquely local safety hazard, state or local governments can regulate narrowly for the purpose of eliminating or reducing the hazard.

It is important to note that, even when there is an unquestionably unique local safety hazard, a State or local government may not resolve the problem by effectively exporting it to another jurisdiction. *(Kassel v. Consolidated Freightways,* 450 U.S. 662 (1981)). For example, a previous inconsistency ruling dealing with a hazardous materials routing rule issued by the City of Boston (IR–3, 46 FR 18918, March 26, 1981), stated that consistency with the HMTA requires a state or local government to "act through a process that adequately weighs the full consenquences of its routing choices and ensures the safety of citizens in other jurisdictions that will be affected by its rules." (46 FR 18922).

II. The TBTA Regulations

A. Summary

Section 1074.3 of the TBTA Regulations prohibits most shipments of class A or B explosives or radioactive materials over seven named bridges. It allows shipments of radioactive pharmaceuticals over three of the bridges under certain conditions.

Section 1074.6 applies only to transportation of explosives over the Throgs Neck Bridge, transportation which also is regulated under § 1074.3. Both sections contain prohibitions on the transportation of most class A and B explosives over that Bridge, the latter section cross-references the former, both were reprinted in Appendix A to the public notice on this matter, and both must be considered in order to understand under what circumstances class A or B explosives maybe transported across the Throgs Neck Bridge. Therefore, the consistency of both §§ 1074.6 and 1074.7 will be discussed in this ruling.

Finally, § 1075.19 prohibits most shipments of radioactive materials through the Queens Midtown Tunnel or the Brooklyn-Battery Tunnel or over the Verrazano-Narrows Bridge Lower Level. It provides exceptions for small quantities of radioactive materials under specified limited conditions.

CANT contends that its members live and work near a highway affected by the cited provisions and thus are affected by those provisions. They contend that TBTA's "ban" on radioactive shipments across its bridges caused a truck carrying low-level nuclear waste to be diverted into their neighborhood, where it collided with a rail bridge over a city street.

CANT asserts that the TBTA regulations are inconsistent for two general reasons:

(1) They place routing restrictions on shipments of materials that are exempted from such requirements under Federal rules, and

(2) They force use of a highly circuitous route that passes through more densely populated areas on local streets when safer interstate highways are available.

The applicant contends that these regulations are inconsistent with the Federal regulations because they significantly restrict movement by public highway and apply because of the hazardous nature of the cargo. Thus, it asserts, they constitute a prohibited local routing rule.

Also, CANT states that these regulations are inconsistent with 49 CFR 177.825(a) because they block use of a route that minimizes radiological risk: To avoid the bridges controlled by TBTA, the driver must use New York City bridges that pass through the most densely populated and active areas of the City along local roads not designed to interstate highway standards.

Finally, CANT contends that these regulations fail both the "obstacle" and "dual compliance" tests. They assert that these regulations are an obstacle to choosing a route that minimizes risk and that simultaneous compliance with them and with 49 CFR 177.825(a) is impossible.

B. Regulation of Explosive Materials Transportation

Section 1074.3, entitled "Explosives—radioactive materials," prohibits transportation of most class A or B explosives (all except special fireworks in quantities of 10 pounds or less per vehicle) over seven designated bridges, including the Throgs Neck Bridge. That section, however, begins with the words, "Except as otherwise set forth in § 1074.6 of this Part, ..." Section 1074.6 is entitled "Transportation of explosives over the Throgs Neck Bridge," and its provisions thus appear to govern transportation over that Bridge.

Section 1074.6 prohibits transportation across the Throgs Neck Bridge of the same quantities of class A or B explosives as described above for § 1074.3 except if the following five conditions are met:

(a) Prior permission must be granted by the facility supervisor of the bridge, or his authorized representative, at least two hours before intended travel over the bridge.

(b) If permission to use the facility is granted by the facility supervisor or his representative, passage may be made during the following hours:

Monday through Friday—10:00 a.m. to 3 p.m., 7 p.m. to 6 a.m.

Saturdays, Sundays and holidays—traffic permitting.

(c) Vehicles transporting class A or B explosives, their contents and shipping documents, shall be subject to inspection by bridge personnel prior to entering the facility.

(d) Operators of vehicles transporting class A or B explosives must comply with all lawful orders, instructions and directives of authorized bridge personnel.

(e) Vehicles transporting class A or B explosives, whether halted or in motion, must remain at least 300 feet behind any vehicle traveling in the same direction while crossing the bridge.

This provision is not a total ban or prohibition on the transport of class A or B explosives; if it were, it would be inconsistent *per se.* IR–3, *supra;* IR–3(A), 47 FR 18457 (Apr. 29, 1982); IR–10, 49 FR 46645 (Nov. 27, 1984); IR–16, 50 FR 20872 (May 20, 1985). Instead it is a permit or approval system; such a system is not *per se* inconsistent, but its consistency depends upon the consistency of the requirements that must be complied with in order to obtain approval to

transport. IR–2, 44 FR 75566 (Dec. 20, 1979); IR–3, *supra*. Although hazardous materials transportation approval requirements identical to Federal requirements are consistent (IR–14, 49 FR 46656 (Nov. 27, 1984); IR–15, 49 FR 46660 (Nov. 27, 1984)), such transportation approval requirements different from or additional to Federal requirements are inconsistent. IR–8, FR 46637 (Nov. 27, 1984); IR–8(A), 52 FR 13000 (Apr. 20, 1987); IR–10, *supra*; IR–11, 49 FR 46647 (Nov. 27, 1984); IR–12, 49 FR 46650 (Nov. 27, 1984); IR–13, 49 FR 46653 (Nov. 27, 1984); IR–15, supra; IR–15(A), 52 FR 13062 (Apr. 20, 1987).

Because permission to transport explosives across the Throgs Neck Bridge is made contingent upon compliance with each of five conditions, the inconsistency of any of them would render the entire approval process of § 1074.6 inconsistent unless any inconsistent provision is severed from the process. Thus, in order to make a consistency determination concerning that section, it is necessary to evaluate the consistency of each of the five stipulated conditions.

Paragraph (a) requires permission from the bridge's facility supervision (or his authorized representative) at least two hours before intended travel over the bridge. Because no standards are set forth defining when permission will or will not be granted, the facility supervisor (or authorized representative) has the type of unfettered discretion to prohibit transportation which has been found previously to be inconsistent with the HMTA and the HMR. IR–8(A), *supra* at 13003, 13006; IR–15(A), *supra* at 13063; IR–18, 52 FR 200 at 203 (Jan. 2, 1987).

Another problem with Paragraph (a) is its time requirement. Requiring approval at least two hours before the intended transportation across the Bridge is inconsistent with a primary objective of the HMTA and the HMR: expediting shipments of hazardous materials in order to reduce time in transit and consequent exposure to accidents. "The manifest purpose of the HMTA and the Hazardous Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation." IR–2, *supra*, at 75571." The mere threat of delay may redirect commercial hazardous materials traffic into other jurisdictions that may not be aware of or prepared for a sudden, possibly permanent, change in traffic patterns." IR–3, *supra* at 18921. "Since safety risks are 'inherent in the transportation of hazardous materials in commerce' [49 U.S.C. 1801], an important aspect of transportation safety is that transit time be minimized. This precept has been incorporated in the HMR at 49 CFR 177.853, which directs highway shipments to proceed without unnecessary delay, and at 49 CFR 174.14, which directs rail shipments to be expedited within a stated time frame." IR–6, 49 FR 760 at 765 (Jan. 6, 1983); see also IR–16, *supra*, at 20879.

Since Paragraph (a) requires the *approval* of the transportation at least two hours before the transportation, additional delay beyond two hours would result between the time approval is requested and the time approval is granted. It is difficult to judge the length of the delay because the regulation does not explain what information, if any, may be requested or required in order to obtain the necessary approval. There is no evidence in the record that this notice requirement serves any specific purpose (e.g., providing adequate time for the TBTA to provide escorts). Thus, paragraph (a) threatens the possibility of significant delay in transportation and, as indicated in IR–3, *supra*, may be a cause of the type of diversions of traffic complained of by the applicants.

In summary, paragraph (a) contains a broadly discretionary and delay-inducing approval process which is inconsistent with the HMTA and the HMR.

Paragraph (b) of § 1074.6 provides that, if permission is granted to cross the bridge, passage may only be made on weekdays between 10 a.m. and 3 p.m. and between 7 p.m. and 6 a.m., and on Saturdays, Sundays and holidays—"traffic permitting." Because paragraph (a) is inconsistent, the language in Paragraph (b) referring back to the approval process in (a) also is inconsistent.

The time restrictions in paragraph (b) require separate analysis. In IR–3, *supra* a city prohibition of hazardous materials transportation in a downtown area between 6 a.m. and 8 p.m. on weekdays was found consistent only insofar as it applied to in-city pickups and deliveries. Time restrictions going beyond those on in-city pickups and deliveries, however, must have an adequate safety justification and be appropriately coordinated with adjoining affected jurisdictions. IR–3(A), *supra*. A statewide prohibition of hazardous materials transportation from 7–9 a.m. and 4–6 p.m. on weekdays was found inconsistent. IR–2, *supra; National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509 (R.I. 1982), aff'd 698 F.2d 559 (1st Cir. 1983). However, a citywide prohibition of such transportation from 6–10 a.m. and 3–7 p.m. was found consistent. *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2nd Cir. 1982), affirming *City of New York v. Ritter Transportation Co.*, 515 F. Supp. 663 (S.D. N.Y. 1981).

