Glasgow, KY—Glasgow Muni, NDB RWY 7, Amdt. 6
Greenville, KY—Muhlenberg County, VOR/DME–A, Amdt. 3
Madisonville, KY—Madisonville Muni, VOR RWY 23, Amdt. 10
Madisonville, KY—Madisonville Muni, RNAV RWY 23, Amdt. 1
Caribou, ME—Caribou Muni, VOR–A, Amdt. 9
Traverse City, MI—Cherry Capital, VOR or TACAN–A, Amdt. 19
Traverse City, MI—Cherry Capital, NDB RWY 28, Amdt. 9
Traverse City, MI—Cherry Capital, ILS RWY 28, Amdt. 11
Holland, MI—Park Township, VOR–C, Amdt. 6, CANCELLED
Minneapolis, MN—Flying Cloud, VOR RWY 9R, Amdt. 6
Minneapolis, MN—Flying Cloud, VOR RWY 36, Amdt. 11
Minneapolis, MN—Flying Cloud, LOC RWY 9R, Amdt. 1, CANCELLED
Minneapolis, MN—Flying Cloud, ILS RWY 9R, Orig.
Red Wing, MN—Red Wing Muni, NDB RWY 9, Amdt. 2
North Kingstown, RI—Quonset State, VOR–A, Amdt. 2
North Kingstown, RI—Quonset State, VOR RWY 34, Amdt. 4
North Kingstown, RI—Quonset State, ILS RWY 16, Amdt. 3
Salt Lake City, UT—Salt Lake City Muni 2, RADAR–2, Amdt. 1

. . . Effective July 27, 1989

Cumberland, MD—Cumberland Muni, LOC–A, Amdt. 2
Cumberland, MD—Cumberland Muni, LOC/DME RWY 23, Amdt. 4
Cumberland, MD—Cumberland Muni, NDB–A, Amdt. 7
Hancock, MI—Houghton County Memorial, VOR RWY 13, Amdt. 13
Hancock, MI—Houghton County Memorial, VOR/DME RWY 13, Amdt. 1
Hancock, MI—Houghton County Memorial, VOR RWY 25, Amdt. 15
Hancock, MI—Houghton County Memorial, VOR/DME RWY 25, Amdt. 1
Hancock, MI—Houghton County Memorial, VOR RWY 31, Amdt. 12
Hancock, MI—Houghton County Memorial, VOR/DME RWY 31, Amdt. 1
Hancock, MI—Houghton County Memorial, LOC/DME BC RWY 13, Amdt. 9
Hancock, MI—Houghton County Memorial, NDB RWY 31, Amdt. 9
Hancock, MI—Houghton County Memorial, ILS RWY 31, Amdt. 10
Raleigh/Durham, NC—Raleigh/Durham, ILS RWY 5L, Amdt. 1
Leesburg, VA—Leesburg Muni/Godfrey Field, RNAV RWY 17, Amdt. 9
Martinsburg, WV—Eastern WV Regional/Shephard Field, LOC/DME BC RWY 8, Amdt. 4

. . . Effective June 21, 1989

Macomb, IL—Macomb Muni, LOC RWY 27, Amdt. 1
Macomb, IL—Macomb Muni, NDB RWY 27, Amdt. 1

. . . Effective June 20, 1989

Manhattan, KS—Manhattan Muni, ILS RWY 3, Amdt. 5

. . . Effective June 12, 1989

Boonville, MO—Jesse Viertel Memorial, NDB RWY 18, Amdt. 7

[FR Doc. 89–15690 Filed 7–3–89; 8:45 am]
BILLING CODE 4910–13–M

FEDERAL TRADE COMMISSION

16 CFR Part 305

RIN 3084–AA26

Energy Costs and Consumption Information Used in Labeling and Advertising of Consumer Appliances Under the Energy Policy and Conservation Act

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The National Appliance Energy Conservation Admendments of 1988 [1] ("NAECA 88"), enacted on June 28, 1988, adds fluorescent ballasts to the list of appliances in the Energy Policy and Conservation Act ("EPCA"), as amended by the National Appliance Energy Conservation Act of 1987 ("NAECA 87"),[2] for which the Department of Energy ("DOE") must establish minimum efficiency standards and testing procedures. In addition, NAECA 88 requires the Federal Trade Commission ("the Commission") to promulgate ballast labeling requirements.

On January 12, 1989,[3] the Commission published a Notice of Proposed Rulemaking (NPR) to add fluorescent lamp ballasts to the list of products covered by the Commission's Appliance Labeling Rule ("the Rule").[4] Today, the Commission announces final amendments to the Rule and discusses its reasons for adopting them.

EFFECTIVE DATE: June 23, 1989.

FOR FURTHER INFORMATION CONTACT: Neil J. Blickman (202–326–3038) or James G. Mills (202–326–3035), Attorneys, Division of Enforcement, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

The Notice of Proposed Rulemaking

The January 12 Notice solicited comments on the substantive proposed amendments to the Commission's Appliance Labeling Rule, which expand the coverage of the Rule to include fluorescent lamp ballasts. Specifically, the Commission sought comment on whether manufacturers of the newly covered products should be required to submit energy usage data to the Commission pursuant to § 305.8 of the Rule, whether the Commission's proposed disclosure approach for such products pursuant to § 305.11 of the Rule is appropriate and whether, pursuant to § 305.13 of the Rule, the Commission should require disclosures in connection with the use of point-of-sale promotional materials by manufacturers of the new covered products.

Under section 336(a) of EPCA,[5] the Commission must prescribe amendments to its Appliance Labeling Rule in accordance with the notice-and-comment requirements of section 553 of the Administrative Procedure Act,[6] except that interested persons must be afforded an opportunity for a hearing.

Written comments were received through February 13, 1989. The following groups and individual commented on the Commission's proposal: (1) The California Energy Commission ("CEC"), (2) The New York State Energy Office ("NY"), (3) The National Electrical Manufacturers Association ("NEMA"), (4) The Advance Transformer Co. ("Advance"), (5) The Coalition for Alternatives in Nutrition and Healthcare, Inc. and (6) Mr. Mark Uebel.

Although afforded the opportunity, no one notified the Presiding Officer to request a public hearing on the proposed amendments. Interested persons also were afforded 20 days, until March 6, 1989, to file rebuttal submissions. No comments were received during the rebuttal period.

NAECA 88 Labeling Requirements

NAECA 88 directs the Commission to amend the Appliance Labeling Rule to require disclosure that ballasts meet the minimum efficiency standards set by NAECA 88.[7] The legislation specifically requires that the disclosure be in the form of a capital letter "E" printed within a circle on the ballast and on the packaging of the ballast or the lamp containing the ballast.[8]

[1] Pub. L. 100–357, 102 Stat. 671.
[2] 42 U.S.C. 6291 *et seq.*
[3] 54 FR 1182.
[4] 16 CFR Part 305.
[5] 42 U.S.C. 6306.
[6] 5 U.S.C. 553.
[7] The standards will apply only to the four most commonly used fluorescent lamp ballasts, which make up approximately 85% of the ballast market. The standards will take effect in phases, with manufacturers of ballasts having to comply with respect to ballasts manufactured after January 1, 1990, sold by manufacturers after April 1, 1990 or incorporated into lamps by April 1, 1991.
[8] The relevant portion of the legislation states: (B) The Commission shall prescribe labeling rules

Continued

Further, NAECA 88 specifically amends section 324 of EPCA so that the Rule the Commission must promulgate for labeling lamp ballasts will differ from the appliance labeling requirements presently required by the Rule in two major respects. First, amended section 324 removes the Commission's authority to require, for lamp ballasts, disclosure of the estimated annual operating costs of the products or another measure of energy consumption, like energy efficiency ratings. Second, amended section 324 removes the Commission's authority to require, for lamp ballasts, disclosure of the range of estimated annual operating costs or energy efficiency ratings for the products.

Analysis of Comments and Statement of Reasons for Final Rule

Although NAECA 88 adds fluorescent lamp ballasts to the list of covered products under EPCA, as previously mentioned, its substantive requirements are more limited than those for the other products covered by the Rule. To prevent the new status of fluorescent lamp ballasts as a "covered product" from triggering other requirements of the existing Rule, the Commission has made a number of minor amendments to adjust the final Rule. These amendments reconcile the Rule's existing labeling requirements with the simplified approach mandated by Congress for fluorescent lamp ballasts.[9] No comments were received relating to these amendments.

A discussion of the proposed substantive amendments and the comments on those amendments follows below.

Section 305.8 Submission of Data

Section 326 of EPCA, which is unchanged by the NAECA 88 amendments, requires manufacturers of covered products to submit to the Commission energy usage data and starting serial numbers pertaining to their products. These statutory requirements are repeated in § 305.8 of the Rule along with requirements for additional product information and data needed to establish and maintain the ranges of comparability in connection with product labeling requirements.

In the NPR, the proposed amendments excluded manufacturers of fluorescent lamp ballasts from the Rule's data reporting requirements. At that time, the Commission believed that compliance with portions of the reporting requirements would not be possible because manufacturers did not use serial numbers on lamp ballasts. Further, other information required by § 305.8 was deemed inapplicable to lamp ballasts or unnecessary for ballasts because it is used to prepare ranges of comparability for covered products. Labels for fluorescent lamp ballasts will not disclose ranges since the statutory labeling requirement for these products excludes the disclosure of ranges.

In response to a question on this section of the Rule in the NPR, the California Energy Commission, New York State Energy Office and Advance Transformer Co. submitted comments. The comments urged the Commission to require manufacturers of covered ballast products to submit the energy usage data required to be submitted to the Commission by other covered product manufacturers pursuant to § 305.8 of the Rule.[10] NY, for example, pointed out that without such energy usage data, the Commission will have no effective means for determining which ballasts must comply with the NAECA 88 efficiency standards and the Rule's labeling requirements.[11] NY also urged the Commission to require ballast manufacturers to submit information concerning the energy efficiency rating of covered ballasts pursuant to § 305.8. With respect to ballasts, that rating is referred to generally as the ballast efficacy factor ("BEF").[12]

The comments also stated that although ballasts do not have serial numbers, it is standard practice for all ballast manufacturers to date code their products in order to administer warranty programs. The comments contended that information concerning the date of manufacture of covered ballast products would assist the Commission in determining whether manufacturers have complied with the Rule's labeling requirements, and, therefore, should be reported under § 305.8 of the Rule.[13]

In light of the comments stating that date codes would be an effective alternative to serial numbers for compliance with the reporting requirements, the Commission has revised § 305.8. As revised, it now requires ballast manufacturers to submit the date codes for their products. It also requires manufacturers to submit the BEF's and certain related information for their products so the Commission can determine whether a ballast is entitled to use the "E" logo, and whether it meets the minimum efficiency standards. The Commission has the power to restrain any person from distributing in commerce a covered ballast that does not comply with the NAECA 88 minimum efficiency standards.[14] Lamp ballast manufacturers will not be required, however, to submit certain data required by § 305.8 that is needed for preparing comparability ranges (ranges will not be published for lamp ballasts) or other information that is inapplicable to this product category.

Finally, NY's comment also suggested that requiring § 305.8 disclosure is necessary for another reason. NY contended that section 327(a)(1)(B) of EPCA, which is not amended by NAECA 88, may preempt state regulations that require the reporting of information concerning the energy use or efficiency of covered products other than information required to be reported pursuant to § 305.8 of the Commission's Appliance Labeling Rule.[15] NY argued that if § 305.8 of the Commission's Rule does not require the submission of energy usage and efficiency data, it is questionable whether the states and utilities could continue to require the

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under this section applicable to the covered products specified in paragraph (13) of section 322(a) and to which standards are applicable under section 325. Such rules shall provide that the labeling of any fluorescent lamp ballast manufactured on or after January 1, 1990, will indicate conspicuously, in a manner prescribed by the Commission under subsection (b) by July 1, 1989, a capital 'E' printed within a circle on the ballast and on the packaging of the ballast or of the luminaire into which the ballast has been incorporated. Section 2(d)(1), 102 Stat. 672.

[9] The amendments are to the following sections of the Appliance Labeling Rule:

Section 305.1(a) Scope of the Regulations in this Part.

Section 305.2(n), (o), (p) and (q) Definitions.

Section 305.3(j) Description of Covered Products to Which This Part Applies.

Section 305.4(e)(2) Prohibited Acts.

Section 305.5 and (i) Determinations of Estimated Annual Energy Cost and Energy Efficiency Rating.

Section 305.7(j) Determinations of Capacity.

Section 305.10(a) Ranges of Estimated Annual Energy Costs and Energy Efficiency Ratings.

Section 305.16 Required Testing by Designated Laboratory.

Section 305.18 (i) and (j) When the Rule Takes Effect.

The amendments have been revised in two respects since publication of the proposed regulation. After consulting with the Department of Energy, the Commission has added a definition of "ballast efficacy factor" and a description of the method used for determining the capacity of fluorescent lamp ballasts to §§ 305.2 and 305.7 respectively of the final Rule. The text of the minor changes to these sections appears in section C of this notice.

[10] Advance, D–18, p. 2; CEC, E–5, p. 2; NY, E–7, pp. 2–5.

[11] NY, E–7, p. 3.

[12] NY, E–7, p. 4.

[13] Advance, D–18, p. 2; CEC, E–5, p. 2; NY, E–7, p. 3.

[14] 42 U.S.C. 6304.

[15] NY, E–7, p. 4.

reporting of such information for state certification, directory publication and rebate programs.[16]

The Commission believes that the most logical and reasonable reading of section 327(a)(1)(B) of EPCA is that it does not preempt the states from requiring ballast manufacturers to report energy usage and efficiency information. This section of EPCA applies to the preemption of state testing and labeling requirements. Consequently, when this section states that it preempts state disclosure regulations that differ from the Rule's disclosure requirements, it is referring to testing and disclosures on a covered product label, not to information-reporting requirements. Section 305.8 of the Rule will now contain certain reporting requirements for ballast manufacturers and, therefore, this issue is largely moot.

Section 305.11(d) Labeling for Covered Products

The NPR added a new subsection—§ 305.11(d)—to the section on labeling to describe how the encircled capital "E" logo must be disclosed on ballasts and packaging. The proposed subsection incorporated the NAECA 88 statutory criterion of a "conspicuous" disclosure along with several options as to how and where the disclosure must be made.

One product labeling option was to disclose the logo on the existing ballast label. The other options proposed were using a separate label or indelibly stamping the ballast itself. If a separate label is used or if the product is stamped, the proposed regulation required that the disclosure be made on the surface of the ballast that is normally labeled. In all cases, the proposed regulation required the logo to be disclosed in color-contrasting ink.