In the case at hand, there is no information concerning any safety justification for these time restrictions, any coordination of them with adjoining affected jurisdictions, or concerning any delays or redirection of hazardous materials shipments resulting therefrom. In the absence of such information, it would be inappropriate to render a decision on the consistency of these time restrictions. Thus, no opinion is expressed concerning the consistency of the time restrictions in paragraph (b).

Paragraph (b) allows weekend and holiday transportation of class A and B explosives—"traffic permitting." So long as that pharse represents a criterion that is reasonably administered to restrict or suspend operations only when road, weather, traffic or other hazardous conditions or circumstances warrant, it is consistent with the HMTA and the HMR. IR–3, *supra;* IR–15(A), *supra; American Trucking Assns. v. City of Boston*, C.A. 81–628–MA (D. Mass. 1981); *National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509 (D. R.I. 1982), *aff'd* 698 F.2d 559 (1st Cir. 1983). Local traffic controls are presumed to be valid. In the absence in the record of any evidence of unreasonable administration, paragraph (b)'s "traffic permitting" limitation on weekend and holiday transportation is consistent with the HMTA and the HMR.

Paragraph (c) of § 1074.6 provides that vehicles transporting class A or B explosives, as well as their contents and shipping documents, are subject to inspection by bridge personnel prior to entering the bridge. Inspection requirements imposed to assure compliance with Federal or consistent requirements are themselves consistent. IR–2, *supra* at 75572; IR–8, *supra* at 46644; IR–15, *supra* at 46666; IR–17, 57 FR 20925 at 20930 (June 9, 1986). RSPA encourages state and local enforcement of, and inspections for compliance with, Federal and consistent hazardous materials transportation requirements. Therefore, in the absence of any evidence that the TBTA inspections are for compliance with inconsistent requirements, paragraph (c) is consistent with the HMTA and the HMR.

Similarly, paragraph (d) of § 1074.6 facilitates safe transportation by requiring operators of vehicles transporting class A or B explosives to comply with all lawful orders, instructions and directives of authorized bridge personnel. Because such orders,

etc. would not be "lawful" if inconsistent with the HMTA or the HMR, this provision requires compliance only with orders (regulations), instructions and directives issued by the Federal Government or those issued by the TBTA that are consistent with the HMTA and the HMR. As such, this provision is consistent with the HMTA and the HMR.

Finally, paragraph (e) of § 104.6 requires vehicles transporting class A or B explosives, whether halted or in motion, to remain at least 300 feet behind any vehicle traveling in the same direction while crossing the bridge. This requirement is more restrictive in some respects than a City of Boston distance restriction found consistent in IR–3, *supra*:

> 7.1.2 Except when overtaking or passing in opposite directions of travel, all vehicles transporting hazardous materials shall maintain a minimum distance of at least 300 feet from other vehicles carrying hazardous materials except where the conditions of traffic make it impractical to do so. This requirement shall apply whether such vehicles are moving or parked except when at a destination or point of origin.

Unlike the Boston rule, the TBTA requirement makes no exception for overtaking situations or for situations in which traffic conditions make it impractical to comply. However, TBTA's paragraph (e) requires a 300-feet separation distance only "behind" any vehicle traveling in the same direction. Because a vehicle driver would have no control over the distance that vehicle is from vehicles in adjoining lanes (in which, for example, vehicles could pass that vehicle and remain slightly ahead of it), it is assumed that paragraph (e) applies only to traffic ahead of, and in the same lane as, the vehicle carrying class A or B explosives. Therefore, construed as applying within a single lane of traffic, paragraph (e) does not create any obvious hazards, does not cause unreasonable delays, and thus is consistent with the HMTA and the HMR.

In summary, the consistency of each of the paragraphs of § 1074.6 is as follows:

(a) Inconsistent
(b) "Permission to use" language—Inconsistent
Weekday time restrictions—No opinion
"Traffic permitting" restriction—Consistent
(c) Consistent
(d) As construed, consistent
(e) As construed, consistent.

Therefore, based on the limited record in this matter and construed as indicated, the § 1074.6 class A or B explosives approval process for the Throgs Neck Bridge may, consistent with the HMTA and the HMR, be implemented by the TBTA, with the exception of paragraph (a) and the "permission to use" portion of paragraph (b)—and with the possible exception of the weekday time restrictions, concerning which no opinion is rendered.

Except for the foregoing restricted passage over the Throgs Neck Bridge, § 1074.3(a) of the TBTA's regulations prohibits the transportation of a single vehicle of any class A or B explosives (except special fireworks, including railway or track torpedoes, in quantities of ten pounds or less) across the Triborough Bridge, Bronx-Whitestone Bridge, Henry Hudson Bridge, Marine Parkway Gil Hodges Memorial Bridge, Cross Bay Veterans Memorial Bridge and the Verrazano-Narrows Bridge Upper Level.

State or local prohibitions upon the transportation of hazardous materials generally are inconsistent with the HMTA and the HMR. State or local governments may not resolve problems related to such transportation by exporting those problems to other jurisdictions. *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981).

The inconsistency of local bans was discussed in the Decision on Appeal of IR–3, *supra:*

> The power to ban, as contrasted with the power to channel and guide the flow of hazardous materials highway traffic, in our view, is exclusively Federal. The nature of the subject matter and the structure and purpose of the HMR and the HMTA support this view. Hazardous materials, packaged and handled as required by the HMR, are safe for movement in interstate commerce. The HMR assume that they move freely and expeditiously under levels of local regulation appropriate to local highway traffic flow management considerations and emergency response planning and management. A unilateral local ban is a negation, rather than an exercise, of local responsibility, since it isolates the local jurisdiction from the risks associated with the commercial life of the nation.
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> 47 FR 18457.

In this instance, the transportation of class A and B explosives is thoroughly regulated by the HMR under the authority of the HMTA. The HMR prohibit the transportation of ten specific explosives, 49 CFR 173.51; contain detailed requirements relating to the packaging and handling of Class A explosives, §§ 173.3–173.87; and control the transportation of Class B explosives, §§ 173.88–173.95.

Therefore, transportation of Class A or B explosives in accordance with those regulations is presumptively safe and may not be prohibited by state or local governments. Thus, the ban in the TBTA's § 1074.3(a) on the transportation of class A or B explosives is inconsistent with the HMTA and the HMR and, therefore, preempted.

C. Regulation of Radioactive Materials Transportation

Section 1074.3(b) applies to the same six bridges as § 1074.3(a) and also to the Throgs Neck Bridge. Section 1074.3(b) prohibits transportation across those bridges of any radioactive materials, "including but not limited to radionuclides, nuclear fissionable material, reactor fuel rods, irradiated fuel rods, and radioactive ores, residues and wastes," with three limited exceptions.

Those three exceptions are as follows:

> (1) When the type and quantity of radioactive material is such that it is exempt from all U.S.D.O.T. prescribed packaging, marking, labeling and placarding;
>
> (2) When radioactive materials are a component part of manufactured articles other than liquids, such as instrument or clock dials or electronic tubes or apparatus, which are exempt from all U.S.D.O.T. specification packaging, marking, labeling and placarding; and
>
> (3) With respect to the Verrazano-Narrows Bridge, upper level only, the Bronx-Whitestone Bridge and the Triborough Bridge, when radioactive pharmaceuticals are shipped in compliance with the packaging, marking, labeling, placarding and all other regulations issued by the United States Department of Transportation, and when prior permission has been granted by the facility supervisor or his authorized representative at least two hours before he intended travel over the bridge.

Because the first two exceptions allow transportation of radioactive materials which are exempt from DOT requirements, they are consistent with the HMTA and the HMR. To the extent that the third exception allows transportation of radioactive pharmaceuticals across three bridges when they are in compliance with DOT regulations, it is similarly consistent.

However, the third exception contains the same type of inconsistent provision as § 1074.6(a), which governs transportation of class A or B explosives over the Throgs Neck Bridge and was discussed above. Because no standards are provided defining when permission will or will not be granted, the facility supervisor or authorized representative has the type of unfettered discretion to prohibit transportation which is inconsistent with the HMTA and the

HMR. IR–8(A), *supra* at 13003, 13006; IR–15(A), *supra* at 13063; IR–18, *supra* at 203. Similarly inconsistent is the time-consuming and delay-inducing requirement of at least two hours' advance approval for transportation. As indicated in the discussion above of the similar language in § 1074.6(a), this provision involves unnecessary delay, increases safety risks, and is inconsistent with the HMTA and the HMR, particularly § 177.853 thereof. IR–2, IR–3, IR–6, IR–16, all *supra*.

The larger problems here, however, are that exception (3) impliedly bans the transportation of radioactive pharmaceuticals over the Throgs Neck Bridge, the Henry Hudson Bridge, the Marine Parkway Gil Hodges Memorial Bridge, and that § 1074.3 in its entirety bans the transportation of all DOT-regulated radioactive materials except radioactive pharmaceuticals across seven delineated bridges. Since these bans explicitly do not apply to certain radioactive materials exempt from DOT requirements, it is clear that they *do* apply to radioactive materials regulated by DOT.

Combined with the companion TBTA prohibitions on transportation of radioactive materials in § 1075.19, discussed *infra*, these § 1074.3(b) limitations might be evaluated either as prohibitions of radioactive materials transportation or as *de facto* routing requirements which effectively divert that transportation to other bridges and tunnels in the New York City area. Whether viewed as bans on transportation or as *de facto* routing requirements, these provisions are inconsistent with the HMTA and the HMR.

The TBTA effectively bans the transportation of most radioactive materials across seven bridges and two tunnels under its jurisdiction. Such a ban is similar to a unilateral local ban, which was described in IR–3(A), *supra* at 18457 as "a negation, rather than an exercise, of local responsibility, since it isolates the local jurisdiction from the risks associated with the commercial life of the nation." Political subdivisions, like the TBTA, may not resolve problems associated with radioactive materials transportation by effectively exporting them to other political subdivisions. Preamble to IR–7 through IR–15 (the "Nine-Pack"), 46 FR 46632 at 46633 (Nov. 27, 1984), citing *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981) and IR–3, *supra*. Therefore, prohibitions of radioactive materials shipments, including those of spent nuclear fuel, are inconsistent with the HMTA and HMR. *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F.2d 1103 (3rd Cir. 1985); IR–16, *supra;* IR–18, *supra;* see 49 CFR Part 177, Appendix A. TBTA's prohibitions thus are inconsistent with the HMTA and the HMR and, therefore, are preempted.

They are similarly inconsistent when viewed as routing restrictions. Routing restrictions on highway route controlled quantity radioactive materials not in accordance with 49 CFR 177.825(b), which authorizes state (not local) designation of certain alternate preferred routes, are inconsistent. IR–16, *supra;* IR–18, *supra; Jersey Central Power & Light Co. v. State of New Jersey*, Civil No. 84–5883 (D. N.J., Dec. 27, 1984), *appeal dismissed as moot* 772 F.2d 35 (3rd Cir. 1985).

> [T]hrough promulgation of 49 CFR 177.825, [DOT] has established a near total occupation of the field of routing . . . requirements relating to the transportation of radioactive materials. Thus, state and local radioactive materials transportation routing . . . requirements other than (1) those identical to Federal requirements or (2) state designated alternate routes under 49 CFR 177.825(b), are very likely to be inconsistent and thus preempted under section 112(a) of the HMTA.

IR–8(A), 52 FR 13000 at 13003.

Impacts of the rerouting caused by the TBTA's § 1074.3 were discussed in the following unrebutted statements made by the applicants in this case:

> CANT members live and work adjacent to the route recently used by carriers of low level waste from the Radiac Corporation. A truck from Radiac, carrying low level waste, recently collided with a rail bridge over a city street. The driver was using this route because other drivers from his firm had been turned back from the Verrazano Narrows Bridge which is part of Interstate 278.
>
> * * * * *
>
> Part 1074 is inconsistent because it blocks use of a route that minimizes radiological risk. To avoid the bridges controlled by TBTA, the driver must use New York City bridges that pass through the most densely populated and active areas of the City along local roads not designed to interstate highway standards.

49 CFR 177.825(a) states in pertinent part:

> The carrier shall ensure that any motor vehicle which contains a radioactive material for which placarding is required is operated on routes that minimize radiological risk. The carrier shall consider available information on accident rates, transit time, population density and activities, time of day and day of week during which transportation will occur . . .
>
> A finding of inconsistency must be based on the results of the "obstacle" or "dual compliance" tests. Part 1074 fails both tests. On the one hand, it is an obstacle to choosing a route that minimizes risk. On the other hand, complying with Part 1074 by avoiding TBTA bridges requires use of tunnels and bridges the pass through a highly populated area when a safer route is available that is also more direct than any of the routes using non-TBTA bridges. It is therefore impossible to simultaneously comply with both 1074 and 49 CFR 177.825(a).

With a supplement to their application, CANT provided a map of the New York City area. On the map they indicated a shorter, more direct route from the Radiac facility in Brooklyn via I–278 and the Verrazano-Narrows Bridge to the New Jersey Turnpike (I–95) and a longer, less direct route from Radiac via the Queensboro Bridge and streets of Manhattan to I–95 at a point several miles north of the intersection with I–95 resulting from use of the Verrazano-Narrows Bridge route. The unrebutted contention of CANT is that the longer route represents the only available route to comply with present TBTA rules. The record, therefore, indicates that the unavailability of the Verrazano-Narrows Bridge for most radioactive materials shipments causes such shipments to be diverted away from Interstate routes onto non-preferred routes (including local city streets), causes them to travel greater distances, and thus caused delay and greater exposure to the risks of transportation. A study map of the New York City area indicates that the restrictions on the Verrazano-Narrows, Throgs Neck, Bronx Whitestone and Triborough bridges would have similar effects on any highway transportation of radioactive materials between (1) Queens, Brooklyn, or all of Long Island and (2) the rest of the United States.

For all the foregoing reasons, the § 1074.3(b) prohibitions on the transportation of radioactive materials across seven specific bridges preclude compliance with § 177.825 of the HMR. They make it impossible for a carrier transporting placarded radioactive materials to operate on routes that minimize radiological risk, as required by § 177.825(a), and for a carrier transporting highway route controlled quantity radioactive materials to operate over a preferred route, as required by § 177.825(b). The prohibitions, as a result, fail the "dual compliance" test. In addition, because they create unnecessary delay, unjustifiably shift transportation risks to others, and constitute an impermissible local ban on transportation, these prohibitions also fail the "obstacle" test. Therefore, the TBTA's § 1074.3(b), in its entirety, is inconsistent with the HMTA and the HMR and thus is preempted.

Additional restrictions are placed upon the transportation of radioactive

materials by § 1075.19. That section prohibits transportation across the Verrazano-Narrows Bridge Lower Level and through Queens Midtown Tunnel and the Brooklyn-Battery Tunnel of "any radioactive material, including but not limited to radionuclides, nuclear or fissionable materials, radioactive ores, residue or waste or any radioactive material."

There are, however, three exceptions to this prohibition. Paragraph (a) excludes "specifically packaged and labeled magnesium-thorium alloys in formed shapes (not powdered, and which shall contain not more than four percent nominal thorium 232)." That provision bears some resemblance to RSPA's regulatory exception for certain articles containing natural uranium or thorium in § 173.424 of the HMR. However, the definition of hazard classes and hazardous materials is an exclusive Federal function. "The key to hazardous materials transportation safety is precise communication of risk. The proliferation of differing State and local systems of hazard classification is antithetical to a uniform, comprehensive system of hazardous materials transportation safety regulations." IR–6, *supra* at 764. Thus local provisions, such as paragraph (a) of § 1075.19, which in effect, create new definitions of regulated radioactive materials are inconsistent with the HMTA and the HMR. *Union Pacific RR Co. v. City of Las Vegas*, CV–LV–85–932 HDM (D. Nev. 1986); IR–8, IR–12, IR–15, IR–16, IR–18, all *supra*.

Paragraph (b) provides an exception for radioactive materials exempt from DOT packaging, labeling and marking requirements because of their type or quantity—"but not exempt by reason of Nuclear Regulatory Commission shipment and escort, military convoy or other special authorization." The effect of this provision is to prohibit shipments of radioactive materials made by or under the direction or supervision of the Department of Defense or Department of Energy, escorted by specifically designated or authorized personnel, and for national security purposes—even though RSPA, in § 173.7(b) of the HMR, has expected such shipments from the HMR. State governments or political subdivisions may not regulate—let alone prohibit—the transportation of radioactive or other hazardous materials specifically excepted from regulation under the HMTA or the HMR. The determination of what hazardous materials may or may not be regulated in the transportation field is the essence of DOT's exclusive authority to define and classify hazardous materials. IR–5, IR–6, IR–18, all *supra*.

Finally, paragraph (c) of the TBTA's § 1075.19 excepts from the general prohibition radioactive instrument or clock dials or electronic tubes shipped in conformity with DOT regulations—so long as the gross weight of the radioactive materials and their container does not exceed 500 pounds per vehicle and so long as prior permission has been granted by the facility supervisor or authorized representative at least two hours before the intended travel. As indicated in earlier discussions, an approval provision containing unfettered discretion and causing a delay of at least two hours is inconsistent with the HMTA and the HMR.

In addition, the weight limitation, because it applies only to the radioactive materials and their container rather than to the entire vehicle and its contents, is not a *bona fide* traffic control measure. Unlike the Interstate Highway System 80,000-pound maximum limitation at issue in *Jersey Central Power & Light Co. v. State of New Jersey*, Civil No. 84–5883 (D. N.J., Dec. 27, 1984), *appeal dismissed as moot* 772 F.2d 25 (3rd Cir. 1985), the TBTA limitation is prohibitively low and applies solely as a result of the hazardous nature of the cargo; it would ban numerous shipments which are in full compliance with the HMR and thus presumptively safe.