The proposed requirements for disclosing the logo on packaging for individual ballasts and luminaires paralleled the disclosure requirements for ballasts themselves. The proposed regulation required that the disclosure be made on the surface on which printing normally appears, and be in the form of a separate label or an addition to an existing label or printing, or be indelibly stamped on the package itself. The NPR further proposed that if the package contained printing on more than one surface, then the label must appear on the surface that contains the product's specifications. Because the majority of fluorescent lamp ballasts and luminaires are packaged by the pallet load, usually wrapped in plastic sheeting, or "shrink wrap," the proposed regulations specifically addressed this packaging method. To ensure that the logo is disclosed conspicuously under these circumstances, the proposed regulation required that the logo appear "conspicuously" on the packaging, the shrink wrap and the documentation that usually accompanies the load. Again, the options for the method of disclosure were a separate label, printing or stamping with indelible ink.

Size of the Required Disclosure

With respect to the size and design of the encircled "E" logo, three comments urged the Commission to specify the size of the logo. The comments suggested that the size be consistent with the sizes of other logos that already appear on ballast labels, for example, Underwriters Laboratory (UL), Certified Ballast Manufacturers (CBM) and Engineering Testing Laboratories (ETL).[17]

Since the required disclosure is a simple one, containing no comparative numerical information, extremely specific regulatory requirements, tailored to the various lamp ballast label sizes, are unnecessary. The Commission believes that a performance standard, in terms of size, is sufficient for this category. The final Rule, therefore, requires the disclosure to be "conspicuous," but does not contain mandatory type size requirements. (The Rule does, however, require that the disclosure be made in color-contrasting ink).

The Commission has decided, however, to incorporate the commentors' suggestions as "safe harbors." The final Rule states that, for purposes of this section, the Commission will deem the encircled "E" to be "conspicuous" if it is as large as either the manufacturer's name or another logo, such as the "UL", "CMB" or "ETL" logos, whichever is larger, that appears on the fluorescent lamp ballast, the packaging for such ballast or the packaging for the luminaire into which the covered ballast is incorporated, whichever is applicable for purposes of labeling. Thus, the regulation offers certainty, as well as flexibility, as to what would constitute compliance.

Color-Contrasting Ink Requirement

The proposed regulation required that disclosure of the encircled "E" be in "color-contrasting" ink, *i.e.*, in a color that contrasts with the background onto which it is placed. The comments requested clarification in the final Rule that manufacturers are not being required to add a third color of ink to their labels.[18] The color-contrasting provision does not necessarily require a third color. The purpose of this requirement is for the "E" to stand out against its background. For example, it would not be acceptable to have the background in one shade of blue, and the "E" in a similar shade, because it would probably not be sufficiently conspicuous. The "E" could be in blue or black, for example, or another color against a white background banded by the same color as the "E."

Shrink Wrap Labeling Requirement

The proposed regulation recognized that ballasts and luminaires are often packaged by the pallet load and wrapped in plastic "shrink wrap." The comments recommended that the Commission not require labeling on "shrink wrap" if it is clear plastic and the encircled "E" on ballast and luminaire boxes is legible underneath the wrap.[19] The Commission agrees that additional labeling is unnecessary in this case. Therefore, the final Rule does not require the labeling of clear plastic wrap if the encircled "E" appears conspicuously underneath it.

Section 305.13 Promotional Material Displayed or Distributed at Point of Sale

The NAECA 88 amendments do not affect the Commission's authority, pursuant to section 324(c)(4) of EPCA, to require certain disclosures in connection with the use of point-of-sale promotional materials. The disclosures, however, are statutorily limited to any of the information required to be disclosed on the product's label. Since the Commission originally believed that fluorescent lamp ballasts and luminaires containing them are rarely sold through the use of promotional materials, the proposed regulations excluded manufacturers of these products from the requirements of § 305.13 of the Rule.

The California Energy Commission comment stated, however, that manufacturers of fluorescent lamp ballasts produce, and frequently use, point-of-sale promotional materials to

[16] Under New York and California state laws, ballast manufacturers are required to file energy usage and efficiency information, including ballast efficacy factors, for publication in state directories of fluorescent lamp ballast and luminaire manufacturers. These directories apparently are used extensively by building professionals who purchase ballasts and by state utilities that offer rebates for the purchase and installation of high efficiency ballasts.

[17] Advance, D–18, p. 2; NEMA, D–19, p. 2; CEC, E–5, p. 3.

[18] Advance, D–18, p. 1; NEMA, D–19, p. 1.

[19] *Id.*

influence consumer purchasing decisions.[20] According to CEC, such materials are widely delivered to and disseminated by wholesale distributors at industry trade shows. Consequently, the Commission is not amending § 305.13 of the Rule to exclude ballast manufacturers from its requirements. Rather, pursuant to section 324(c)(4) of EPCA, the Commission is adding a new paragraph to § 305.13 of the Rule to require that the encircled "E" logo be disclosed in each description of a covered ballast in any printed matter displayed or distributed at the point-of-sale of such product.

Section 305.14 Catalogs

Section 326(a) of EPCA, which is unaffected by NAECA 88, requires that if a manufacturer of a covered product advertises the product in a catalog, the catalog must display all the information required on the label, unless otherwise required by the Commission. The proposed Rule required, therefore, that ballast manufacturers display the encircled "E" logo in connection with the product description for each covered ballast they include in their catalogs. That logo is all the information required on a ballast label pursuant to section 324 of EPCA, as amended by NAECA 88.

NY and CEC commented that, in addition to the encircled "E", the Commission should require disclosure of ballast efficacy factors in catalogs. They contended that there still will be a wide range of energy efficiencies among the ballasts that satisfy the minimum efficiency standards set by NAECA 88. Requiring the disclosure of ballast efficacy factors in catalogs would allow buyers to choose a level of ballast efficiency desired, beyond the minimum.

Regardless of the merits of the proposal, it would be inconsistent with the authority granted the Commission under section 326(a) of EPCA for the Commission to require the disclosure of BEFs in catalogs. The most logical and reasonable interpretation of section 326(a) of EPCA is that the Commission has the authority to require that catalogs describing covered products display all or less than all the information required on the appliance labels for such products. In other words, section 326(a) allows the Commission to limit, not expand, by rule what would otherwise statutorily be required to be disclosed in catalogs. The Commission is not requiring, therefore, the disclosure of ballast efficacy factors in catalogs, and the language in the January 12 Notice is adopted for this section of the final Rule.[21]

Section A—Regulatory Flexibility Act

The Notice announcing the proposed amendments did not contain a regulatory analysis under the Regulatory Flexibility Act (5 U.S.C. 603–604). This analysis was not required because the Commission believed that the amendments, if promulgated, would not have a significant economic impact on a substantial number of small entities. The Commission reached this conclusion because the proposed amendments will impose few additional costs on small entities and will have a minimal effect on all business entities within the affected industry regardless of their size.

The NPR, however, discussed the applicability of the Regulatory Flexibility Act to the proposed amendments and requested any information that would bear on whether the proposed amendments would have a significant economic impact on a substantial number of small entities. None of the comments addressed this issue.

The statutory and regulatory requirements for products, packaging, point-of-sale materials and catalogs to disclose an encircled "E" logo will result in few costs to the industry. Further, the Commission estimates that compliance with the data reporting requirements announced today will take no more than two hours per year for each of the approximately 20 ballast manufacturers. In view of the minimal cost effect of the amendments, the Commission certifies that, under the provisions of section 5 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Rule amendments as promulgated will not have a significant economic impact on a substantial number of small entities.

Section B—Paperwork Reduction Act

The disclosure amendments being announced today are not subject to the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501–3518. The "public disclosure of information originally supplied by the Federal government to the recipient for th[at] purpose," is not the "collection of information" as defined by the rule implementing the PRA, 5 CFR 1320.7(c)(2) (1988). The disclosure required for fluorescent lamp ballasts (the encircled letter "E") is specified in the Rule and, therefore, the industry does not have to collect any information in order to develop the disclosure.

The amendments to the reporting requirements in § 305.8 of the Rule, however, do involve the "collection of information." Compliance with these reporting requirements will take each of the approximately 20 affected fluorescent lamp ballast manufacturers an estimated two hours per year, resulting in a total of less than 50 hours of paperwork burden. These requirements have been incorporated into the existing clearance for the Commission's Appliance Labeling Rule (OMB Control No. 3084–0069).

List of Subjects in 16 CFR Part 305

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

Section C—Amendments

For the reasons set forth in the preamble, the Commission amends Title 16, Part 305 of the Code of Federal Regulations as follows:

PART 305—RULES FOR USING ENERGY COSTS AND CONSUMPTION INFORMATION USED IN LABELING AND ADVERTISING FOR CONSUMER APPLIANCES

1. The authority citation for Part 305 continues to read as follows:

Authority: Sec. 324 of the Energy Policy and Conservation Act (Pub. L. 94–163) (1975), as amended by the National Energy Conservation Policy Act, (Pub. L. 95–619) (1978), the National Appliance Energy Conservation Act, (Pub. L. 100–12) (1987), and the National Appliance Energy Conservation Amendments of 1988, (Pub. L. 100–357) (1988), 42 U.S.C. 6294; sec. 553 of the Administrative Procedure Act, 5 U.S.C. 533.

2. Section 305.1(a) is revised to read as follows:

§ 305.1 Scope of the regulations in this part.

* * * * *

(a) Labeling the products with information indicating their estimated annual energy costs or energy efficiency ratings, and related information or their compliance with applicable standards under section 325 of the Energy Policy and Conservation Act, 42 U.S.C. 6295.

* * * * *

3. Section 305.2 (n) and (o) are revised, and § 305.2 is amended by the addition of a new paragraph (p) and a new paragraph (q) to read as follows:

§ 305.2 Definitions.

* * * * *

[20] CEC, E–5, pp. 3–4.

[21] The Commission believes, however, that manufacturers who produce ballasts with efficiencies beyond the minimums established by NAECA 88 will have an incentive to provide that information to purchasers voluntarily.

(n) "Consumer appliance product" means any "consumer product," as identified in section 322 of the Act (42 U.S.C. 6292).

(o) "Covered Product" means any consumer appliance product defined in § 305.3 of the rule.

(p) "Luminaire" means a complete lighting unit consisting of a fluorescent lamp or lamps, together with parts designed to distribute the light, to position and protect such lamps, and to connect such lamps to the power supply through the ballast.

(q) "Ballast efficacy factor" means the relative light output divided by the power input of a fluorescent lamp ballast, as measured under test conditions specified in American National Standards Institute standard C82.2–1984, or as may be prescribed by the Secretary of Energy.

4. Section 305.3 is amended by the addition of a new paragraph (j) to read as follows:

§ 305.3 Description of covered products to which this part applies

* * * * *

(j) "Fluorescent lamp ballast" means a device that is used to start and operate fluorescent lamps by providing a starting voltage and current and limiting the current during normal operation, and that is designed to operate at nominal input voltages of 120 or 277 volts with a frequency of 60 Hertz and is for use in connection with F40T12, F96T12 or F96T12HO lamps.

(5) Section 305.4(e)(2) is revised to read as follows:

§ 305.4 Prohibited acts.

* * * * *

(e) * * *

(2) Any covered product, except central air conditioners, pulse combustion and condensing furnaces, and fluorescent lamp ballasts, if the manufacture of the product was completed prior to May 19, 1980. Any central air conditioner, pulse combustion furnace or condensing furnace if its manufacture was completed prior to June 7, 1988. Any fluorescent lamp ballast if its manufacture was completed prior to January 1, 1990.

* * * * *

6. Section 305.5 is amended by revising the introductory text and by adding a new paragraph (i), to read as follows:

§ 305.5 Determinations of estimated annual energy cost and energy efficiency rating.

Procedures for determining the estimated annual energy costs, the energy efficiency ratings and the power and efficacy factors of covered products are those found in 10 CFR Part 430, Subpart B, in the following sections:

* * * * *

(i) Fluorescent lamp ballasts—§ 430.22(q).

7. Section 305.7 is amended by the addition of a new paragraph (j), to read as follows:

§ 305.7 Determinations of capacity

* * * * *

(j) *Fluorescent lamp ballasts.* The capacity shall be the ballast input voltage, determined according to 1.2 of Appendix Q to 10 CFR Part 430, Subpart B.

8. Section 305.8(a) is amended by revising the first sentence and adding two new sentences at the end to read as follows:

§ 305.8 Submission of data

(a) Each manufacturer of a covered product, except manufacturers of fluorescent lamp ballasts, shall submit to the Commission, not later than January 21, 1980 (for manufacturers of central air conditioners and pulse combustion and condensing furnaces, the submission date shall be February 8, 1988), a report listing the estimated annual energy cost (for refrigerators and refrigerator-freezers, freezers, dishwashers, water heaters, and clothes washers) or the energy efficiency rating (for room air conditioners, central air conditioners and furnaces) for each basic model in current production, determined according to § 305.5 and statistically verified according to § 305.6. * * * Each manufacturer of a covered fluorescent lamp ballast shall submit to the Commission, not later than March 1, 1990 (and annually thereafter on or before that date), a report for each basic model of fluorescent lamp ballast in current production. The report shall contain the following information:

(1) Name and address of manufacturer;

(2) All trade names under which the fluroescent lamp ballast is marketed;

(3) Model number;

(4) Starting serial number, date code or other means of identifying the date of manufacture (date of manufacture information must be included with only the first submission for each basic model);

(5) Nominal input voltage and frequency;

(6) Ballast efficacy factor; and,

(7) Type (F40T12, F96T12 or F96T12HO) and number of lamp or lamps with which the fluorescent lamp ballast is designed to be used.

* * * * *

9. The first sentence of § 305.10(a) is revised to read as follows:

§ 305.10 Ranges of estimated annual energy costs and energy efficiency ratings.

(a) The range of estimated annual energy costs or range of energy efficiency ratings for each covered product (except flouorescent lamp ballasts) shall be taken from the appropriate appendix to this rule in effect at the time the labels are affixed to the products.* * *

* * * * *

10. Section 305.11 is amended by the addition of a new paragraph (d) to read as follows:

§ 305.11 Labeling for covered products.

* * * * *

(d) *Fluorescent Lamp Ballasts and Luminaires*—(1) *Contents.* Fluorescent lamp ballasts that are "covered products," as defined in § 305.2(o), and to which standards are applicable under section 325 of the Act, shall be marked conspicuously, in color-contrasting ink, with a capital letter "E" printed within a circle. Packaging for such fluorescent lamp ballasts, as well as packaging for luminaires into which they are incorporated, shall also be marked conspicuously with a capital letter "E" printed within a circle. For purposes of this section, the encircled capital letter "E" will be deemed "conspicuous," in terms of size, if it is as large as either the manufacturer's name or another logo, such as the "UL," "CBM" or "ETL" logos, whichever is larger, that appears on the fluorescent lamp ballast, the packaging for such ballast or the packaging for the luminaire into which the covered ballast is incorporated, whichever is applicable for purpose of labeling.

(2) *Product Labeling.* The encircled capital letter "E" on fluorescent lamp ballasts must appear conspicuously, in color-contrasting ink, (*i.e.*, in a color that contrasts with the background on which the encircled capital letter "E" is placed) on the surface that is normally labeled. It may be printed on the label that normally appears on the fluorescent lamp ballast, printed on a separate label, or stamped indelibly on the surface of the fluorescent lamp ballast.