In summary, each of the three exceptions in § 1075.19 is inconsistent with the HMTA and the HMR. Furthermore, the remainder of that section is a prohibition on radioactive materials transportation through two tunnels and across one bridge which has the same or similar effects as the similar prohibition across seven bridges contained in § 1074.3(b). Because two tunnels are involved, an additional HMR provision is relevant:

Section 177.810 Vehicular tunnels

Except as regards radioactive materials, nothing contained in Parts 170–189 of this subchapter shall be so construed as to nullify or supersede regulations established and published under authority of State statute or municipal ordinance regarding the kind, character, or quantity of any hazardous material permitted by such regulations to be transported through any urban vehicular tunnel used for mass transportation. *For radioactive materials, see § 177.825 of this part.* (Emphasis added)

Even assuming that this provision authorizes the TBTA to regulate the transportation of other hazardous materials through these two urban vehicular tunnels, it clearly does not authorize the TBTA to prohibit the transportation of most radioactive materials through those tunnels. In fact, § 177.810 specifically provides that § 177.825 governs the transportation of radioactive materials through urban vehicular tunnels. Under the latter provision, a carrier of placarded radioactive materials is required to operate on routes that minimize radiological risk and a carrier of highway route controlled quantity radioactive materials is required to operate over preferred routes, (i.e., Interstate System routes, in the absence of a state-designated alternate route). All of the § 1075.19 prohibitions prevent compliance with the former requirement, and the Verrazano-Narrows Bridge Lower Level prohibition (combined with the § 1074.3 prohibition over the upper level of the same bridge) precludes compliance with the latter requirement. All of those provisions furthermore induce unnecessary delay and thus greater risk in transportation. Therefore, §1075.19 in its entirety fails both the "dual compliance" and the "obstacle" tests, is inconsistent with the HMTA and the HMR, and thus is preempted.

D. Summary

The bans on hazardous materials transportation contained in the TBTA regulations considered here not only cause rerouting and delays of such shipments but also deny them the use of Interstate routes and compel them to use local streets in the heart of a major metropolitan area. These prohibitions adversely affect the safety of virtually every significant highway shipment of class A or B explosives or radioactive materials between Queeens, Brooklyn or Long Island and the rest of the United States. They demonstrate the need for a systematic, inter-governmental, regional approach to the issue of hazardous materials routing in the New York City metropolitan area.

III. Ruling

For the foregoing reasons, I find §§ 1074.3 and 1075.19, as well as subsection (a) and the "permission to use" phrase in paragraph (b) of § 1074.6,

of the Triborough Bridge and Tunnel Authority Regulations inconsistent with the HMTA and the HMR and, therefore, preempted under 49 App. U.S.C. 1811(a). Paragraphs (c), (d), (e), and the "traffic permitting" phrase in paragraph (b) of § 1074.6, as construed in this ruling, are consistent with the HMTA and the HMR. The record is insufficient to make a determination concerning the consistency of the weekday time restrictions in paragraph (b) of § 1074.6.

Any appeal of this ruling must be filed within 30 days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC on June 23, 1987.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

[FR Doc. 87-14812 Filed 6-29-87; 8:45 am]

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Part VI

Department of Transportation

Research and Special Programs Administration

Nevada Public Service Commission Regulations Governing Transportation of Hazardous Materials; Notice

DEPARTMENT OF TRANSPORTATION
Research and Special Programs Administration

[Inconsistency Ruling No. IR-19; Docket No. IRA-39]

Nevada Public Service Commission Regulations Governing Transportation of Hazardous Materials

Applicant: Southern Pacific Transportation Company.

State Regulations Affected: Sections 705.310–705.380 of the Nevada Administrative Code governing certain railroad-related loading, unloading, transfer and storage of specified hazardous materials in the State of Nevada.

Applicable Federal Requirements: Hazardous Materials Transportation Act (HMTA) (Pub. L. 93–633, 49 App. U.S.C. 1801 *et seq.)* and the Hazardous Material Regulations (HMR) (49 CFR Parts 170–179) issued thereunder.

Modes Affected: Rail and Highway.

Issue Date: June 23, 1987.

Ruling: Sections 705.310, 705.320, 705.330, 705.340, 705.350, 705.360, and 705.370 of the Nevada Administrative Code are inconsistent with the HMTA and regulations issued thereunder and thus are preempted. Section 705.380 thereof is consistent with the HMTA and the HMR and thus is not preempted.

Summary: This inconsistency ruling is the opinion of the Office of Hazardous Materials Transportation (OHMT) concerning whether §§ 705.310–705.380 of the Nevada Administrative Code are inconsistent with the HMTA and regulations issued thereunder and thus preempted by section 112(a) of the HMTA. This ruling was applied for and is issued under the procedures set forth at 49 CFR 107.201–107.209.

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I. Background

A. Chronology

On October 21, 1986, Southern Pacific Transportation Company (Southern Pacific) filed an in consistency ruling application in which it requested that §§ 705.310–705.380 of the Nevada Administrative Code be found inconsistent with the HMTA and the HMR. OHMT published a notice and invitation to comment concerning the application in the **Federal Register** (51 FR 42808; Nov. 25, 1986).

In response to that notice, the Nevada Public Service Commission (PSC) filed comments in support of its regulations and the Association of America Railroads, the State of New Jersey, the Electric Utility Companies' Nuclear Transportation Group, the Department of Energy, the Union Pacific System, Sea Containers America, Inc., the Southern Pacific Transportation Company and the National Tank Truck Carriers, Inc., filed comments contending that the Nevada regulations are inconsistent with the HMTA and the HMR.

Earlier, a dispute had arisen concerning the State of New Jersey's attempt to transport 7,200 tons of low-level radiation-contaminated soils to Nevada for disposal. Nevada's Department of Human Resource (DHR) refused to issue New Jersey the required disposal permit. This led to a legal action in the U.S. Supreme Court by New Jersey attempting to compel the State of Nevada to accept the soils. *State of New Jersey v. State of Nevada,* No. 104, Original (U.S. Supreme Ct., filed Sept. 19, 1985). New Jersey challenged the DHR's action and the PSC's hazardous materials transportation regulations. The Supreme Court denied a request for an injunction, appointed a special master, and has taken no further action.

Nevada's PSC adopted an emergency regulation on August 30, 1985, requiring railroads to obtain a permit to transport radioactive material destined for permanent disposal in Nevada. On November 26, 1985, the PSC adopted the more comprehensive regulations at issue in this proceeding. In a January 27, 1986 statement of principal reasons for adopting these regulations, the PSC concluded with the following statements:

> Nevada business should be reassured that there is some oversight at the state level and that there is a state agency in possession of vital safety information. The railroads both gave examples of their excellent safety records. Although the Commission was impressed with their history of safety, the major concern of the Commission is what might happen in the future and what effect it would have on Nevada. Even if the probability of a hazardous materials accident in a railyard is low, the consequences associated with such an accident are great, and the risks are high. Accidents with highly dangerous materials cause severe property damage and numerous injuries, some of which might be fatal. It is this concern coupled with [the] fact that railyard operators are not required to prepare emergency plans that leads the Commission to believe General Order 52 is a necessity regulation.

Southern Pacific in September 1986 filed a complaint against the PSC in the U.S. District Court for the District of Nevada and requested the Court to enjoin enforcement of the PSC regulations at issue here. *Southern Pacific Transportation Co. v. Public Service Commission of Nevada,* CV–R–86–444–BRT (D. Nev. 1986). After a brief hearing, including two witnesses' testimony and counsel's arguments, the Court on October 9, 1986, denied the request for an injunction, which had been based upon Commerce Clause and HMTA preemption theories. The Court discussed neither the "dual compliance" nor the "obstacle" tests for consistency (see discussion in Section B. *infra*). The PSC also had argued to the Court that the Federal Anti-Injunction Act, 28 U.S.C. 2283, precluded issuance of an injunction against pending state criminal proceedings. Such proceedings for alleged violations of the PSC regulations were dismissed in Lyon and Storey counties in Nevada but remain pending in Washoe County. Injunctive relief from the PSC regulations also was denied in *Stephens v. Nevada,* CVR–85–539 (D. Nev. 1985).

In a development related to the New Jersey soils issue, Union Pacific on December 3, 1985, applied for a PSC permit to transport those soils in accordance with the August 1985 emergency regulations. The PSC held an oral evidentiary hearing on that application on April 18, 1986. Its staff recommended approval of the permit. In June 1986, the PSC reopened the record. To date, the PSC has not acted on the application. It contends that: "It is simply unnecessary and unwarranted to issue this shipment-specific permit to the Union Pacific Railroad until the Supreme Court resolves the issue of whether the radioactive dirt can be disposed of in Nevada. If the Supreme Court finds that disposal in Nevada is required, Union Pacific will receive its permit."