(3) *Package Labeling.* For purposes of labeling under this section, packaging for such fluorescent lamp ballasts and the luminaires into which they are incorporated consists of the plastic sheeting, or "shrink-wrap," covering pallet loads of fluorescent lamp ballasts or luminaires as well as any containers in which such fluorescent lamp ballasts or the luminaires into which they are

incorporated are marketed individually or in small numbers. The encircled capital letter "E" on packages containing fluorescent lamp ballasts or the luminaires into which they are incorporated must appear conspicuously, in color-contrasting ink, on the surface of the package on which printing or a label normally appears. If the package contains printing on more than one surface, the label must appear on the surface on which the product inside the package is described. The encircled capital letter "E" may be printed on the surface of the package, printed on a label containing other information, printed on a separate label, or indelibly stamped on the surface of the package. In the case of pallet loads containing fluorescent lamp ballasts or the luminaires into which they are incorporated, the encircled capital letter "E" must appear conspicuously, in color-contrasting ink, on the plastic sheeting, unless clear plastic sheeting is used and the encircled capital letter "E" is eligble underneath this packaging. The encircled capital letter "E" must also appear conspicuously on any documentation that would normally accompany such a pallet load. The encircled capital letter "E" may appear on a label affixed to the sheeting or may be indelibly stamped on the sheeting. It may be printed on the documentation, printed on a separate label that is affixed to the documentation or indelibly stamped on the documentation.

11. Section 305.13 is amended by revising the introductory text of paragraph (a), and by adding a new paragraph (c), to read as follows:

§ 305.13 Promotional material displayed or distributed at point of sale.

(a) Any manufacturer, distributor, retailer, or private labeler who prepares printed material for display or distribution at point of sale concerning a covered product (except fluorescent lamp ballasts) shall clearly and conspicuously include in such printed material the following required disclosure:

* * * * *

(c) Any manufacturer, distributor, retailer, or private labeler who prepares printed material for display or distribution at point of sale concerning fluorescent lamp ballasts that are "covered products," as defined in § 305.2(o), and to which standards are applicable under section 325 of the Act, shall disclose conspicuously in such printed material, in each description of such fluorescent lamp ballasts, an encircled capital letter "E".

12. Section 305.14 is amended by revising the introductory text of paragraph (a), and by adding a new paragraph (c), to read as follows:

§ 305.14 Catalogs.

(a) Any manufacturer, distributor, retailer, or private labeler who advertises a covered product (except fluorescent lamp ballasts) in a catalog, from which it may be purchased by cash, charge account or credit terms, shall include in such catalog, on each page that lists a covered product, the following information required to be disclosed on the label:

* * * * *

(c) Any manufacturer, distributor, retailer, or private labeler who advertises fluorescent lamp ballasts that are "covered products," as defined in § 305.2(o), and to which standards are applicable under section 325 of the Act, in a catalog, from which they may be purchased by cash, charge account or credit terms, shall disclose conspicuously in such catalog, in each description of such fluorescent lamp ballasts, a capital letter "E" printed within a circle.

13. The first sentence of § 305.16 is revised to read as follows:

§ 305.16 Required testing and designated laboratory.

Upon notification by the Commission or its designated representative, a manufacturer of a covered product shall supply, at the manufacturer's expense, no more than two of each model of each product to a laboratory, which will be identified by the Commission or its designated representative in the notice, for the purpose of ascertaining whether the estimated annual energy cost or energy efficiency rating disclosed on the label or fact sheet, or as required by § 305.14, or the representation made by the encircled capital letter "E" label that the product is in compliance with applicable standards in section 325 of the Act, is accurate. * * *

* * * * *

14. Section 305.18 is amended by adding a new sentence at the end of paragraphs (a) and (b); by revising paragraphs (e) and (f); by redesignating paragraph (i) as (j); and by adding a new paragraph (i), to read as follows: (Paragraph (j) is republished for the convenience of the reader.)

§ 305.18 When the rules take effect.

(a) * * * For manufacturers of fluorescent lamp ballasts, the date for submitting starting serial numbers, date codes or other means of identifying the date of manufacture shall be March 1, 1990.

(b) * * * For manufacturers of fluorescent lamp ballasts, the date for submitting such data shall be March 1, 1990.

* * * * *

(e) The requirement that specified information about covered products be disclosed in catalogs takes effect for all catalogs printed and distributed on or after May 19, 1980. This requirement does not apply to catalogs if the catalog issue was distributed before May 19, 1980. The requirement that specified information about central air conditioners and pulse combustion and condensing furnaces be disclosed in catalogs takes effect for all catalogs printed and distributed on or after June 7, 1988. The requirement that specified information about fluorescent lamp ballasts be disclosed in catalogs takes effect for all catalogs printed and distributed on or after January 1, 1990.

Required revisions to the specified information must be made in all new editions and new catalogs printed and distributed after the date of the revision.

(f) The requirement that all printed material displayed or distributed at the point of sale disclose information specified in § 305.13 takes effect on May 19, 1980, except as provided for in § 305.18 (h) and (i).

* * * * *

(i) Unless otherwise provided in § 305.18, all requirements pertaining to fluorescent lamp ballasts take effect for all new covered products on which manufacture is completed on or after January 1, 1990. All requirements pertaining to luminaires into which covered fluorescent lamp ballasts have been incorporated take effect on January 1, 1990.

(j) All other requirements of this rule except those in § 305.4(d) take effect on May 19, 1980.

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 89-15682 Filed 7-3-89; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Adverse Effect Wage Rate Methodology

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration of the Department of Labor (DOL) is adopting an interim rule as a final rule setting forth a methodology for computing adverse effect wage rates (AEWRs) for the temporary alien agricultural labor certification (H–2A) program. AEWRs are the minimum wage rates which must be offered and paid to U.S. and alien workers by employers seeking certification of temporary or seasonal agricultural labor or services of nonimmigrant alien workers (H–2A visaholders) in the United States. Because of the uncertainty of the outcome of ongoing litigation involving the existing methodology which was initially adopted on June 1, 1987, DOL, after notice and consideration of comments, is adopting an interim rule as a final rule setting forth that same methodology based upon an expanded record.

EFFECTIVE DATE: August 4, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas M. Bruening, Chief, Division of Foreign Labor Certifications, United States Employment Service, Employment and Training Administration, United States Department of Labor, Room N–4456, 200 Constitution Avenue, NW., Washington, DC 20210; Telephone: 202–535–0163 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On October 28, 1988, the Department of Labor (DOL) published a proposed rule in the **Federal Register** to adopt an expanded explanation for 20 CFR 655.107. 52 FR 43722. After consideration of public comments and the entire administrative record, and for the reasons that follow, DOL is promulgating the final rule described below.

Table of Contents

I. Introduction.

A. The H–2A Program

Whether to grant or deny an employer's petition to import a nonimmigrant alien to the United States for the purpose of temporary employment is solely the decision of the Attorney General and his designee, the Commissioner of the Immigration and Naturalization Service (INS). The Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*), as amended by the Immigratioin Reform and Control Act of 1986 (IRCA), Pub. L. 99–603, 100 Stat. 3359, provides that the Attorney General may not approve such a petition from an employer for employment of nonimmigrant alien workers (H–2A visaholders or workers) for temporary or seasonal services or labor in agriculture unless the petitioner has applied to the Secretary of Labor (Secretary) for a labor certification showing that:

(1) There are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and

(2) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The amendments to the INA made by IRCA codified DOL's role in the temporary alien agricultural labor certification process. Prior to June 1, 1987, many of DOL's responsibilities specified in IRCA were carried out under the requirement in the INA at 8 U.S.C. 1184(c) that the Attorney General consult with appropriate agencies of the Government concerning the importation of nonimmigrant workers, and under INS regulations governing the reliance placed by INS on the advice of DOL relative to U.S. worker availability and adverse effect. See 8 CFR 214.2(h)(3)(i) (1986); 20 CFR Part 665, Subpart C (1986).

The H–2A-related amendments to the INA made by IRCA apply to petitions and applications filed under INA sections 214(c) and 216 on or after the effective date of June 1, 1987. IRCA section 301(d), 8 U.S.C. 1186 note; see U.S.C. 1184(c) and 1186. Section 301(e) of IRCA requires that "[n]otwithstanding any other provision of law, final regulations to implement * * * [sections 101(a)(15)(ii)(a) and 216 of the Immigration and Nationality Act] shall first be issued, on an interim or other basis, not later than the effective date." 8 U.S.C. 1186 note.

On May 5, 1987, DOL published in the **Federal Register** at 52 FR 16770 a proposed rule to implement DOL's responsibilities under the H–2A temporary alien agricultural labor certification program, as set out at sections 101(a)(15)(H)(ii)(a), 214(c), and 216 of the INA, as amended by IRCA (8 U.S.C. 1101(a)(15)(ii)(a), 1184(c), and 1186). Under that program, job opportunities are certified for H–2A workers to perform agricultural labor or services of a temporary or seasonal nature in the United States. Written comments on the May 5, 1987, proposed rule were invited through May 19, 1987.

On June 1, 1987, DOL published an interim final rule in the **Federal Register**, effective on that date. 52 FR 20496. The interim final rule discussed many of the comments received in response to the May 5, 1987, proposed rule, changing some language not relevant to this document. The comment period also was reopened through July 31, 1987. The amendments in DOL's June 1, 1987, interim final rule contained changes to the labor certification process as mandated by IRCA and revised procedures as deemed necessary by DOL to carry out its statutory responsibilities.

B. The AFL–CIO Litigation and Further Rulemaking

Upon publication of the June 1, 1987, interim final rule, the AFL–CIO sued the Secretary of Labot to, among other things, invalidate the interim final 20 CFR 655.107(a), which established the methodology for computing AEWRs.

On December 22, 1987, the United States Court of Appeals for the District of Columbia Circuit reversed a lower court decision that had invalidated the interim final 20 CFR 655.107(a). *American Federation of Labor and Congress of Industrial Organizations* v. *Brock*, 835 F. 2d 912 (D.C. Cir. 1987), *rev'g*, 668 F. Supp. 31 (D.D.C. 1987). Also vacated was that portion of the lower court decision that had stayed implementation of the June 1, 1987, interim final AWER methodology in 20 CFR 655.107(a). 835 F. 2d at 913 n. 2.

However, the D.C. Circuit held that the interim final rule did not contain information sufficient for the court to "discern the reasonableness of the action without further explanation" and remanded the matter "to the Department for a more adequate explanation of its actions * * *." 835 F. 2d at 913 n. 2, 919, and 920. The D.C. Circuit, therefore, remanded the rulemaking for DOL to provide a more reasoned explanation for why it chose in the June 1, 1987, methodology to discontinue what the Court of Appeals viewed as the prior practice of providing for an enhancement to correct for the past employment of legal and undocumented aliens.

Upon remand, the U.S. District Court for the District of Columbia ordered DOL's "reasoned explanation" to be issued on or before April 30, 1988, unless otherwise ordered. *AFL–CIO* v. *Brock*, Civil Action No. 87–1683 (Order, D.D.C. March 25, 1988). DOL submitted the expanded explanation to the District Court in April 1988.

Additionally, DOL published the expanded explanation in the Federal Register as a new Notice of Proposed Rulemaking (NPRM). 52 FR 43722 (October 28, 1988). Interested parties were invited to submit written comments on the NPRM through November 28, 1988. *Id.*

On December 20, 1988, the U.S. District Court for the District of Columbia filed an opinion and order, finding that the April 1988 submission to it from DOL was invalid, since it was, among other things, an improper "post-hoc rationalization." *AFL–CIO* v. *McLaughlin*, Civil Action No. 87–1683 (D.D.C. Opinion and Order, filed December 20, 1988). The court held that the June 1, 1987, interim final methodology could not be justified by the document filed with the court in April 1988, and enjoined the June 1, 1987, 20 CFR 655.107. The court did not rule on the October 28, 1988, NPRM.[1]

The December 20, 1988, order of the U.S. District Court regarding the June 1, 1987, AEWR methodology and the April 1988 submission has been stayed indefinitely by the U.S. Court of Appeals for the District of Columbia Circuit. *AFL–CIO* v. *McLaughlin*, Case No. 89–5001 (D.C. Cir. January 13, 1989) (Order granting stay pendng appeal).

DOL has engaged in an extensive analysis of the opinions and orders in the *AFL–CIO* litigation; has reviewed and considered the pre- and post-June 1, 1987, rulemaking record, the documents discussed in the October 28, 1988, NPRM, the comments received in response to the October 28, 1988, NPRM, and other data; and has consulted with other affected agencies of the Federal Government. As a result of this review, consideration, and consultation, and on the basis of its own analysis, DOL herein adopts prospectively an AEWR methodology for the reasons set foth below. A discussion of the June 1, 1987, AEWR methodology, and of the public comments on AEWRs, received since the May 5, 1987, NPRM, and in response to that NPRM, the June 1, 1987, interim final rule, and the October 28, 1988, NPRM, is set forth below.

DOL continues to consider the comments received on other portions of the June 1, 1987, interim final rule and the May 5, 1987, proposed rule. DOL's comprehensive final rule for the H–2A Program will be published at a future date.

II. The June 1, 1987, Methodology

IRCA is expected to expand significantly the lawful importation program. DOL, therefore decided to establish H–2A program adverse effect wage rates (AEWRs) not merely for the 14 "traditional user States", but instead to set them for every State (except Alaska). In order to ensure that the wages of similarly employed U.S. workers are not adversely affected, DOL continued in the June 1, 1987, interim final H–2A regulation its past policy and practice of requiring covered agricultural employers to offer and pay their U.S. and H–2A workers no less than the applicable AEWR, as determined by the Director, U.S. Employment Service (USES). Further, the interim final H–2A regulations, as had the predecessor H–2 temporary alien agricultural labor certification regulations, provided that employers applying for temporary alien agricultural labor certification must agree to comply with all employment-related laws. If the employment is covered by a wage standard applicable under any federal or State minimum wage law, the employer must comply with that law. See *e.g.*, 29 U.S.C. 206(a); and 20 CFR 653.501(d)(4) and (e)(1) (1986). If the prevailing wage for the occupation in the labor market of intended employment is higher, the employer must offer and pay that wage.

Thus, a worker in employment under the H–2A program must be paid at the highest of the applicable wage rates, whether that rate is the AEWR, the prevailing wage, or the federal or State statutory minimum wage. See *Limoneira Co.* v. *Wirtz*, 327 F. 2d 499 (9th Cir. 1964), *aff'g*, 225 F. Supp. 961 (S.D. Cal. 1963); see also *Elton Orchards, Inc.* v. *Brennan*, 508 F. 2d 1154, 1156 (1st Cir. 1974); and *Flecha* v. *Quiros*, 567 F. 2d 1154, 1156 (1st Cir. 1977). These decisions acknowledge DOL's discretion in the area of AEWRs and form a basis for construing DOL's H–2A regulations.

Although continuing its basic past policy of requiring the payment of the AEWR, prevailing wage, or statutory minimum wage, whichever is highest, DOL, in the June 1, 1987, interim final rule, revised the procedures for calculating and establishing AEWRs for H–2A work. DOL changed the method of calculating AEWRS, by basing AEWRs on the level of actual average hourly agricultural wages for each State, as surveyed by the U.S. Department of Agriculture (USDA). This new methodology sets AEWRs in each year for the H–2A program at a level equal to the previous year's annual regional average hourly wage rates for field and livestock workers (combined), as computed by USDA quarterly wage surveys. (This is the same data series by which AEWRs under the previous H–2 agricultural worker program were indexed. USDA publishes the data for the 48 contiguous States and Hawaii by nineteen agricultural regions, which consist of one or more States.)

The new methodology ties AEWRs directly to the average wage, as opposed to the old methodology which resulted in AEWRs substantially higher than agricultural earnings in many States, and lower for some States. The new

[1] In a separate opinion, the District Court on the same date remanded to DOL the H–2A program's "piece-rate regulation", 20 CFR 655.102(b)(9)(ii). *AFL–CIO* v. *McLaughlin*, Civil Action No. 87–1683 (Opinion and Order, filed December 20, 1988). That order has been stayed indefinitely by the U.S. Court of Appeals for the District of Columbia Circuit. *AFL–CIO* v. *McLaughlin*, Case No. 89–5001 (D.C. Cir. February 6, 1989) (Order granting motion to enlarge stay pending appeal).

methodology is based directly on a current average agricultural wage that is not apparently depressed by the presence of foreign workers, rather than being based on a 1950 agricultural wage that had been adjusted upward by various methods over the years, as discussed below.

III. Historical Protections Against Adverse Effect on Wages

A. History of AEWRs

1. Background

In order to adequately assess the court's concern that the June 1, 1987, AEWR methodology represents a substantial departure from past practice, it is necessary to review DOL's longstanding practice in setting AEWRs.

From the beginning of the Federal Government's involvement in the lawful importation of foreign agricultural workers, dating at least as far back as 1942, the Government has sought to protect similarly employed U.S. workers from the adverse effect such employment would have on their wages. At first, these programs were established under both international agreements and federal statutes, and more recently by federal statutes alone.

For a number of decades, DOL has computed and published AEWRs for the temporary employment of nonimmigrant alien workers for agricultural employment under various admission programs. See H.N. Dellon, "Foreign Agricultural Workers and the Prevention of Adverse Effect", 17 *Labor Law Journal* 739 (1966). Mr. Dellon's article notes that, as far back as 1953, employers seeking to import foreign nationals to work in various crop activities (in that case, under the Bracero Program) were required to pay not less than a wage established by DOL. Eventually, AEWRs began to be set periodically on a Statewide basis. See *Dona Ana County Farm & Livestock Bureau, Inc.* v. *Goldberg*, 200 F. Supp. 210 (D.D.C. 1961).

As time passed, establishment of AEWRs became more formalized, and AEWRs were computed and set for the H–2 agricultural worker program as well, after public notice and comment. See, *e.g.*, 29 FR 19101, 19102 (December 30, 1964); 32 FR 4569, 4571 (March 28, 1967); and 35 FR 12394, 12395 (August 4, 1970).

2. World War II Programs

The 1942 Agreement With Mexico Respecting the Temporary Migration of Mexican Workers, stemming from the wartime shortage of domestic farm labor, facilitated the importation of Mexican workers in the beginnings of the "Bracero program". 56 Stat. 1759, EAS 278 (July 23 and August 4, 1942). The 1942 Agreement required that the Mexican workers be paid the same wage rates as those paid to U.S. farmworkers, but in no event could hourly rate workers be paid less than $.30 per hour. See Wayne D. Rasmussen, *A History of the Emergency Farm Labor Supply Program, 1943–47*, U.S. Department of Agriculture, Bureau of Agricultural Economics, Monograph No. 13 (September 1951) (Rasmussen) at 203. The $.30 per hour wage was equivalent to the federal Fair Labor Standards Act (FLSA) minimum wage then applicable to nonagricultural employment. In 1943, the $.30 per hour minimum in the 1942 Agreement was extended to piece-rate workers. 57 Stat. 1152, EAS 351 (April 26, 1943). In 1946, the wage was raised to $.37 per hour or $33.60 per week (the latter for bi-weekly-paid workers). See Rasmussen at 211.

Congress specifically authorized the Bracero program, and programs to import farmworkers from other Western Hemisphere areas, by statute by enacting Pub. L. 45 in 1943. Act of April 29, 1943, c. 82, 57 Stat. 70. Pub. L. 45 and the agreements with the foreign governments provided the basic structure for the operation of the Mexican and other foreign farm labor programs through 1947.

Other international agreements, although less formal, were entered into with the Bahamas, Barbados, Jamaica, Canada, and Newfoundland (then separate from Canada):

(a) By a March 16, 1943, agreement establishing the Bahamian program, workers were guaranteed the higher of the local prevailing wage or $.30 per hour (equivalent to the FLSA minimum wage). See Rasmussen at 225. This was raised to $15.00 weekly or $30.00 bi-weekly in 1946. See Rasmussen at 240.

(b) By an April 2, 1943, agreement establishing the Jamaican program, workers were guaranteed the higher of the local prevailing wage of $.30 per hour (equivalent to the FLSA minimum wage). See Rasmussen at 250–51. This was raised to $15.00 weekly or $30.00 bi-weekly in 1946. See Rasmussen at 253.

(c) By a May 24, 1944, agreement establishing the Barbadian program, workers were guaranteed the higher of the local prevailing wage or $.30 per hour (equivalent to the FLSA minimum wage). See Rasmussen at 273–274. This was raised to $15.00 weekly or $30.00 bi-weekly in 1946. See Rasmussen at 275.

(d) Thirteen cents and $.15 per barrel minimum piece-rates were set for Canadian farmworkers in the Maine potato harvest. Rasmussen at 276.

(e) By a March 23 and 24, 1944, agreement establishing the Newfoundland program, dairy workers were guaranteed the higher of the local prevailing wage or $65.00 per month. See Rasmussen at 282.

3. Post-war Program

The World War II programs ended at the close of 1947. However, temporary foreign agricultural workers continued to enter the United States, particularly from Mexico, pursuant to section 3 of the Immigration Act of 1917, and post-war extensions and revisions of the 1942 international agreement. 61 Stat. 3738, TIAS 1710 (March 25 and April 2, 1947); 62 Stat. 3887, TIAS 1968 (February 21, 1948); and 2 U.S.T. 1048, TIAS 2260 (August 1, 1949). The agreement was informally extended in 1950. The work contract under the post-1947 agreements differed in the area of wages, however. There was no guaranteed hourly wage (in 1945 this was $.37 per hour) and no guaranteed minimum piece-rate earnings.

4. Bracero Program

Concern was raised, however, that importation of these workers had caused wages in their areas of employment to lag. President's Commission on Migratory Labor, *Migratory Labor in American Agriculture* (1951) at 58–59. After negotiations with Mexico, a new agreement was negotiated, authorized by Pub. L. 78, c. 223, 65 Stat. 119 (July 12, 1951), 7 U.S.C. 1461–1468 (1951) (now deleted). Mexican workers could not be admitted unless the Secretary of Labor determined, among other things, that "the employment of the workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed * * *." A new international agreement was signed, effective August 11, 1951. Migrant Labor Agreement of 1951, 2 U.S.T. 1940, TIAS 2331, 162 UNTS 103 (August 11, 1951). Workers were to be paid the prevailing wage rates. As amended and updated in the 1950's and early 1960's, the 1951 statute and international agreement authorized the Bracero program in that period.

The 1961 extension of the 1951 agreement added the requirement that the wages stated in the contract shall be no less than an adverse effect wage rate determined by the Secretary of Labor. 10 U.S.T. 1630, TIAS 4815; 12 U.S.T. 3130, TIAS 4913. In 1962, these ranged from $.60 per hour in Arkansas to $1.00 per hour in 17 other States. The ceiling was set to correspond (rounded to the nearest $.05) to the USDA's national

survey of average agricultural earnings, which was found to be $.99 in 1961. By comparison, the FLSA minimum (not yet extended to agriculture) was $1.15 per hour. States with average earnings above the national average were held to the $1.00 rate; and one State at the national average was rounded down to $.95. In six other States with average earnings below the national average, the AEWR was set generally by taking the State average hourly farm wage rate, as reported in the 1959 Census of Agriculture and adjusting it to 1961 in accordance with the trend in farm wage rates for that State as measured by USDA's series of average hourly farm wage rates with the obtained figures rounded down to the next $.05. These AEWRs applied only to the Bracero program. The 1962 AEWRs for 24 Bracero-user States continued to be used in 1963 and in 1964, the final year of the Bracero program.

5. H–2 program

In 1952, Congress passed the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, which, as amended and updated, controls the importation of other foreign agricultural workers (and, since 1962, Mexican workers as well). This was known as the H–2 program (now replaced under IRCA by the H–2A Program). The use of legally admitted non-Mexican workers was, until the late 1970's, mainly in Atlantic seaboard States (with the exception of sheepherders in the western States).

Only prevailing wages were required to be offered under the H–2 program until 1963. In that year, near the close of the Bracero program, the H–2 program established a series of AEWRs for 11 East Coast H–2 user States. A maximum AEWR ($1.00 per hour) was retained, but the bases for the rates were derived from the 1959 Census of Agriculture average hourly earnings for each State adjusted by the 1959–61 trend in wages as determined by USDA. The 1963 AEWRs continued to be used in 1964.

A new formula was applied to set AEWRs for 28 States using foreign agricultural workers in 1965. See 20 CFR 602.10 (1965), 29 FR 19101 (December 30, 1964). The formula used the 1950 Census of Agricultural average hourly farm wage (AHFW) rate for each State, adjusted by the 1950–63 trend in gross average hourly earnings of production workers in manufacturing or the 1950 Census of Agriculture national AHFW rate similarly adjusted, whichever was higher, rounded down to the nearest $.05. A minimum AEWR of $1.15 per hour and a maximum of $1.40 per hour was applied. The AEWR was set above the computed level in five New England States (all except Connecticut), to $1.25 for Maine and to $1.30 for the other four States. The maximum caused AEWRs in five States (California, Kansas, Minnesota, South Dakota, and Utah) to be lowerd below the computed level, to $1.40.

In 1967, AEWRs were increased by $.20 per hour, based on 1963–66 changes in the USDA survey of farm wages and other factors.

Beginning in 1968, these AEWRs were computed by adjusting the previous year's Statewide AEWR by the same percentage as the percentage change in the Statewide annual average wage rates for field and livestock workers, as surveyed by the USDA, and were set through rulemaking amending the H–2 agricultural workers regulations. See 41 FR 25018 (June 22, 1976); and 43 FR 10306, 10310 (March 10, 1978); see also 20 CFR 602.10b(a)(1) (1977).

The regulations for the H–2 agricultural worker program were consolidated and substantially revised in 1978, after an extended comment period and six public hearings (May and June 1977). 20 CFR Part 655, Subpart C, 43 FR 10306 (March 10, 1978). As part of that rulemaking, DOL's methodology for computing AEWRs, as well as alternative methodologies for computing AEWRs, were discussed and considered. 43 FR at 10310–10311. The methodology was set out in the regulations for the H–2 agricultural worker program. 20 CFR 655. 207, 43 FR at 10317.

DOL continued to study the AEWR after the 1977–78 rulemaking. An Advance Notice of Proposed Rulemaking was published in 1979, and six additional public hearings were held. 44 FR 59390 (October 16, 1979). Various alternative methodologies were presented for public comment; the public responded to the alternatives and additional methodologies were suggested as part of the rulemaking record. A proposed rule (with a four-month comment period) was published in 1980, and a final rule was published in 1981. 46 FR 4568 (January 16, 1981); 45 FR 29854 (May 6, 1980); and 45 FR 15914 (March 11, 1980). The final rule would have established a single, nationwide, AEWR at the level of the previous year's national annual average hourly wage for piece-rate-paid hired agricultural workers, as computed by USDA surveys. However, as part of a general review of agency regulations, and to consider fully the impact of the new methodology, it was withdrawn prior to its effective date. 46 FR 32437 (June 23, 1981); and 46 FR 19119 (March 27, 1981).

In 1981, USDA substantially reduced its number of surveys and ceased compiling annual average field and livestock worker wage rates, as well as the survey data which would have been used in the rule withdrawn in 1981. Various interim methodologies were utilized until USDA reestablished its surveys and DOL reestablished the 1968–1981 methodology. The interim methodologies did not change the basic way in which AEWRs were computed, by adjusting the previous year's rate by the annual change in farm worker wages as reflected in a wage survey. These were accompanied by further rulemaking, and opportunity for and consideration of public comments. See, *e.g.*, 51 FR 20516, (June 5, 1986), 51 FR 15915 (April 29, 1986); 51 FR 12872 (April 16, 1986); 50 FR 47636 (November 19, 1985); 49 FR 31784 (August 8, 1984); 49 FR 30208 (July 27, 1984); 48 FR 40168 (September 2, 1983); 48 FR 33684 (July 22, 1983); 48 FR 232 (January 4, 1983); 47 FR 52198 (November 19, 1982); and 47 FR 37980 (August 27, 1982).

B. Summary

This review of the history of the setting of AEWRs over the past 40 years leads to two conclusions; first, that the old methodology was *not* designed to enhance Statewide average hourly earnings from the USDA survey; and, second, that the fact that the AEWR averaged 20% above the average hourly earnings from the USDA survey in the fourteen "traditional user States" is an unintended result of the application of the various methodologies used in the 1960's to create the AEWR base; it cannot in any way be viewed as a measurement of the quantum of adverse effect.

In all its long history of dealing with AEWRs, DOL has employed a number of methodologies for setting AEWRs during the different periods of time. None of these methodologies ever has purported to add an enhancement to the USDA rates. To the contrary, DOL's efforts to set Statewide AEWRs have always been in response to instances where it was thought that wage depression existed in specific crops or activities. (DOL consistently has set statewide AEWRs. Because of the absence of data from which to measure wage depression at the local level and because of the vast number of different crops, activities and areas in which such local AEWRs) would have to be set, it was and is administratively infeasible to set AEWRs for specific crops or activities.) The fact that the pre-June 1 1987, AEWRs were higher than the USDA average in most (but not all)

States is the result of other methodologies that were distinctly different from that of adding an explicit enhancement to a Statewide USDA earnings rate. These previous methodologies included setting AEWRs at or below the USDA average (early 1960's); assuming that agricultural wage rates should have increased by the same percentage as manufacturing wage rates (1965); setting an absolute floor and an absolute ceiling as well, both regardless of the comparison with manufacturing wages (1965); and assuming that the rates in all states should have increased by the same *absolute* amount (20 cents) as the increase in the national USDA rate (1967). These different methodologies do not appear to have measured wage depression accurately. For example, in 1965, DOL used increase in manufacturing wages as a proxy for increases in agricultural wages, which were believed to be depressed. The application of this methodology led to AEWRs which were higher than Statewide agricultural earnings in some states and lower in others. In order to address these erratic results, DOL imposed a minimum and maximum AEWR.