To the latter comment, Southern Pacific replied:

> The foregoing comment confirms that, as SP has charged, the purpose of the permit procedure is not to protect particular localities against localized safety hazards. It is to provide a supplementary arsenal of state procedures to implement Nevada's intention to control how, when, and where hazardous materials may move in interstate commerce to, from or through Nevada. Union Pacific, after having complied with the cumbersome Nevada permit process, and having shown a total lack of any harm, hazard or danger to the community in which the transfer is to take place, was still not given a permit, and is now told that a permit will be issued if the United States Supreme Court compels Nevada to receive the dirt. This is an admission that the true purpose of the Nevada regulations is to provide a cloak for the exercise of a power to prevent movement of undesired hazardous materials to Nevada—a power which is denied to Nevada

by the United States Constitution, and by Congress.

B. General Authority and Preemption Under the HMTA

The HMTA at section 112(a) (49 App. U.S.C. 1811(a)) preempts ". . . any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA], or in a regulation issued under [the HMTA]." This express preemption provision makes it evident that Congress did not intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any state or local action. The HMTA preempts only those state and local requirements that are "inconsistent."

Although advisory in nature, inconsistency rulings issued by the Department under 49 CFR Part 107 provide an alternative to litigation for a determination of the relationship between Federal requirements and those of a state or political subdivision thereof. If a state or political subdivision requirement is found to be inconsistent, such a finding provides the basis for application to the Secretary of Transportation for a determination as to whether preemption will be waived (49 App. U.S.C. 1811(b); 49 CFR 107.215–107.225).

Since these proceedings are conducted pursuant to the HMTA, only the question of statutory preemption under the HMTA will be considered. A Federal court might find a non-Federal requirement statutorily preempted under another statute or preempted by the Commerce Clause of the U.S. Constitution because of an undue burden on interstate commerce. However, the Department of Transportation does not make such determinations in the context of an inconsistency ruling.

OHMT has incorporated into its procedures (49 CFR 107.209(c)) the following case law criteria for determining whether a state or local requirement is consistent:

(1) Whether compliance with both the non-Federal requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the non-Federal requirement is an obstacle to the accomplishment and execution of the act and the regulations issued under the Act.

The first criterion, commonly called the "dual compliance" test, concerns those non-Federal requirements which are irreconcilable with Federal requirements; that is, compliance with the non-Federal requirement causes the Federal requirement to be violated, or *vice versa.* The second criterion, the "obstacle" test, requires an analysis of the non-Federal requirement in light of the requirements of the HMTA and the HMR, as well as the purposes and objectives of Congress in enacting the HMTA and the manner and extent to which those purposes and objectives have been carried out through the OHMT's regulatory program.

In the HMTA's Declaration of Policy (section 102) and in the Senate Commerce Committee language reporting out what became section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation. Congress inserted the preemption language in § 112(a) "in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation" S. Rep. 1192, 93rd Cong., 2d Sess., 37–38 (1974). Through its enactment of the HMTA, Congress gave the Department the authority to promulgate uniform national standards. While the HMTA did not totally preclude state or local action in this area, Congress apparently intended, to the extent possible, to make such state or local action unnecessary. The comprehensiveness of the HMR severely restricts the scope of historically permissible state or local activity. The nature, necessity and number of hazardous materials shipments make uniform standards extremely important.

II. Nevada Administrative Code Provisions

A. Overview

Nevada's regulations (Sections 705.310–705.380) constitute a permitting system for certain railroad-related loading, unloading, transfer, and storage of specified hazardous materials.

The heart of the Nevada regulations is § 705.320. That Section requires a Nevada Public Service Commission (PSC) permit in order to load or unload hazardous material onto or from railroad equipment on railroad property, transfer hazardous material from railroad property to another means of transportation, or store hazardous material on railroad property (except on a through track).

The hazardous materials covered by these permit requirements are, under § 705.310, defined as radioactive materials, class A explosives, poison A materials, and flammable solids (DANGEROUS WHEN WET labels only) requiring placarding, as those terms are defined in the HMR. Section 705.310 also defines storage as keeping any hazardous material for more than 48 hours.

Section 705.330 specifies detailed permit application information and documentation requirements and requires payment of a $200 permit fee. Section 705.340 lists nine factors which the PSC will consider in evaluating a permit application, including "[a]ny other pertinent information requested by the commission."

Section 705.350 provides that permits are valid for one year and may be renewed if specified information is provided and a $200 fee paid. That Section also states that the PSC, upon a showing of compelling need, may issue a temporary permit.

Under § 705.360, a permit may be suspended or revoked for three reasons, including when "necessary to protect against risks to life and property." Section 705.370 provides for 30 days' notice of pending permit applications and for dismissal of permit applications for failure to provide certain information.

Finally, § 705.380 requires railroads to comply with 49 CFR Parts 171–174 as those parts existed on November 1, 1985, and incorporates those parts by reference.

Southern Pacific (SP) and all commenters except the PSC contend that these regulations are inconsistent with the HMTA and the HMR, but the PSC responds that they are land use requirements issued under the police powers of the State. The PSC's contention is difficult to accept because these regulations do not apply to both transportation and non-transportation activities but instead apply solely to railroad-related activities concerning hazardous materials. In fact, these regulations were promulgated by the PSC under the heading, "Transportation of Hazardous Material by Rail." Thus, these are not the type of non-transportation land use restrictions which arguably could be free from interface with the HMTA and the HMR. See IR–16, 50 FR 20872 at 20875 (May 20, 1985). If the PSC believes that Federal regulations concerning hazardous materials transportation do not adequately provide for the safety of the public, it may petition RSPA or the FRA for regulatory amendments. 49 CFR 106.31 and Part 211, Subpart B.

In summary, with the exception of § 107.380 on incorporation by reference, these regulations constitute a hazardous materials transportation permitting system which requires transporters of many types of hazardous materials to take specified actions in addition to

complying with the HMTA and the HMR. They prohibit or require certain transportation activities depending upon whether a PSC permit has been issued—regardless of whether the activity is in full compliance with the HMTA. The PSC requirements apply to selected hazardous materials, involve extensive information and documentation requirements and provide the PSC with considerable discretion concerning permit issuance.

For all of the above reasons, these regulations are the type of varying and conflicting state and local requirements which Congress intended to preempt by enactment of the HMTA. S. Rep. 1192, 93rd Cong., 2d Sess., 37–38 (1974). They constitute an obstacle to the accomplishment of the objectives of the HMTA and the HMR, are inconsistent with the HMTA and the HMR, and, therefore, are preempted by 49 App. U.S.C. 1811(a).

The essence of this inconsistency ruling is that the Nevada regulations at issue, with the exception of § 705.380, cumulatively constitute an inconsistent permitting system. As the following section-by-section analysis indicates, many of the provisions of those sections individually also are inconsistent with the HMTA and the HMR.

B. Definitions

The definitions in § 705.310 of "hazardous material" and "storage" create consistency problems.

Hazardous materials are defined as follows:

> "Hazardous material" means low specific activity material as defined in 49 CFR § 173.403(n) and radioactive material as defined in 49 CFR § 173.403(y) and:
> (a) Class A explosives as defined in 49 CFR § 173.53;
> (b) Class B explosives as defined in 49 CFR § 173.88;
> (c) Poison A as defined in 49 C.F.R. § 173.26; and
> (d) Flammable solids (DANGEROUS WHEN WET labels only) as defined in 49 CFR § 173.150, which are subject to the requirements for placards in Table 1 of 49 CFR § 172.504.

Although the PSC cross-referenced specific Federal regulations, this definition is not without problems. It is unclear whether the phrase "which are subject to the requirements for placards in Table 1 of 49 CFR § 172.504" applies to flammable solids only, to the four (a)–(d) materials, or to all six types of materials referred to in the regulation. This ambiguity gave rise to a debate between commenters and the PSC concerning coverage of railway torpedoes and fusees (which are not required to be placarded). On this issue, the PSC commented:

> Because the Nevada regulations were developed only to encompass those hazardous materials that would be placarded in any quantity, it would seem logical for the Commission to interpret its rules to the effect that if a material is not subject to the regulations at all, then the permit requirements would not apply. This is not explicit in the Nevada rules but certainly is within the realm of proper interpretation of those rules by the body which administers them. The issuance of such an interpretation will be considered.

Thus, the applicability of these regulations remains unclear. The poison A cross-reference is incorrect; it should be to § 173.326, not § 173.26.

The ambiguity and selectivity of the PSC's hazardous materials definition are troublesome. State and local hazardous materials definitions and classifications which result in regulation of different materials than the HMR are obstacles to uniformity in transportation regulation and thus are inconsistent with the HMR. IR–5, 47 FR 51991 (Nov. 18, 1982); IR–6, 48 FR 760 (Jan. 6, 1983); IR–12, 49 FR 46650 (Nov. 27, 1984).

Under its regulatory definition, the PSC is selectively determining which of DOT's hazardous materials are subject to its regulations. Although this approach does not create new hazard classifications, as found inconsistent in IR–6, 48 FR 760 (Jan. 6, 1983), and, thus does not constitute an inconsistency *per se*, it can contribute to the overall inconsistency of a series of interrelated regulations, particularly by creating conflicts with the HMR insofar as what requirements apply to each individual hazardous material.