If it had been DOL policy to enhance the USDA Statewide or regional rates, some degree of uniformity or consistency of relationship between the old AEWRs and the USDA rates, or at least some recognizable pattern relating to estimated presence of illegal aliens, should have been apparent. However, such was clearly not the case. In fact, under the older methodology there would have been four States (Delaware, Oregon, Florida (except sugar cane) and Washington) in 1987 with AEWRs below the applicable USDA average wage rates. These include at least three States with known heavy concentrations of illegals—Washington, Oregon and Florida. This fact very clearly contradicts any assumption that DOL has had a longstanding policy of enhancing USDA average wage rates. At the other extreme, there would have been six States with AEWRs 70 percent or more above the USDA rate. None of these States—Nevada, Alabama, Utah, Minnesota, Mississippi, and South Carolina—is noted for high concentrations of illegal aliens.

Moreover, none of the DOL methodologies ever attempted to measure, with any degree of accuracy, the actual amount by which prevailing wages had been depressed (i.e., adversely affected) by the employment of alien workers. They were simply rough efforts to compensate for what DOL believed was wage depression or stagnation caused by the importation of large numbers of workers under the Bracero program. Thus, the historical fact that the application of the various methodologies resulted in AEWRs which, in most cases, were higher than average agricultural wages is merely fortuitous. It does not reflect any determination that the enhancements themselves were the correct measure of the compensation necessary to eliminate the past adverse effects caused by the Bracero workers.

IV. Explanation for Retaining the Methodology in the Interim Final Rule.

Following the D.C. Circuit's decision in *American Federation of Labor and Congress of Industrial Organizations* v. *Brock*, DOL has extensively reexamined the issues involved in establishing AEWRs for the H–2A program. As explained in the preamble to the June 1, 1987, interim final rule, application of the previous methodology (applied in only 14 States) to a nationwide (49 State) H–2A program would produce inexplicable and unjustifiable results. 52 FR 20404. As a result of the anomalies created by broad application of the old AEWR methodology, DOL determined that a new methodology for setting AEWRs is needed, one that is capable of rational application across the country. DOL promulgated the June 1, 1987, methodology, believing that it satisfied this requirement.

DOL has chosen to use the USDA survey of farm and livestock workers because it presents the best available data on hourly wages in the agricultural sector. The USDA conducts a scientific quarterly survey of the wages of farm and livestock workers. The survey includes small farms not covered in other surveys. The scope and frequency of the survey means that all crops and activities now covered by the H–2A program will be included in the survey data and that peak work periods also will be covered.

Because DOL anticipates that enforcement of IRCA will give rise to a significant expansion of the H–2A program to new States, crops and activities, DOL has decided to set AEWRs for all States, except Alaska, for which USDA data are unavailable. The promulgation of nationwide AEWRs will give new entrants to the H–2A program the opportunity to know in advance the wages they will be required to offer if they choose to apply for H–2A workers and will avoid the delays, uncertainties and litigation that have occurred in the past when new States were sought to be added to the H–2A program.

In light of the D.C. Circuit's decision in *American Federation of Labor and Congress of Industrial Organizations* v. *Brock*, DOL has reviewed its past practices in setting AEWRs, as described in Section IV above, and has reviewed the available literature on the effects of legal and illegal immigration to determine whether, and to what extent, wage depression caused by lawful and illegal alien workers exists in the agricultural labor market. Included in this review were several studies published quite recently. For the reasons outlined below, this analysis has reconfirmed DOL's belief that the June 1, 1987, methodology is valid and appropriate for ensuring that the importation of H–2A workers will not adversely affect the wages of similarly employed domestic workers.

A. Recent Studies Suggest that the Extent of Past Adverse Effect, If Any, From the Employment of Illegal Aliens, Has Been Small and Confined to Local Labor Markets and Not Reflected to Any Significant Degree in the USDA Data Series From Which the AEWR Is Derived

While DOL has believed that there is a tendency for illegal alien workers to adversely affect wage rates, it cannot disregard recent studies and analyses which conclude that such effect probably has been minor and localized. Many of these studies were conducted during the past few years, during the time IRCA was being debated, prior to enactment, and also since enactment. They have been conducted by some of the most prestigious research and evaluation organizations, applying the most rigorous state-of-the-art methodological standards. They include studies and analyses performed by the Council of Economic Advisers, the General Accounting Office, the National Commission for Employment Policy, the National Bureau of Economic Research, the Urban Institute, and other prominent individual researchers.

The 1986 *Economic Report of the President*, prepared by the Council of Economic Advisors, summarizes an extensive review of recent research and economic thinking on wage and employment effects of immigration. The Council's conclusion as to wage effect is mixed:

> *Some* studies of the effects of immigration on wage levels have revealed evidence of adverse wage effects. For example, one study concluded that real wages were 8 to 10 percent lower on average *in cities near the Mexican border.* Several studies found a reduction in the wages of unskilled workers in areas with high concentrations of unskilled immigrant workers.
>
> *Other studies,* however, have shown that greater concentrations of aliens in labor

markets are associated with *higher earnings* of native-born workers. Increased wages have been found both for broad groups of workers and also for native-born minority groups with whom immigrants might compete directly for jobs.

[Emphasis added; *Id.* at 223.]

The General Accounting Office (GAO), responding to a Congressional request, surveyed the existing literature on the effects of illegal aliens on the wages and working conditions of legal workers. *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* (GAO/PEMD–88–13BR) (March 1988). Initially, 230 studies were reviewed; these were pared down to 26 which met GAO's standards for relevance and analytical rigor. With respect to the question, "Do illegal alien workers depress wages and worsen working conditions for native and legal workers?", GAO came to the following qualified and uncertain conclusion:

With regard to the first question, our answer is a qualified "yes." Our major finding, based primarily on results from nine case studies, is that illegal aliens do, in some cases, exert downward pressure on wages and working conditions with low-wage, low-skilled jobs *in certain labor markets.* The four case studies that supported this finding examined illegal alien workers in competition for the same jobs with legal or native workers. Competing native or legal *agricultural workers,* food processing workers, and janitors *in specific labor markets* suffered depressed wages or worsened working conditions as employers in these sectors began to hire a higher percentage of illegal workers.

In three *other sectors and labor markets,* the effects of illegal workers on legal or native workers' wages and working conditions overall *could not be determined.* The five case studies on these sectors or markets provided evidence that the increased supply of workers for *some* job categories, in *some* business and industry sectors such as the garment industry, depressed wages for some native or legal workers but, at the same time, by stimulating business, also expanded employment opportunities and wages for *other* legal and native workers in complementary, usually skilled occupations. None of these studies, however, permitted an assessment of net effects. This suggests that the effects of illegal workers on the wages and working conditions of native or legal workers are not *automatically* in the direction of depressing those conditions, and that those effects depend on a number of factors, of which the illegal status of the workers is one.

[Emphasis added, except *"automatically,"* which is in original; *Id.* at 1–2.]

It should be noted that the only wage depression shown in agricultural employment cited in the GAO report appeared in two limited, localized, studies of San Diego County, California, pole tomatoes and Ventura County, California, citrus. GAO itself noted that these studies were probably atypical.

The case studies also may poorly represent workplaces that employ international migrants. For example, most of the case studies that found wage depression overall were on unionized settings. Substantial evidence indicates that unionization tends to lead to higher wages. In these cases, a part of the effect that illegal aliens may have had on wages was to counteract the effect that the unions had had on wages.

[*Id.* at 64 n 1.]

Thus, the wage-depressing effects noted in the studies may have had as much to do with anti-union activities as any other motive and might have occurred even if the non-union workers had been legal workers.

Further, GAO pointed out that other economic forces also may come into play in determining whether the removal of illegal workers will necessarily raise wages:

[O]ne cannot assume that the absence of illegal aliens would, in all cases, cause an increase in wages and job opportunities for native workers. In some cases, the higher wages necessary to bring workers into a given labor market would possibly raise the employer's costs to a level that prevents the employer from competing effectively with foreign producers.

[*Id.* at 64.]

It also must be noted that DOL submitted critical comments on the draft GAO Report. *Id.* at 57–62. These comments were directed at the adequacy of the GAO analysis with respect to adverse impacts of employing illegal workers in specific occupations and activities in local labor markets. These comments did not take issue with the GAO finding that the effects of employing illegal workers are difficult to detect at levels of analysis beyond specific activities in local labor markets.

The National Commission for Employment Policy also reviewed the available literature in 1986 and came to a similar qualified conclusion (*Illegal Immigrants and Refugees—Their Economic Adaptation and Impact on Local U.S. Labor Markets: A Review of the Literature* (October 1986)):

The evidence regarding the labor market impact of undocumented entrants is *mixed and somewhat inconclusive.* Undocumented workers do displace some native-born U.S. workers and do lower wages and working conditions in *some* occupations and *geographical areas.* The opportunities for U.S. workers sometimes are reduced where undocumented workers dominate segments of the labor market. On the other hand, undocumented workers in some instances create and perpetuate jobs for themselves as well as for some U.S. workers. Furthermore, they help to preserve some U.S. firms that, without such a supply of foreign labor, might move their operations overseas. *The evidence is not conclusive regarding the overall or aggregate effects on the labor market.* Rather the evidence suggests that the labor market effects of undocumented workers may best be viewed as *a series of local and regional effects which vary widely.*

[Emphasis added; *Id.* at vii.]

The National Bureau of Economic Research (NBER) has just completed a two-year research project on the internationalization of the U.S. labor market, including the impact of immigration on wages and employment. Its findings question whether immigrants have had any adverse effect on the wages of U.S. workers (*NBER Summary Report: Immigration, Trade, and the Labor Market* (January 20, 1988)):

Increased immigration has *some modest adverse impacts* on the employment and wages of workers who are the closest substitutes for immigrants, *the immigrants themselves* and earlier immigrants, *but little, if any, impact on young black and Hispanic Americans who are likely to be the next closest substitutes* (Topel and Lalonde). Employment and wages of less educated black and white natives have not worsened noticeably in cities in which immigrant shares of the population rose in the 1970's, while on the positive side, there is some evidence that less skilled natives have moved out of low-wage service and manufacturing industries and that these industries have grown more rapidly or declined more slowly in cities with more immigrants (Altonji and Card). The broad implication is that *immigrants have been absorbed into the American labor market with little adverse impact on natives.*

[Emphasis added; *Id.* at 7.]

An Urban Institute study of the impact of the large population of Mexicans immigrating, both legally and illegally, into Southern California found the following with respect to effect on wages (*The Fourth Wave: California's Newest Immigrants* (1985)):

The presence of Mexicans and, in all likelihood, of other immigrant groups, reduced the average wages in manufacturing and some services, both in Los Angeles and elsewhere in California. This reduction in average wages primarily reflects the increasing share of Hispanics in the work force, since wages for this group are lower than for non-Hispanics in similar occupations. We also conclude that the presence of immigrants has *somewhat depressed the wages of non-Hispanics* working as laborers, but the impact on the *wages paid to non-Hispanics* in semi-skilled occupations *appears to be negligible.* The principal reasons why immigrants received lower wages are that they are less likely to be unionized and they have less experience and education than other workers.

[Emphasis added; *Id.* at 123.]

Specifically with respect to agriculture, Dr. Phillip L. Martin, Professor of Agricultural Economics, University of California at Davis, in a study conducted for DOL, raises serious doubts as to whether illegal aliens have adversely affected agricultural wage rates (*IRCA and the U.S. Farm Labor Market* (February 1988)):

> If illegal alien workers are replaced by U.S. citizens, legal immigrants, and legal non-immigrants, there will be *offsetting effects on farm wages.* Generally, the illegal aliens and the legal non-immigrants are "solo men" (in the U.S. without families); such workers *tend to earn more per hour at prevailing piece-rates than more diverse U.S. workers.* Some illegal aliens are "isolated and powerless;" to the extent that such illegal aliens are replaced by other workers, there should be upward pressure on farm wages.

[Emphasis added; *Id.* at 1.]

Dr. Martin states in the same report, "*The evidence of these possible wage-depressing effects of illegals is sparse.* [Emphasis added.]" *Id.* at 8. As indicated above, one of the main reasons for Dr. Martin's doubt about adverse effect is the fact that aliens often have higher productivity than U.S. workers, so that when paid by the piece their average hourly earnings exceed those of U.S. workers, thus possibly even raising the average wage rate. As he states, "Illegal alien farmworkers tend to be young men; such solo men tend to be the most productive farmworkers in the sense that *they have higher-than-average hourly earnings at prevailing piece-rates.* [Emphasis added.]" *Id.* at 14.

Even if there may have been adverse effects on agricultural wages from the employment of illegal aliens, they apparently have been so concentrated in specific crops, activities, and areas that such effects do not appear to be reflected to any significant degree in the USDA data series, which includes all agricultural activities, usually in multi-State regions. Dr. Martin states as his first major conclusion in his 1988 study cited above:

> The removal of illegal alien workers should raise farm wages. However, illegal alien workers are not uniformly distributed throughout agriculture; instead, they are concentrated in particular tasks, commodities, areas, and on certain farms. Thus the wage *increases traceable to the removal of illegal alien workers may not be apparent in regularly-published wage data* such as *Farm Labor.*

[Emphasis added; *Id.* at 1.]

Clearly, if the removal of illegal aliens may not significantly affect the USDA wage data, their presence also may not affect this series to any significant extent.

(Note: The USDA periodical *Farm Labor* is the publication containing the USDA data series on which AEWRs are based.)

This view is strongly supported by the 1988 GAO report cited above:

> Our experience in the prior synthesis on illegal workers (GAO/PEMD–86–9BR) suggested the general lesson that *wage depression is harder and harder to detect at levels of analysis beyond or above a highly localized and occupation-specific labor market.* For example, we found evidence of displacement of legal citrus pickers by illegal ones in Ventura County, California, but those effects probably would not be evident in data on agricultural workers in central California generally and even less so at higher levels of aggregation such as unskilled workers in the state. Thus, case studies that concentrate on specific industries or sectors in labor markets in specific communities may be better able to detect wage depression than aggregate data.

[Emphasis added; *Id.* at 10.]

Evidence suggesting that the USDA wage rates have not been affected significantly by the presumably lower wages paid to illegals is provided by State average wage data from that USDA data series itself. An examination of average agricultural earnings in the six States most likely to have the highest concentrations of undocumented workers, as measured by the highest concentration of seasonal crop workers, and as shown in the USDA data published in *Farm Labor,* does not reveal a consistent pattern of depression in the USDA earnings data over time. Over the 1974–87 period (the longest period with consistent USDA survey data), average agricultural earnings in North Carolina, Oregon, Texas and Washington increased by more than the national average. Only California and Florida had increases that were below the national average. However, the absolute level of wage rates in both California and Florida is well above the national average.

B. The AEWR Methodology in the Interim Final Rule Is Justified By the Available Evidence

From DOL's review of the available information on the agricultural labor market, DOL views the data and literature as inconclusive on the issue of adverse effect or wage depression from the presence of illegal alien workers on the USDA data series. This inconclusiveness is due, in part, to statistical difficulties in measuring wage depression, but also reflects the fact that data on illegal workers are nearly impossible to obtain for purposes of measuring any possible wage depression caused by such workers. DOL is aware of no study that has quantified or measured any wage depression at any aggregate level such as the State or the region. To the extent that there is some anecdotal evidence of wage depression from these sources, the evidence also suggests that the adverse effects are highly localized and concentrated in specific areas and crop activities. The evidence further suggests that because of the nature of the illegal alien workforce, and because of the concentration of that workforce in particular localities and crops, such adverse effects as may exist are not reflected, to any substantial extent, if at all, in USDA average wage data.

Thus, DOL concludes that setting the AEWR at the level of average agricultural wages, as determined by the USDA survey, is the correct approach. To the extent that wage depression does exist on a concentrated local basis, the average agricultural wage does not appear to be significantly affected by this wage depression. Further, none of the studies reviewed by DOL here quantified or measured any wage depression that might exist in the USDA data series. This series is, therefore, the appropriate source of rates to use to set the AEWR. Based on all of the information available, there is no justification for adding any enhancement to the USDA average agricultural wage. Such an explicit enhancement could only be justified if alien agricultural employment has depressed average agricultural earnings, and if the extent of the depression can be measured at the aggregate level.

Even though the evidence is not conclusive on the existence of past adverse effect, DOL still believes that its statutory responsibility to U.S. workers will be discharged best by the adoption of an AEWR set at the USDA average agricultural wage in order to protect against the possibility that the anticipated expansion of the H–2A program will itself create wage depression or stagnation.

As pointed out in the preamble to the June 1, 1987, interim final rule, the old methodology had resulted in anomalies among the State rates which could not be explained in any rational manner relating to presence of illegal aliens and past adverse effect. See 52 FR at 20504. In light of: (1) The recent studies cited earlier which indicate that it is highly questionable as to whether and how much adverse effect has occurred from the use of illegal aliens; (2) the likelihood that any adverse effect which might have occurred may not be reflected in the USDA data series; and (3) the apparent anomalies in that old

AEWR methodology, it is clear that adding to that USDA average any enhancement factor comparable to that resulting from the old methodology—such as the observed 20 percent average in the 14 States for which old AEWRs were published—would be inappropriate. Even if one were to assume (despite the absence of evidence) that there has been some adverse effect on the USDA rates in States with larger concentrations of illegal aliens, applying an enhancement factor across-the-board to all States clearly would be inequitable and inappropriate.

V. Other Considerations in Developing an AEWR Methodology.

DOL must assume that IRCA will achieve its stated purpose of removing illegal aliens from the labor force. See 8 US.C. 1324a. (One might note that AEWRs, if set too high, might be a disincentive to the use of H–2A and U.S. workers, and could undermine efforts to eradicate the employment of illegal aliens.) Agricultural employers who have employed illegal alien workers in the past then must fill their labor needs with U.S. workers (including special agricultural workers authorized under IRCA) or with H–2A workers. All of these will be covered by various wage and working condition protections, and the total number may well fall short of the pre-IRCA agricultural labor force. These changed conditions could tend to create upward pressures on agricultural wage rates.

Within this context, the AEWR requirement in the H–2A program could contribute to upward wage pressures. Non-H–2A employers will be forced to compete for workers with H–2A employers at the wage rates required in the H–2A program. Using the USDA average as the AEWR will probably have some "ratcheting" effect on wages, as the previous year's average becomes the current year's minimum. This will be particularly true if the number of covered workers (H–2A workers and their U.S. co-workers) at the wage rates required in the H–2A program expands significantly. As a result, requiring an enhancement to the USDA average rate as the AEWR could increase labor costs of employers of H–2A workers and weaken their ability to compete with foreign imports. Lower domestic production could reduce the demand for labor, adversely affecting both wages and job opportunities for U.S. workers whom IRCA was designed to protect.

These effects would also be inconsistent with the purpose of the labor certification process, as recognized by the courts, that the temporary foreign worker regulations are "to promote a manageable scheme * * * that is fair to both sides." *Flecha* v. *Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977). As part of the labor certification process, the setting of AEWRs must balance the needs and interests of U.S. workers and U.S. employers. See *Flecha* v. *Quiros*, 567 F.2d at 1155–1156; *Rogers* v. *Larsen*, 563 F.2d 617, 626 (3d Cir. 1977); and *Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493 (1st Cir. 1974).

The IRCA amendments to the INA do not change the role and effect of the statutory policy to protect the wages of similarly employed U.S. agricultural workers from the adverse effect which may result from the employment of alien workers. Under the H–2A program, as under the H–2 program before it,

> [t]he common purposes [of the program] * * * are to assure [employers] an adequate labor force on the one hand and to protect the jobs of citizens on the other. Any statutory scheme with these two purposes must inevitably strike a balance between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force.

Rogers v. *Larsen*, 563 F.2d 617, 626 (3d Cir. 1977); *Flecha* v. *Quiros*, 567 F.2d at 1154. As stated by the U.S. Court of Appeals for the First Circuit, the purpose of the INA and temporary foreign worker regulations are "to provide a manageable scheme * * * that is fair to both sides." *Flecha* v. *Quiros*, 657 F.2d at 1156.

> We start with a given, that it has always been a Congressional policy to prefer domestic workers in all fields. However, it is also necessary to consider would-be employers, although in case of conflict, wide leeway favoring domestic workers is given the U.S. Secretary [of Labor]. *Elton Orchards, Inc.* v. *Brennan*, 1 Cir., 1974, 508 F.2d 493 * * *.

Id., 567 F.2d at 1155. Thus, the methodology for computing an AEWR must recognize the need to balance the goals of supplying an adequate labor force to employers and protecting the jobs of U.S. workers.

"[R]ather than an area of pure statutory interpretation as to which there is in theory only a single answer", *Building & Construction Trades Department, AFL–CIO* v. *Donovan*, 712 F.2d 611, 619 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984), DOL has "broad discretion" to set AEWRs in accordance with "any of a number of reasonable formulas * * *." *Accord, Florida Sugar Cane League, Inc.* v. *Usery*, 531 F.2d 299, 303–304 (5th Cir. 1976). See *American Federation of Labor and Congress of Industrial Organizations* v. *Brock*, 835 F.2 912, 915 n. 5 (D.C. Cir. 1987); *Florida Fruit & Vegetable Association, Inc.* v. *Donovan*, 583 F. Supp. 268 (S.D. Fla. 1984), *aff'd sub nom. Florida Fruit & Vegetable Association, Inc.* v. *Brock*, 771 F.2d 1455 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1524 (1986); *Shoreham Cooperative Apple Producers' Association, Inc.* v. *Donovan*, 764 F.2d 135 (2d Cir. 1985); *Virginia Agricultural Growers' Association, Inc.* v. *Donovan*, 774 F.2d 90 (4th Cir. 1985); *accord, Rowland* v. *Marshall*, 650 F.2d 28 (4th Cir. 1981) (*per curiam*); *Williams* v. *Usery*, 531 F.2d 305, 306 (5th Cir.), *cert. denied*, 429 U.S. 1000 (1976); *Flecha* v. *Quiros*, 567 F.2d 1154 (1st Cir. 1977); *Limoneira Co.* v. *Wirtz*, 225 F. Supp. 961 (S.D. Cal 1963), *aff'd*, 327 F.2d 499 (9th Cir. 1964); and *Dona Ana County Farm & Livestock Bureau, Inc.* v. *Goldberg*, 200 F. Supp. 210 (D.D.C. 1961); see also *Production Farm Management* v. *Brock*, 767 F.2d 1368 (9th Cir. 1985). DOL believes that the June 1, 1987, methodology is the appropriate method by which to set AEWRs in light of its obligations to balance the needs of U.S. workers and U.S. employers and in light of its great discretion to develop any reasonable formula to set AEWRs.

VI. Summary and Analysis of Comments Received in Response to October 28, 1988, Notice of Proposed Rulemaking

In the October 28, 1988, proposed rule, DOL requested, through November 28, 1988, comments on the AEWR methodology. 52 FR at 43722. Specifically, any additional studies or evidence as to known and measured wage depression reflected in the USDA data series caused by the presence in the agricultural work force of illegal aliens were sought to enable DOL to further examine the conclusions drawn from the materials reviewed. While most of the studies cited in this document are publicly available, the study by Dr. Martin is not available generally. As stated in the October 28, 1988, NPRM, DOL supplied copies of the Martin study to the parties in the *AFL–CIO* v. *Brock* litigation and offered to supply, upon request, copies to any other interested person.

In making a determination on the content of this final rule, DOL fully and carefully considered comments received in response to the October 28, 1988, NPRM, and in response to several other related rulemaking actions. These other actions include a proposed rule to add Montana to the list of States for which special AEWRs were required under the old H–2 program (50 FR 50311

(December 10, 1985); see also 51 FR 7084 (February 28, 1986)); a similar proposed rule to add Idaho and Oregon to the list of such AEWR States (51 FR 11942 (April 8, 1986); see also 51 FR 28599 (August 8, 1986)); the proposed rule for the new H–2A program (52 FR 16770 (May 5, 1987)); and the interim final rule on the new H–2A program, with request for comments (52 FR 20496 (June 1, 1987)).

A total of 168 comments were received by DOL on the two proposed rules to add the States of Montana, Idaho, and Oregon to the list of specially-computed AEWR States. These included a total of 140 comments from employers and their representatives; 15 comments from worker representatives, including legal aid attorneys; the USDA; two Governors; three U.S. Congressmen; an agricultural labor economist; three State agencies; and two State legislators.

A total of 555 comments were received by DOL on the proposed and interim final H–2A regulations. Employers and their representatives submitted a total of 423 comments, while worker representatives, including legal aid attorneys, submitted a total of 40 comments. Congressional representatives submitted a total of 52 comments; 16 comments were submitted by State Farm Bureau Representatives; 16 comments were received from various State agencies; one comment was received from a Governor; one comment was received from an organization advocating immigration reform; five comments were received from ETA Regional Administrators; and one comment was from a private citizen. In addition to the comments submitted by a national organization representing agricultural employers, representatives of the fruit, vegetable, sugar cane, cattle, sheep and goat, dairy, poultry, swine and logging industries submitted comments.

A total of 29 comments were received by DOL on the proposed AEWR methdology rule published October 28, 1988. Comments were received from 16 employer representatives, six legal assistance groups representing workers, three trade associations/lobbyists, two research institutes, and two State agencies.

All of these comments have been considered together with respect to the AEWR methodology issue, the subject of this rulemaking. They can be divided and discussed in terms of those which generally support the position of farmworker advocates and those which generally support the position of agricultural employers.

Comments from farmworker advocates generally reflect opposition to DOL's proposed rule. In brief, farmworker advocates contend that DOL's proposed rule represents a dramatic change from its policy and practice of the past 30 years of "enhanced" AEWRs, without adequate explanation or justification; that there is clear evidence of past adverse effect from the use of foreign workers, which requires an "enhancement" to the AEWRs proposed by DOL; that the USDA survey itself has been tainted by the past use of foreign workers and is otherwise inappropriate to serve as the AEWR base. They advocate instead an AEWR methodology which would yield rates higher than those proposed by DOL.

Options recommended by those opposing the proposed rule include returning to the old H–2 methodology (see 20 CFR 655.207 (1986)); adding an enhancement factor to the USDA average hourly rate (either in all States or only where adverse effect can be demonstrated); setting the AEWR at the average hourly earnings of piece-rate workers; setting or adjusting the AEWR in relation to earnings in manufacturing or non-farm work as a whole; establishing separate AEWRs for piece-rate work and seasonal work. These points are fully laid out and analyzed in the attached "Analysis of Farmworker Comments."

Comments from those representing agricultural employer interests argue strongly for an AEWR methodology requiring only the prevailing wage rate for each specific crop-activity-area, with some adjustments if certain levels of penetration by foreign workers have been exceeded. Employers argue that requiring the average hourly rate as a minimum standard will have an upward-ratcheting, inflationary effect on agricultural wage rates, including a spill-over effect on non-H–2A employers.

Should DOL not adopt their preferred approach, they would then be supportive of DOL's proposed methodology as a next-best alternative approach. The comments supporting the employers' views are fully explained and analyzed in the attached "Analysis of Employer Comments."

After carefully weighing the comments of both farmworker and employer representatives, DOL concludes that its proposed rule setting the AEWR at the average hourly earnings for each State as determined by the USDA quarterly survey strikes an appropriate balance by fully carrying out DOL's obligations under IRCA to prevent adverse effect on the wages of U.S. workers while at the same time taking cognizance of the legitimate concerns of agricultural employers.

VII. Conclusion

The AEWR is the minimum wage rate that agricultural employers seeking nonimmigrant alien workers must offer to and pay their U.S. and alien workers, if prevailing wages and any federal or State minimum wage rates are below the AEWR. The AEWR is a wage floor, and the existence of an AEWR does not prevent the worker from seeking a higher wage or the employer from paying a higher wage.

The purpose of an AEWR, as described by the U.S. Court of Appeals for the Fifth Circuit, is "to neutralize an 'adverse effect' resultant from the influx of temporary foreign workers." It is a "method of avoiding wage deflation." *Williams* v. *Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), *cer. denied*, 429 U.S. 1000; see *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (5th Cir. 1976); see also *Production Farm Management* v. *Brock*, 767 F. 2d 1368 (9th Cir. 1985); *Limoneira Co.* v. *Wirtz*, 225 F. Supp. 961 (S.D. Cal. 1963), *aff'd*, 327 F. 2d 499 (9th Cir. 1964); *Dona Ana County Farm and Livestock Bureau* v. *Goldberg*, 200 F. Supp. 210 (D.D.C. 1961); and 20 CFR 655.0) (1986). The AEWR thus ensures that the wages of similarly employed U.S. workers will not be adversely affected by the lawful importation of temporary, nonimmigrant alien workers. For the reasons outlined above, DOL believes that the June 1, 1987, methodology satisfies DOL's duties under IRCA to ensure that the importation of H–2A workers does not adversely affect the wages of similarly employed domestic workers.

Regulatory Impact

This document affects only those employers using nonimmigrant aliens workers (H–2A visaholders) in temporary agricultural jobs in the United States. It does not have the financial or other impact to make it a major rule and, therefore, the preparation of a regulatory impact analysis is not necessary. See Executive Order No. 12291, 3 CFR 1981 Comp., p. 127, 5 U.S.C. 601 note.