At the very least, the PSC definition creates the kind of confusion referred to in an earlier inconsistency ruling:

> If every jurisdiction were to assign additional requirements on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusion of regulatory requirements would lead directly to the increased likelihood of reduced compliance with the HMR and subsequently decrease in public safety.

IR–12, 49 FR 46650 at 46651.

The second troublesome definition is one defining "storage" as "keeping any hazardous material for more than 48 hours." This definition relates to the prohibition in § 705.320 of storage of hazardous material on railroad property without a PSC permit. By not excluding Saturdays, Sundays, and holidays, this definition creates a conflict with 49 CFR 174.14(a), which provides: "A [rail] carrier must forward each shipment of hazardous materials promptly and within 48 hours *(Saturdays, Sundays, and holidays excluded)*, after acceptance at the originating point or receipt at any yard, transfer station, or interchange point. . . ." (Emphasis added.) The PSC definition of "storage," therefore, results in a PSC prohibition on retention of hazardous materials beyond 48 hours while the Federal regulation literally permits retention for as long as 120 hours depending upon what combination of weekend days and holidays might be involved. In addition, § 174.14(a) allows additional time where biweekly and weekly service only is performed, and the Federal Railroad Administration has interpreted this regulation as placing no time limitation on storage at the destination shown on shipping papers or at the final agency station. Where the HMR have struck a definite balance of safety and economic interests with respect to a particular transportation safety issue, a state or local requirement striking a different balance is inconsistent; that is the case here. See the discussion, below, of the regulation of tansportation-related storage.

The different State and Federal definitions of "hazardous materials" result in further inconsistency between the State and Federal expediting/storage requirements. Section 174.14(a) of the HMR applies to all "hazardous materials" as that term is defined in 49 CFR 171.8, but the counterpart PSC provision applies only to those particular hazardous materials designated by the PSC in § 705.310. This is conclusive evidence of the inconsistency of the PSC's definition of "hazardous material."

In summary, the § 705.310 definitions of "hazardous material" and "storage" are inconsistent with the HMR.

C. Activities for Which Permit Required

The heart of the Nevada regulations is § 705.320, which provides:

> A person shall not:
> 1. Load or unload hazardous material or containers carrying hazardous material onto or from railroad equipment on property owned by or under the control of a railroad;
> 2. Transfer hazardous material from property owned by or under the control of a railroad to another means of transportation; or
> 3. Store hazardous material on property owned by or under the control of a railroad, except a through track, without a permit issued by the commission.

Because the heading of this section is "Activities for which permit required," it is apparent that the phrase "without a permit issued by the commission" applies to paragraphs 1, 2, and 3, not just to paragraph 3.

Each of the three PSC-regulated activities constitutes hazardous

materials transportation in commerce subject to RSPA regulation under the HMTA. Transportation subject to the HMTA is "any movement of property by any mode, and any loading, unloading, or storage incidental thereto." 49 App. U.S.C. 1802(6). Loading and unloading onto or from railroad equipment are literally covered by both the HMTA and PSC § 705.320. The PSC's coverage of intermodal transfers on railroad-owned or -controlled property is included within the HMTA coverage of "movement of property by any mode." In addition, the PSC's regulation of storage of hazardous materials on railroad-owned or controlled property comes within the scope of the HMTA's coverage of storage incidential to the movement of property by any mode. See discussion of storage issues, below. Finally, the PSC's prohibition of storage (which it defines as keeping for more than 48 hours) without a PSC permit actually constitutes a mandate to transport within 48 hours or less.

Examples of HMR provisions regulating the railroad transportation-related loading, unloading, or transfer of hazardous materials follow:

(1) Section 174.16 requires certain unloading from rail cars.

(2) Section 174.103 requires certain unloading or immediate removal of damaged or astray shipments.

(3) Section 174.18 requires immediate forwarding of certain astray shipments of non-explosive hazardous materials.

(4) Section 174.103 provides detailed requirements for the disposition of damaged or astray shipments of explosives.

(5) Section 174.20 authorizes carriers to impose local restrictions when local conditions make the acceptance, transportation or delivery of hazardous materials unusually hazardous.

(6) Section 174.67 contains detailed regulations for the unloading of tank cars.

(7) Section 174.104(e) and (f) require supervision of loading of trailers and containers containing class A explosives on flatcars, as well as certification of that supervision.

(8) Section 174.101(n) and (o) prescribe detailed requirements for the loading of class A or B explosives on flatcars or other railroad cars.

(9) Section 174.55(d) regulates the loading and unloading of heavy packages and containers of hazardous materials.

(10) Section 174.5 exempts railway torpedoes and fusees (class B explosives) from the HMR when they are carried in engines or rail cars but does require that they be in closed metal boxes when not in use.

(11) Section 174.700 regulates the loading of radioactive materials onto rail cars and provides distance limitations therefor.

(12) Section 177.841(a) prohibits loading or unloading of poisons from motor vehicles "near or adjacent to any place where there are or are likely to be . . . assemblages of persons . . . or upon any public highway or in any public place."

Examples (1) through (4) demonstrate "dual compliance" difficulties which may arise under the PSC regulations. In many circumstances, they require unloading, loading, or transfers by carriers which the PSC regulations prohibit without a PSC permit. The PSC permit requirements, therefore, are inconsistent with these HMR provisions under the "dual compliance" test.

In addition, these requirements are inconsistent under the "obstacle" test. All of the cited Federal requirements demonstrate the depth and complexities of the Federal regulatory scheme and the difficulties a carrier would encounter in attempting to comply simultaneously with them and the PSC's burdensome and open-ended permitting process. For example, the carrier must describe all of its loading, unloading, and transfer procedures to the PSC, § 775.330(1)(d), and the PSC then decides whether these procedures are adequate—regardless of whether they are in compliance with the HMR.

In summary, therefore, all of the activities for which § 705.320 requires a PSC permit are activities extensively covered by the HMTA and the HMR. Thus, the effect of that regulation is to require a PSC permit for hazardous materials transportation activities even if those activities are in full compliance with the HMTA and HMR. Activities in compliance with the HMTA and the HMR are presumptively safe, and permitting requirements relating to them cause confusion and delay and thus are inconsistent with the HMTA and the HMR under the "obstacle" test.

To the extent that the PSC permit regulations apply to the transportation of radioactive materials, they are inconsistent. The issue of state or local permits for such transportation was addressed recently by RSPA's Administrator:

> 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.

IR-15 Decision on Appeal (IR-15(A)), 52 FR 13062 at 13063 (Apr. 20, 1987). That statement is dispositive of the issue here.

To the extent that the PSC permit regulations apply to the transportation of nonradioactive hazardous materials, they are not *per se* inconsistent; their consistency depends upon the requirements for obtaining a permit. IR-2, 44 FR 75566 (Dec. 20, 1979); IR-3, 46 FR 18918 (Mar. 26, 1981).

Unlike the Rhode Island provisions considered in IR-2, the PSC regulations do not necessarily require a permit prior to each individual transportation movement. In fact, testimony before the U.S District Court for the District of Nevada, which decided not to enjoin enforcement of the Nevada regulations, indicated that a railroad only needs an annual permit (probably for each site) to conduct hazardous materials operations. However, the Court did not consider whether any other party conducting a regulated activity needs a permit. Section 705.320 states: "A person shall not . . . [l]oad or unload . . . [t]ransfer . . . or. . . [s]tore hazardous material . . . without a permit issued by the commission." Literally, therefore, any trucking company loading, unloading, or transferring hazardous materials on railroad property is required to obtain a PSC permit. It is clear that one or more parties must obtain a permit before any intermodal transfer (including any trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) transfer) could take place. Therefore, the mere fact that the required permits are "annual" does not necessarily eliminate the necessity for permits for individual shipments.

In any event, as discussed in more detail below, the PSC's annual permit information and documentation requirements are burdensome and redundant, the overlap of the PSC's requirements with HMR provisions is great, their potential for delay is considerable, and the PSC's discretion concerning permit issuance is virtually unfettered. Cumulatively, these factors constitute unauthorized prior restraints on shipments of nonradioactive hazardous materials that are presumptively safe based on their compliance with Federal regulations. Therefore, the PSC permitting system is an obstacle to accomplishment of the

objectives of the HMTA and the HMR and thus is inconsistent with them.

D. Information and Documentation Requirements

Section 705.330(1) requires submission of the following information and documentation in support of an application for an annual PSC permit:

(a) A map of the proposed site for loading, unloading, storage or transfer, including the indicators of its location on the track and all structures at the site;
(b) A report identifying each switch, siding, spur or branch of track at the site and its purpose;
(c) A copy of any report made by a federal or state inspector during the preceding 6 months on defects in the track and the remedial action taken;
(d) A summary of all major construction or other work on the track at the site during the preceding year;
(e) A summary of all hazardous material carried by the railroad during the preceding 12 months;
(f) A summary of all unintended releases of hazardous material during the preceding 12 months which were reported by the applicant pursuant to 49 C.F.R. §§ 171.16 and 171.17;
(g) An outline of the procedure to be used in the loading, unloading, transfer or storage of the hazardous materials;
(h) A description of the measures to be used by the railroad to ensure that the hazardous material is safe from vandalism, theft or sabotage; and
(i) An outline of all plans to be used in the event of an accident.