When the October 28, 1988, proposed rule was published, the Department of Labor notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This document contains no paperwork requirements which mandate clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog of Federal Domestic Assistance* as Number 17.202 "Certification of Foreign Workers for Agricultural and Logging Employment."

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Employment, Forest and forest products, Guam, Labor, Migrant labor, Wages.

Final Rule

Accordingly, Part 655 of Chapter V of Title 20, Code of Federal Regulations, is amended as follows:

PART 655—LABOR CERTIFICATION PROCESS FOR THE TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. In 20 CFR Part 655, the authority citation is revised to read as follows:

Authority 8 U.S.C. 1101(a)(15)(H) and 1184(c), and 29 U.S.C. 49 *et seq.*; §§ 655.00, 655.00, and 655.00 also issued under 8 U.S.C. 1186 and 8 CFR 214.2(h)(4)(i); Subpart A and Subpart C also issued under 8 CFR 214.2(h)(4)(i); Subpart B also issued under 8 U.S.C. 1186.

2. Section 655.107(a) is republished without change to read as follows:

§ 655.107 Adverse effect wage rates (AEWRs).

(a) *Computation and publication of AEWRs.* Except as otherwise provided in this section, the AEWRs for all agricultural employment (except for those occupations deemed inappropriate under the special circumstances provisions of § 655.93 of this part) for which temporary alien agricultural labor certification is being sought shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey. The Director shall publish, at least once in each calendar year, on a date or dates to be determined by the Director, AEWRs for each State (for which USDA publishes regional data), calculated pursuant to this paragraph (a) as a notice or notices in the **Federal Register.**

* * * * *

Signed at Washington, DC, this 28th day of June 1989.

Elizabeth Dole,

Secretary of Labor.

Attachment 1—Summary and Analysis of Employer Comments

Points raised by employers in support of their position include the following:

1. There is no empirical evidence of past adverse effect on agricultural wage rates from the use of foreign workers. This is true of the studies cited by DOL in the NPRM and also generally of the research literature on this subject. In addition, specific information presented in connection with the Montana, Idaho, and Oregon NPRMs, as well as other information relating to Florida, shows no adverse effect from the use of illegals. Furthermore, there is evidence that the H–2 program has raised overall agricultural wage rates in Florida, New York and New England. Finally, it is inappropriate to look at agricultural-nonagricultural wage differentials as an indication of past adverse effect, for a variety of reasons. DOL tends to agree with the overall thrust of this point, although not necessarily in all the particulars. DOL believes past adverse effect has not been significant enough to cause generalized wage rate depression, but recognizes the possibility of adverse effect in specific crops, activities and areas.

2. A theoretical or conceptual model of agricultural labor markets supports the inability of empirical findings to find generalized adverse effect. Such a model must take into account international competition in agriculture, which has increased dramatically in the 1980's. Using this model, it is shown that wage levels are determined primarily by international equilibrium market conditions, not the supply of labor, as the demand for labor is very elastic. The conclusion from this model is that foreign workers have not had an adverse effect on wage rates. However, even if one assumes a closed-system, non-international model, demand for labor is still relatively elastic, so that past wage depression would be small. DOL agrees that the demand for agricultural labor is very elastic, particularly in crops which are highly competitive internationally, and that this elasticity would tend to minimize, but not necessarily eliminate, any past adverse effect. Adverse effect could still have occurred in specific crops, activities and areas.

3. The USDA survey wage rates have not been depressed from the use of foreign workers. Again, lack of empirical and theoretical evidence of adverse effect is cited. Also, the broad geographic scope of the USDA survey would tend to average out any localized wage depression. DOL agrees with this point.

4. Use of the USDA survey, and the average wage rates produced by that survey, is appropriate (as a second-best alternative to their preferred approach) from a technical point of view, and also will not cause wage stagnation. First, use of the USDA average wage eliminates serious anomalies in the old H–2 methodology. Second, the USDA survey is methodologically sound, providing the best and most comprehensive information on agricultural wage rates. Third, the survey sample adequately covers the kinds of activities for which H–2A applications are likely under IRCA. Fourth, rather than causing wage stagnation, the use of last year's average rate as this year's minimum will cause wage inflation because of a ratcheting-upward effect. This ratcheting effect will occur also because of the need to maintain wage differentials, particularly for piece-rate work. Furthermore, the effect on the movement of wages would be no different than if the old H–2 methodology were retained, since that methodology used the year-to-year changes in the USDA rates to index the AEWRs. DOL agrees that the USDA survey is entirely appropriate from a technical point of view, and agrees with the reasons cited. DOL also agrees that use of the USDA survey average rate will not cause wage depression; if anything, requiring the previous year's average as this year's minimum may tend to have a ratcheting-upward effect on wage rates.

5. Unreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile. Agricultural employers may reduce production, mechanize more, to quit production altogether, all of which would eliminate jobs for U.S. workers. The clear Congressional intent was to make the H–2A program usable, not to make U.S. producers noncompetitive. This is reflected in the many special provisions in IRCA for agriculture. Unreasonably high AEWRs would also encourage continued use of illegals, which would undermine the intent of IRCA. While these considerations are not dispositive, DOL believes they are valid considerations, which tend to support DOL's AEWR methodology. However, they were not the primary or controlling reasons for adopting that methodology.

6. IRCA only requires that the AEWR prevent future adverse effect from the

use of foreign workers, not compensate for past effect. The USDA average will certainly accomplish this. In addition, wages can be expected to rise in the post-IRCA period of possible labor shortages. DOL acknowledges there may be some tendency for wage rates to rise, but probably not to any significant extent, because of the same factors which precluded past foreign workers from having a significant depressive effect on wages. Regarding IRCA's applicability to future or past adverse effect, the Court of Appeals has ruled it applies to both.

As stated above, employer representatives strongly prefer an AEWR methodology based on prevailing rates in specific crops, activities, and areas. DOL cannot accept this approach for several reasons. While DOL believes past adverse effect has not been significant enough to cause generalized wage rate depression, it does acknowledge the possibility of adverse effect in specific crops, activities and areas. Such adverse effect would not be addressed by requiring only the prevailing wage rate as the AEWR. Part of the employer's preferred approach is that where such pockets of adverse effect exist, suitable adjustments could be made on a case-by-case basis. While this is conceptually valid, DOL deems the administrative difficulties in making such determinations of adverse effect and quantifying the adjustments to be made as insurmountable. DOL believes that by requiring the average wage as the AEWR, such pockets of past adverse effect will be suitably addressed.

ATTACHMENT 2.—ANALYSIS OF FARMWORKER COMMENTS

Farmworker Advocate Comments	DOL Analysis
A. *DOL Has Dramatically Changed Policy and Practice of Past 30 Years of "Enhanced AEWRs" and Has Done So Without Adequate Explanation/Justification*	
1. Past policy and practice has clearly been to enhance average or prevailing rates; DOL misrepresented past DOL policy in NPRM. Early AEWRs (particularly 1965 adjustments whose effects were carried forward under indexing) were conscious enhancements. Also, rulemaking adding States for which special AEWRs were established under the H-2 program specifically compensated for adverse effect on prevailing rates.	1. DOL has never established a policy of adding an enhancement to the USDA rates. The 1965 adjustments were made on the rationale that agricultural rates should change by the same proportions as manufacturing rates in each State. These adjustments resulted in rates higher (by different proportions) than the USDA rate in most States, but not all. In addition, in 1965 a minimum rate was applied, presumably related to the FLSA minimum rate, which did not apply to agriculture at the time. While these adjustments apparently reflected some DOL dissatisfaction with the USDA average *at the time,* they were not a direct enhancement of the USDA rates per se. As stated in the NPRM, "the fact that the AEWR averaged 20% above the average hourly earnings from the USDA survey in the four seen 'traditional user States' is an unintended result of the application of the various methodologies used in the 1960's to create the AEWR base; it cannot in any way be viewed as a measurement of the quantum of adverse effect." Regarding rulemaking to add AEWR States under H-2, the focus was on *prevailing* rates (which apply to specific crop-activity-areas), as opposed to Statewide *average* rates, as determined by the USDA survey.
2. Past AEWR concept has been the rate which would have existed were it not for illegals.	2. This has never been the AEWR concept or policy. The AEWR is intended as a *floor,* or *minimum;* it was never designed to protect wages above this floor or minimum. This approach has always been deemed sufficient to prevent the adverse effect specified in the old H-2 regulations, and now in IRCA. The Appeals Court has interpreted such adverse effect to include both past and prospective adverse effect. There is no way of determining empirically what rates would have existed in the absence of illegals. Theoretically, a rate necessary to attract the *same number* of U.S. workers as there were illegals would be dramatically higher, given the apparent inelasticity of supply of U.S. agricultural labor. This concept has been specifically rejected by the Courts. However, the more likely result, recognizing the great elasticity of demand for labor, particularly in the highly internationally competitive agricultural markets of the 1980's, is that wage rates would have been about the same, with far less production and employment.
3. The H-2A AEWR methodology represents a dramatic change in AEWR policy by dropping an enhancement factor. Evidence of dramatic change is that AEWRs are significantly lower in almost all States compared with the old H-2 methodology, which had been upheld by the Court.	3. There has been *no* change in the basic AEWR concept and principles, as described in Item 2 above, only in the methodology employed to observe and implement this concept and these principles. This change was made in light of the following: (a) a thorough re-examination of the origins and history of the old H-2 methodology revealed basic flaws which did not impact seriously on the 14 traditional States, but which clearly would produce inappropriate AEWRs for the many possible new States under IRCA; (b) more sophisticated and methodologically superior recent research contradicts assumptions about adverse effect based on more crudely constructed studies of 25–30 years ago; (c) agricultural markets have become dramatically more international since the 1960's when previous AEWR methodology was established, providing a theoretical framework of analysis which supports recent empirical findings of little or no adverse effect; (d) the passage of IRCA, reflecting clear Congressional intent for a workable, usable H-2A program, not one which would put U.S. agriculture out of business (Congress' interest in a viable U.S. agricultural industry is reflected in all the special agricultural provisions in IRCA); IRCA also promises to remove illegals from agriculture (so that whatever adverse impact they might have had in the past will be removed) and to bring about a significant expansion in the H-2A program. These changes have led DOL to adopt a methodology setting the AEWR equal to the USDA average in each State. In briefest form, the rationale for adopting this approach is: (1) Best available studies fail to provide evidence of any adverse effect (much less any quantification of such effect) at State/regional/national levels; this lack of empirical evidence of adverse effect is supported by theoretical analysis; (2) any localized adverse effects are probably not large enough to show up in USDA series; (3) thus, DOL has no basis and no right to impose an arbitrary enhancement factor; (4) to the extent there are localized pockets that wage rates are below the State/regional average, requiring the average as a minimum will "cure" this adverse effect; DOL has *not* adopted the employers preferred approach of basically using only crop-activity-area prevailing wage rates.

ATTACHMENT 2.—ANALYSIS OF FARMWORKER COMMENTS—Continued

Farmworker Advocate Comments	DOL Analysis
	The old methodology was based on information and analyses which are now shown to be weak. This methodology was upheld by the Courts as within DOL discretion. DOL's new methodology, based on better information and analysis, and recognizing recent developments in agricultural markets, should not be precluded because of past faulty practice, but is likewise within DOL discretion.
B *There Has Been Clear Past Adverse Effect on Agricultural Wage Rates*	
1. DOL has misrepresented the studies it cited; they actually confirm adverse effect.	1 DOL has carefully reviewed the studies again, and concludes they were not misrepresented.
a. *Economic Report of the President* was misrepresented; shows "devastating" impact on workers in direct competition with aliens.	a This is a gross misrepresentation by farmworker advocates. While the report makes a distinction between those workers competing directly and indirectly with aliens (and says adverse impact is more likely among those directly competing), the overwhelming thrust of the report is that adverse effects, if any, are negligible—and even possibly positive—for *both* direct and indirect workers. DOL quoted directly from report in NPRM: "Increased wages have been found both for broad groups of workers and also for native-born minority groups with whom immigrants might compete directly for jobs."
b. National Commission on Employment Policy report misrepresented; says job displacement was greatest among direct-competition workers.	b. Statement quoted by farmworker advocates relates to job displacement, not wage rates. Also, the statement goes on to say that the numbers involved are unknown, and *may* be significant, indicating the effect, if any, is not large. Regarding wages rates, the report cities several studies which found minimal wage depression.
c. DOL ignored case studies dealing with agriculture in GAO report, which found significant wage depression.	c. DOL did not ignore those case studies. They were acknowledged in the NPRM, and are not inconsistent with DOL's view that there have possible been localized adverse effects, but the overall impact is unclear, and likely not enough to have affected the USDA series in any significant way. The overwhelming thrust of the GAO report is one of great uncertainty as to whether and how much adverse effect has occurred. With respect to the questions of whether illegal alien workers depress wages and are associated with declining business environments, GAO states: "For both questions, we found again that useful evidence was scarce. Many of the studies would not or did not adequately differentiate between illegal alien and legal immigrant workers. Studies that did permit (with varying degrees of accuracy) differentiation by legal status were generally limited in ways which constrain generalizability. Accordingly, our answer to both questions are again caveated." And to repeat the last sentence quoted in the NPRM from the GAO report: "This suggests that the effects of illegal workers on the wages and working conditions of native or legal workers are not *automatically* in the direction of depressing these conditions, and that those effects depend on a number of factors, of which the illegal status of the workers is one."
d. DOL misinterpreted GAO statement about aggregation—difficulty in measuring should not be interpreted as meaning no adverse effect.	d. DOL believes GAO's statement that "wage depression is harder and harder to detect at levels of analysis beyond or above a highly localized and occupation-specific labor market" was probably intended to have both meanings—any adverse effect would be more difficult to measure at higher levels of aggregation, but also if the effect were large, it would probably be able to be detected. DOL believes the latter meaning is strongly indicated in GAO's uncertainty as to *whether* adverse effect has occurred, as well as how much.
e. The National Bureau of Economic Research and Urban Institute studies should be dismissed because they do not include agriculture.	e. While agricultural sectors were not included in those studies, the concepts and principles being analyzed may be applied to agriculture. The NBER study clearly says there have been only *modest* impacts on those competing directly with illegal aliens (immigrants and earlier immigrants) and *little, if any,* impact on blacks and Hispanics, the next closest substitutes. The Urban Institute study concludes the wages of non-Hispanic laborers were only *somewhat* depressed in local case studies, with *negligible* impacts on non-Hispanic semi-skilled workers.
2. DOL has misrepresented Dr. Martin's special study for DOL; it and other Martin studies say there has been adverse effect.	2. DOL reviewed the proposed AEWR rationale with Martin prior to its submission to the Court in April 1988, and again prior to preparation of this final rule. Martin stated that his study was not misrepresented, and that DOL's approach seemed reasonable.
a. Study design dictated by DOL was flawed; required certain assumptions which may not be true; was theoretical speculation, rather than empirical study.	a. This misses the point of the study, and its implications for the issue at hand. Martin was asked to theorize, based on his estabilshed expertise, what effects the removal of illegals might have on agricultural wages. His overall conclusion was that wage rates would tend to rise, but not enough to show up in the USDA average wage rates. Whether or not illegals actually cease to exist in agriculture as a result of IRCA, Dr. Martin's analysis and conclusions are still valid; namely, that illegals have had no discernible effect on USDA wage rates. This must be so since their removal would have no discernible effect.
b. Statement on Page 10 says (indirectly) that illegals have depressed farm wages.	b. DOL does not rule out the possibility—indeed it acknowledges in the NPRM—that wages could be depressed from the use of illegals in certain crops, activities, and areas, and Martin appears to concur. But this one statement does not invalidate the overwhelming thrust of his paper that any increase in wages from the removal of illegals would probably not be large enough to show up in the USDA series.
c. Piece rates may have been adversely affected by illegals, even if average hourly earnings under these piece rates have been high. Martin concurred with this subsequent to his report.	c. Martin's study says that illegals may tend to *increase* average hourly earnings (on which the AEWR is based), because of the higher productivity of solo men working at piece rates, over what it might have been if only U.S. workers were involved. This has not been disputed by farmworker advocates. Even if piece rates would have been higher without illegals (which DOL does not concede), it does not mean less productive U.S. workers would have had higher hourly earnings than the illegals had.