In addition, § 705.340 contains a list of factors which the PSC is to consider in evaluating an application for a permit. That list follows:

1. The topography of the proposed site;
2. The proximity of the proposed site to:
(a) Centers of population;
(b) Heavily traveled highways;
(c) Hospitals;
(d) Schools;
(e) Sources of water; and
(f) Other sites for the storage of hazardous material;
3. The expected duration of the operation at the site;
4. The availability of alternative sites;
5. The quality of the track;
6. The security at the site;
7. The plans to be used in the event of an accident at the site;
8. The equipment and resources available in the event of an accident at the site; and
9. Any other pertinent information requested by the commission.

It is apparent that this list involves the obtaining of information not specifically required in § 705.330. Also, it is noteworthy that the last item authorizes the PSC to request any "other pertinent information."

In order to renew a permit, § 705.350 requires the applicant to certify that the original information remains correct or update the information. The applicant for renewal also must file a statement:

(1) Describing any relevant accident or release of hazardous materials since the issuance or renewal of the permit, or if an accident or release has not occurred, a certification to that effect; and
(2) Summarizing the loading, unloading, transfer or storage conducted pursuant to the permit, as well as any incident involving the hazardous material.

Under § 705.360(3), the PSC many suspend or revoke a permit if its issuance was based on false, fraudulent, or misleading representations or information. Under § 705.370(2), the PSC will dismiss a permit application if there is insufficient information or if the applicant fails to submit additional information the PSC requests.

With respect to information and documentation requirements relating to radioactive materials transportation, RSPA's Administrator recently set forth the following standard:

DOT and NRC have determined what information and documentation requirements are needed for the safe transportation of radioactive materials, and state and local requirements going beyond them create confusion, impose burdens on transporters, are obstacles to the accomplishment of the HMTA's objectives, and thus are inconsistent.

IR–8(A), 52 FR 13000 at 13004 (Apr. 20, 1987). This statement also provides an appropriate standard with regard to hazardous materials information and documentation requirements generally. RSPA has determined what information and documentation requirements are needed for the safe transportation of hazardous materials, and thus state and local requirements going beyond them create confusion, impose burdens on 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).

Despite the fact that the PSC's information and documentation requirements are annual and not shipment-specific, they are extremely comprehensive and burdensome. As such, they create confusion and delay and thus constitute obstacles to implementation of the HMTA and the HMR. The burdensome nature of the requirements is demonstrated by § 705.330(e), which requires a summary of all hazardous material carried by the railroad (presumably nationwide) during the preceding 12 months. Section 705.330(f) is a redundant and inconsistent requirement for information on incidents reported by the applicant to DOT under 49 CFR 171.16 and 171.17. IR–2, 44 FR 75566 (Dec. 20, 1979); IR–3, 46 FR 18918 (Mar. 26, 1981); IR–3(A), 47 FR 18457 (Apr. 29, 1982); IR–8, 49 FR 46637 (Nov. 29. 1984); IR–8(A), 52 FR 13000 (Apr. 20, 1987).

Because emergency response is primarily a local responsibility, IR–2, *supra*, at 75568, transportation cannot be made contingent upon the adequacy of emergency response capabilities. IR–18, 52 FR 200 (Jan. 2, 1987). Therefore, the express and implied emergency response-related information requirements of §§ 705.330(i) and 705.340 (7) and (8) represent efforts to obtain information which may not be used as a prerequisite to hazardous material transportation; as a result, those provisions are inconsistent with the HMTA and the HMR.

In summary, the HMTA and HMR provide sufficient information and documentation requirements for the safe transportation of hazardous materials; state and local requirements in excess of them constitute obstacles to implemenation of the HMTA and HMR and thus are inconsistent with them. As such, §§ 705.330, 705.340, 705.350, 705.360(3), and 705.370(2) of the PSC regulations are inconsistent with the HMTA and the HMR.

E. Potential for Delay

"The manifest purpose of the HMTA and the HMR is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation." IR–2, 44 FR 75566 at 75571. However, several aspects of the PSC regulations raise issues concerning potential transportation delays.

Section 705.350 provides for an annual renewable permit and for a temporary permit which may be issued "[u]pon a showing of compelling need" while an annual permit application is pending. Under § 705.370(1), the PSC gives at least 30 days' notice of permit applications before taking action on them.

Under its regulations, therefore, the PSC can take as much time as it deems desirable or necessary to consider, grant or deny permit applications. It can prolong the process by insistence upon compliance with its comprehensive information and documentation requirements and upon submission of any other pertinent information (§ 705.340(9)).

In fact, the PSC has not taken any definitive action with respect to the only permit application filed under these regulations. In December 1985, Union Pacific filed an application involving transportation of certain low-level

radioactive soils which were to be transported from New Jersey to Nevada for disposal. The PSC contends it has not acted upon this application because there is a pending U.S. Supreme Court case (*New Jersey* v. *Nevada*, Original Jurisdiction Docket 104) concerning Commerce Clause issues relating to the same proposed transportation. See discussion, above, at end of Section A.

Of relevance to all hazardous materials transportation is the following recent statement of RSPA's Administrator:

> While states do have a role in effectuating the safe transportation of radioactive materials, it does not follow that they have unfettered discretion to take actions which have the effect of restricting or delaying transportation being conducted in compliance with Federal law.

IR–8(A), 52 FR 13000 at 13003 (Apr. 20, 1987).

An earlier inconsistency ruling cited specific inconsistencies with the HMR which result from delays:

> Since safety risks "are inherent in the transportation of hazardous materials in commerce" [49 U.S.C. 1801], an important aspect of transportation safety is that transit time be minimized. This precept has been incorporated in the HMR at 49 CFR 177.853, which directs highway shipments to proceed without unnecessary delay, and at 49 CFR 174.14, which directs rail shipments to be expedited within a stated time frame.

IR–6, 49 FR 760 at 765 (Jan. 6, 1983).

Both of the cited HMR provisions are relevant here because the PSC permit system applies to railroad operations and to intermodal transfers on railroad property. Intermodal COFC and TOFC shipments obviously would be covered. Under the PSC regulations, a trucking company cannot load, unload or transfer hazardous materials on railroad property without a PSC permit having been issued to the railroad and possibly to the trucking company as well.

To obtain a permit, an applicant must, as previously discussed, make extensive and burdensome submissions of information and documents. This obviously would be time-consuming. In addition, the PSC gives 30 days' notice of these applications and specifically reserves the right to request additional relevant information. As demonstrated by the PSC's non-action on the only permit application which has been filed (other than holding a hearing 3½ months after the application was filed), the PSC has considerable discretion concerning whether to even act on a permit application. There is no requirement that the PSC issue a permit when certain conditions have been met by the applicant or determined by the PSC. As in IR–13, 49 FR 46653 (Nov. 27, 1984), the PSC appears to be able to impose whatever preconditions it desires. As the Union Pacific indicated in its comments, nothing in the PSC regulations precludes the PSC from knowingly or unknowingly creating permit terms which conflict with specific provisions of the HMR or *ad hoc* exemptions or approvals issued by RSPA or the FRA under HMR provisions, including 49 CFR 107.109(d) (exemption authority); § 173.3a(a)(3) (approvals for packaging of certain materials, including Poison A); §§ 173.22(b) and 174.61(c) (FRA approval authority for transporting materials, including Poison A, in multi-unit tank car trailers in TOFC/COFC service); and § 174.63(b) (FRA approval authority for transporting materials, including "Flammable Solids—Dangerous When Wet" in TOFC/COFC service).

The PSC contends that judicial review would be available to rectify abuses of its permitting discretion; however, the PSC regulations provide no specific standard for permit issuances or denial against which a court could conduct meaningful judicial review. Furthermore, a court is unlikely to intervene while the PSC "deliberates" concerning a petition application.

The fact that the PSC may issue a temporary permit "[u]pon a showing of compelling need" does not alter the completely discretionary nature of the PSC's permitting authority. Also, since a temporary permit is valid only "while the application for an annual permit is pending," it apparently cannot be sought or issued until a permit application is filed.

The PSC's broad discretion, especially in light of the burdensome and open-ended application requirements, translates into delay—or at least the overwhelming prospect for delay. The Nevada permitting process makes delay beyond the timeframes contemplated in the HMR possible, even likely. This prospect of delay contrasts sharply with the railroads' Federal obligations. As common carriers subject to Interstate Commerce Commission mandates, they must accept, without advance notice, deliveries of all types of hazardous materials for transportation. Thereafter, they must immediately begin handling these materials in accordance with the detailed requirements of the HMR. Therefore, the entire permitting process contained in the Nevada regulations is inconsistent with 49 CFR 177.853 and 174.14 and thus is preempted.

F. Regulation of Transportation-Related Storage

As indicated in the discussion of definitions above, the combined effect of PSC §§ 705.310 and 705.320 is the prohibition of storage or retention of hazardous materials on railroad property for more than 48 hours without a PSC permit. It is unclear how long and under what conditions the PSC, by permit, would allow what hazardous materials to be retained on which railroad properties.

The issue for resolution is whether this discretionary PSC control over the storage of hazardous materials is inconsistent with the HMTA and HMR provisions on transportation-related storage. Clearly, the HMTA applies; section 103 thereof provides that storage incidental to the movement of property by any mode is included within the definitions of "transports" and "transportation." 49 App. U.S.C. 1802. Section 105 of the HMTA, in turn, authorizes the Secretary of Transportation to issue "regulations for the safe transportation of hazardous materials" (49 App. U.S.C. 1804), which, under section 103, includes the safe storage of hazardous materials.

This regulatory authority concerning storage has been exercised extensively, particularly with respect to railroad-related storage. A few examples illustrate the extent of such regulations.

(1) *Expedition movements.* Under § 174.14(a) a rail carrier must forward hazardous materials within 48 hours (Saturdays, Sundays and holidays excluded) after acceptance at the originating point or receipt at any yard, transfer station or interchange point. Where only biweekly or weekly service is performed, the hazardous materials must be forwarded in the first available train. This section applies only to holding of shipments at points other than their intended destinations as shown on the shipping papers. Once shipments have reached that destination, even if not the ultimate point of unloading, unlimited storage is permitted except as noted below (see (9) "Prohibitions on storage in transit"). Under § 174.14(b), tank cars containing a flammable liquid or gas or a poison gas may not be received and held at any point subject for forwarding orders in order to defeat the purpose of § 174.14(a).

(2) *Disposition of hazardous materials at destination.* Section 174.16(a) forbids the unloading of explosives at non-agency stations unless the consignee directly receives them or unless they are properly locked and secure storage

facilities are provided there for their protection. At agency stations, § 174.16(b) mandates that carriers require consignees of hazardous materials shipments to remove them from the carriers' properties within 48 hours (exclusive of Saturdays, Sundays and holidays) after notice of arrival has been sent or given. That section further specifies alternative carrier disposal requirements for class A explosives, and other hazardous materials in both carload and non-carload shipments in the event that the consignee does not remove them within the specified period. Safe storage on carrier property is one permissible alternative.

(3) *Notice and reporting of incidents.* The regulation requiring immediate notification of certain hazardous materials incidents (§ 171.15) and detailed reports on other rail incidents (§ 174.750) expressly applies to incidents that occur in "temporary storage."

(4) *Methods of storage.* DOT (and thus the Federal Railroad Administration) is authorized by §§ 173.3 and 174.8 to inspect "methods of storage" of hazardous materials. Rail carriers are required by § 174.55(e) to store hazardous materials securely while they are being held for loading or delivery.

(5) *Separation and segregation of materials in storage.* The restrictions found in § 174.81, on what materials can be placed next to each other in rail cars and at what distance, apply during storage, as well as during loading and other transportation.

(6) *Limitations on storage of specific commodities.* The regulations contain restrictions on how certain radioactive materials may be stored. Section 173.447, entitled "Storage incident to transportation—general requirements," contains limitations on how certain radioactive materials may be stored, including a requirement that they be stored at least 20 feet from other groups of packages containing radioactive materials. See also §§ 173.457(a) and 174.700.

(7) *Other storage restrictions.* Class A explosives may not be stored on carrier property with certain other materials (§ 174.102), and rail cars placarded "Explosives A" must be placed so that they will be safe from all probable danger of fire when in a yard or on a siding (§ 174.85). Class A explosives, flammable gases, and flammable liquids may not be stored in a rail car equipped with any type of lighted heater, open-flame device, or any mechanism utilizing an internal combustion engine. §§ 174.101, .200, .300. Other storage restrictions are contained in §§ 173.101(c), 174.450 and 174.204(a)(2).

(8) *Local carrier restrictions.* Section 174.20 authorizes carriers to impose local restrictions when local conditions make the acceptance, transportation or delivery of hazardous materials unusually hazardous.

(9) *Prohibitions on storage in transit.* Requirements for compressed gases in tank cars allow a filling density of 58.8 percent from November through March but provide that, when that density is used, tank cars must be loaded and shipped directly to consumers for unloading and that storage in transit is prohibited. § 173.314(c), note 15. A similar prohibition applies to tank cars carrying liquefied petroleum gas and butadiene (materials not covered by the PSC regulations). § 173.314(f), note 1.

In summary, the HMR contain a comprehensive series of regulations relating to the storage of hazardous materials incidental to transportation by rail. These regulations authorize or prohibit specific types of hazardous materials storage under specified circumstances. Creation by the PSC of a separate regulatory regime for rail transport-related storage of hazardous materials raises the spectre of widespread confusion. The PSC regulations are so open-ended and discretionary that they authorize the PSC to approve storage prohibited by the HMR or prohibit storage authorized by the HMR.

These potential inconsistencies appear to have become a reality. Southern Pacific alleged, and the PSC did not deny, that the PSC instituted criminal actions against Southern Pacific and its employees for holding carts at a siding beyond 48 hours to wait for a weekly train on the branch line—a holding or storage authorized by § 174.14 of the HMR. There also is an unrebutted allegation by Southern Pacific that there are over 200 locations (stations, intermodel transfer points, sites, and siting areas) for which it would have to apply for PSC permits to fulfill its common carrier obligations.

Therefore, insofar as they concern rail transportation-related storage of hazardous materials, the PSC regulations are an obstacle to the accomplishment of the objectives of the HMTA and the HMR and, therefore, are inconsistent with them.

G. Permit-related Provisions

Because, as indicated in the prior sections, the Nevada PSC's permitting system is inconsistent with the HMTA and the HMR, all of the challenged provisions relating to the permitting system are similarly inconsistent.

For example, while a fee provision relating to consistent requirements may be consistent (IR–17; 51 FR 20925 (June 9, 1986); *New Hampshire Motor Transport Assn. v. Flynn*, 751 F.2d 43 (1st Cir. 1984)), the PSC's $200 permit fee provisions (§§ 705.330(2) and 705.350(3)) are inconsistent because they are related to inconsistent requirements. IR–11, 49 FR 46647 (Nov. 27, 1984); IR–13, 49 FR 46653 (Nov. 27, 1984); IR–15, 49 FR 46660 (Nov. 27, 1984).

Similarly, the permit suspension and revocation provisions of § 705.360 are directly related to the inconsistent permitting system and are thus themselves inconsistent with the HMTA and the HMR.

H. Incorporation by Reference of Federal Regulations

Section 705.380 of the PSC regulations is entitled "Adoption of federal regulations by reference." It requires railroads subject to the PSC's jurisdiction to comply with Parts 171, 172, 173 and 174 of the HMR as those parts existed on November 1, 1985. It specifically adopts those parts by reference and provides information concerning how to obtain copies of them.

Some commenters contended that this regulation is inconsistent with the HMR because it adopts November 1, 1985 versions of the HMR, which have been superseded by the October 1, 1986 edition of the HMR and subsequent HMR amendments published in the **Federal Register.** This contention is without merit at this time. The HMR consist of an extensive body of regulations which are amended on a regular basis by changes published in the **Federal Register** and incorporated into the annual editions of the Code of Federal Regulations (CFR). RSPA encourages states to adopt and enforce the HMR as state requirements. IR–17, 51 FR 20925 at 20929 (June 9, 1986).

It is impossible, however, for states to adopt new HMR requirements simultaneously with RSPA's issuance of them. This inconsistency ruling application was filed in November 1986, less than two months after the October 1, 1986 revision date of the current CFR version of the HMR. CFR volumes generally are not published and available for a few months after the dates as of which they are current. Therefore, the incorporation by reference in § 705.380 is reasonably currently and thus consistent with the HMR.

If a change to the HMR results in a direct conflict with a state requirement, the HMR would control as soon as the

HMR change becomes effective. However, there is no basis for a wholesale preemption of state regulations which contain slightly outdated state incorporations by reference or adoptions of the HMR as state requirements.

I. Summary

The permitting system established by the PSC constitutes a regulatory system for the transportation of hazardous materials. Its applicability solely to railroad transportation-related hazardous materials activities and its non-applicability to non-transportation facilities demonstrate that it is not a land use or zoning regulation.

The PSC regulations contain inconsistent definitions; govern activities comprehensively regulated by the HMTA and the HMR; provide the PSC with unfettered discretion to determine whether transportation may occur; contain redundant, burdensome and inconsistent information and documentation requirements; have the potential—even likelihood—to cause delay in hazardous materials transportation; and regulate transportation-related storage of hazardous materials in a manner inconsistent with the HMR.

Therefore, the entire permitting system contained in the PSC regulations constitutes an obstacle to the accomplishment and execution of the HMTA and the HMR and, therefore, is in consistent with them.

III. Ruling

For the foregoing reasons, I find §§ 705.310 through 705.370 of the Nevada Administrative Code inconsistent with the HMTA and the HMR and, therefore, preempted under 49 App. U.S.C. 1811(a). Section 705.380 of the Nevada Administrative Code is consistent with the HMTA and the HMR and thus is not preempted.

Any appeal of this ruling must be filed within 30 days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on June 23, 1987.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

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