ATTACHMENT 2.—ANALYSIS OF FARMWORKER COMMENTS—Continued

Farmworker Advocate Comments	DOL Analysis
d. Other Martin studies conclude illegals cause wage depression.	d. Again, possible wage depression in certain crop-activity-areas is not disputed by DOL, nor by Martin. The issue is whether in the aggregate there is wage depression, whether it is significant, and whether it is reflected in the USDA survey. One Martin study cited by farmworker advocates, while generally concluding some wage depression, also states: "Average hourly and annual earnings have decreased, but these decreases cannot be observed in wage statistics." This is entirely consistent with DOL's position, and with Martin's conclusions in his special study for DOL.
3. Past DOL studies over the last 30 years show adverse effect. These include a 1959 Consultants Report; 123 wage surveys done in 1960; studies done in the 1960's of Texas and California border areas; analyses supporting rulemaking in 1979 and 1986 adding States for which separate AEWRs were to be calculated; and justification for a 1980–81 AEWR rulemaking subsequently withdrawn.	3. DOL has reviewed these studies, to the extent they are still available, and finds they invariably related to specific crop-activity-areas; they were simple comparisons, not meeting today's methodological standards for economic research (they were not included by GAO among the studies meeting its methodological standards for inclusion in its review of the literature); and most of them were done 20 or more years ago, since which time significant changes in agricultural markets have occurred. These rulemakings cited apprehensions of illegals in agriculture and wages at or near the FLSA minimum wage as a basis for determining the existence of past adverse effect and the need for establishing Statewide AEWRs. Comments received in the 1986 Idaho-Mont-Oregon rulemaking have given DOL pause in this regard; information presented raises doubts about penetration of illegals and effect on wages. Nevertheless, DOL continues to assume the need for an AEWR under its H–2A methodology, in that it *has* set AEWRs for *all* States. DOL's withdrawal of this rule in 1981 very shortly after promulgation indicates it did not support the underlying analysis.
4. Other studies by non-DOL researchers show adverse effect; even show adverse effect from H–2 program.	4. DOL has reviewed the studies cited by farmworker advocates. Almost all of these were not included in the GAO review of studies which met GAO's methodological standards. Almost all of these dealt with specific crop-activity-area situations, rather than Statewide or industry-wide analyses. In any event, these studies generally do not assert clear-cut adverse effects. Two studies which do deal with Statewide or industry-wide impacts were carefully reviewed by DOL. (Both were not reviewed in the GAO report.) DOL found the Medoff-Abraham study of the impact of the H–2 program to be methodologically seriously flawed. Contrary to their overall conclusion that the use of H–2 workers depressed average agricultural wages, the average wages in the two States with the highest penetration of H–2 workers (Florida and West Virginia) increased faster than the average wages in non-H–2 States. In addition, still other studies of H–2 program effects in Florida show a positive impact on State wage rates. The Morgan-Gardner study of the impact of the 1950's and 60's bracero program is a very thoughtful and careful study; however, its assumptions and implications for today have been questioned by other prominent agricultural labor economists, as well as DOL analysts, with respect to the elasticity of the demand for labor and the effects of more recent changes in agricultural markets.
5. Agricultural wage rates have not kept pace with manufacturing wage rates between 1974 and 1987 in many States with high estimated numbers of illegals; DOL's citing high agricultural wage rates in these States not meaningful in themselves.	5. There is little conceptual or theoretical basis for believing that agricultural and manufacturing wage rates should move in lock step. The variables that determine wage rates in each are distinctly different. For example, year-to-year changes in agricultural wages (but not in non-agricultural wages) will be influenced by weather patterns throughout the world, which will affect the demand for U.S. agricultural products and the demand for agricultural workers in the U.S. (DOL considered, and then withdrew, this approach in 1980–81 rulemaking. DOL also applied this approach partially to AEWRs in 1965, which became the basis for subsequent indexing; this is one reason DOL finds the old H–2 methodology unsuitable under IRCA.) In addition, the special circumstances surrounding agriculture were recognized by the Congress in establishing a special legalization program and special programs for utilizing foreign workers in agriculture. Nevertheless, further analysis of agricultural-manufacturing wage relationships shows that in all of the high-illegal States the agricultural-manufacturing wage rate ratio is approximately as high or higher than in the U.S. as a whole. Even using the percent change in these rates between 1974 and 1987, shows that generally States with AWERs under the old H-2 methodology (which farmworker advocates recommend retaining) fare worse then States with no AEWRs. Regarding absolute agricultural wage rates, it is difficult to explain why the State with the undisputed greatest penetration of illegals (California) should also have the highest agricultural wage rates within the contiguous 48 States, if illegals cause the adverse effect claimed by farmworker advocates. Other high-illegal States (such as Washington and Oregon) have the next highest wage rates.
6. Even if studies were considered to be inconclusive as to adverse effect, DOL should give benefit of the doubt to U.S. workers.	6. DOL takes the opposite view, which it believes is more reasonable; namely, lacking any solid evidence of past adverse effect, and lacking the means for determining adverse effect, DOL has no right to impose some arbitrary enhancement to the USDA average. In addition to the empirical studies which have been unable to demonstrate generalized adverse effect, DOL must give weight to a theoretical analysis which recognizes that in a global agricultural market, a condition which has accelerated rapidly in the 1980's, wage levels are determined primarily by international equilibrium market conditions, which means a highly elastic demand for labor, rather than by labor supply. Furthemore, DOL has an obligation to be evenhanded, recognizing the legitimate interests and concerns of both employers and workers.

ATTACHMENT 2.—ANALYSIS OF FARMWORKER COMMENTS—Continued

Farmworker Advocate Comments	DOL Analysis
C. *The USDA Survey Has Been Tainted/Depressed from Past Use of Illegals*	
1. If one accepts (as DOL does) the possibility of adverse effect in local aeas where illegals have predominated, then the high numbers and widespread penetration of illegals in agricultural activities generally *must* have affected the USDA series. Cites unofficial DOL March 13, 1987 estimates; large number of SAW applications (1.2 million); DOL comments on GAO report; Texas sheep and goat survey. Farmworker advocates estimates 12–50% penetration.	1. Both the total number of farmworkers, and especially the number of illegals, are highly uncertain. Estimates of the number of illegals in the past range from 200,000 to over 1 million. The proportion of illegals has been surveyed by Martin at 20 percent in California, the State with acknowledged highest penetration. Estimate for specific crop activities in California was as high as 54 percent. Other estimates run higher in some specific crop-activity-areas. But these are all *only estimates*; nobody knows with any certainty. With respect to SAW applications, INS believes there is a very high incidence of unsupported applications. Even if the penetration is high, it is not clear that aliens have had an adverse effect on wages; could even be positive, due to higher hourly earnings than U.S. workers at piece rates. Furthermore, with highly elastic labor demand conditions, the wage rate is not influenced greatly by the supply of labor. Finally, it is possible that in some specific crop-activity-areas there has been adverse effect, but not enough to significantly effect the USDA average. The DOL comments on the GAO report refer to studies done in specific activities and areas, not to general average wage levels in an occupation or industry. The Texas sheep and goat survey relates likewise to a specific activity and area; it also indicates nothing about what the rate would have been absent the high penetration of illegals; the same rate may have prevailed, with fewer producers and workers.
2. DOL has misrepresented Martins' view on this matter; clarifying Martin-Tuddenham conversations and correspondence confirm this.	2. While Martin has indicated, subsequent to his special study for DOL, that it cannot be said with certainty that the USDA survey is untainted, he has not changed his statement in the report that the removal of illegals would probably not have an effect on the USDA survey data—which means their presence also has not had an effect. This is the major conclusion of his study. Again, Martin reviewed the DOL use of his study and found he was not misrepresented.
D. *USDA SURVEY is Too Flawed and Otherwise Inappropriate to Serve as AEWR Base, Apart from Adverse Effect Considerations*	
1. Wage rates generated by USDA survey are erratic, showing large changes from year-to-year in some regions/States. Cites Martin statement that this is why wage increases from removal of illegals would not show up in USDA surveys. Also, cites GAO criticism of USDA survey.	1. In citing Martin statement in special DOL study, farmworker advocates apparently are accepting Martin's overall conclusion that wage changes won't show up in USDA series, but they misrepresent his explanation of why this is so. Martin says: "It is entirely possible that illegal aliens are simply too small a factor in the generally multi-State labor markets surveyed by *Farm Labor* to isolate the effects of their removal. Alternatively, *Farm Labor* may be an unreliable guide to changes in farm labor, especially over short time periods." *Both* of these are possible explanations of Martin's overall conclusion—but his conclusion still stands. In fact, the USDA survey is the best, most scientific measure of farm wage rates; it is given high marks by GAO, even though some aspects are criticized. The GAO report in essence affirms the USDA survey as a statistically designed and defensible probability survey for collecting regional and U.S. level wage rate data. It is noteworthy that in attacking the reliability and validity of the USDA survey, farmworker advocates are attacking the very basis for their preferred AEWR methodologies; namely, the old H–2 methodology which used the USDA survey to index year-to-year changes, and adding an enhancement factor to the USDA base rate.
2. USDA Survey understates wage rates for occupations in which H–2A workers tend to be employed, as determined by GAO report. Martin concurs.	2. DOL disagrees, based on anticipated expansion of H–2A program to a much wider variety of agricultural occupations (see official DOL comments on GAO report). Also based on further analysis of offsetting factors, as follows.
a. Survey does not include higher paid agricultural service workers, which include employees of farm labor contractors; such workers comprise about 15–20% of agriculture workers nationally and a higher proportion in some states, such as California.	a. It is true that agricultural service workers' wages are not included in the USDA wage rates. However, GAO points out that wage differences between agricultural service workers and other farm workers are small, and agricultural service workers may include high-wage, high-skilled "non-agricultural" workers (i.e., not field and livestock workers). In addition, the field and livestock worker wage categories include higher skilled workers such as farm machine operators and livestock herdsmen. Also, Martin-Mines found wages of contract workers *lower* than others in California. It may be noted that since illegals tend to be heavily represented in labor contract work, the omission of such work from the USDA survey lessens the influence of illegals on that survey. (It also suggests illegals may not depress the overall averages.)
b. Survey undercounts seasonal and temporary workers which tend to be paid higher wages. Ratio of seasonal to year-round is 1:2 in USDA survey; 4:1 in Census of Agriculture.	b. The differences in the ratios are not necessarily inconsistent. The USDA counts workers on farms during a 1-week period each quarter so farm-to-farm migration of seasonal workers is minimal. The Census of Agriculture counts workers on farms during the year so a seasonal worker that worked on six different farms would be reported six times. The affect of any possible undercounting of seasonal workers tends to be offset by the fact that GAO says piece rate hours are probably understated. If true, this means the hourly earnings for piece-rate paid workers are probably overstated—which gives an upward bias to the overall USDA rate. If the USDA survey does undercount seasonal workers, this undercuts advocates' assertion that illegals tend to depress wages, since they tend to be concentrated in seasonal/temporary work. In addition, if such work is underrepresented here, then illegals have less influence on the USDA rate
3 Use of *last* year's average as required rate for *this* year inappropriate; one-year lag in the data.	3. DOL has no suitable basis for adjusting for this lag. In fact, the direction of change is not always upward
4. USDA average should be enhanced to take account of Social Security and FUTA taxes which employers of aliens are not required to pay; estimated at 9–10 percent of wages.	4. The AEWR relates to wages paid to workers, not to total labor costs incurred by employers. Legislation specifically exempts employers from making these payments for alien workers. Employers also make the point that they incur other costs in the H-2A program which non-H–2A employers are not required to bear

ATTACHMENT 2.—ANALYSIS OF FARMWORKER COMMENTS—Continued

Farmworker Advocate Comments	DOL Analysis
5. Requiring only the average will have depressing and stagnating effect on wage rates.	5. DOL believes quite the contrary. If anything, requiring the previous year's *average* as this year's *minimum* may tend to have a ratcheting-upward effect on wage rates. This is particularly true where piece rates are used as incentive payments permitting higher-productivity workers to earn well above the average; in other words, for incentives to be maintained, piece rates (and earnings) would have to be raised. Also, non-H-2A employers would be pressured to raise rates to compete for workers. And if an enhancement were added, the ratcheting effect would be very inflationary It should be noted that even the staunchest FLSA minimum wage advocates would recognize as inflationary setting the FLSA minimum equivalent to the average non-agricultural earnings. The highest the post-war FLSA minimum has been set as a proportion of average non-agricultural earnings is 56 percent in 1956.
E. *Other DOL Arguments Are Inappropriate*	
1. "Anomalies in old methodolgy"—no justification for current approach of non-enhancement; cf. Appeals Court—could as easily say anomalies show need for more enhancement, not less.	1. By themselves, the flaws in the methodology which DOL has documented do not provide a justification *for* any specific methodology, but they are important considerations in that they indicate a clear need to change from the old methodology. They also demonstrate the lack of ability to measure adverse effect.
2. "Elimination of illegals will raise wages"—doesn't address past adverse effect, as required by the Court of Appeals.	2. While this point does not address past adverse effect, it is nevertheless an important consideration to assure that the AEWR methodology does not build in a further inflationary accelerator, such as an enhancement factor.
3. "International competition considerations"—not within scope of legitimate consideration.	3. DOL believes international competition must be part of basic theoretical model for analyzing adverse effect, because that is factually the way agricultural markets are, particularly in the 1980's. Clearly DOL must be mindful of the potential consequences of its actions, to the extent it has administrative discretion within statutory limitations.
F. *Recommended AEWR Approaches*	
1. Return to old H-2 methodology for all States	1. Clearly fatally flawed—bears no relationship to any reasonable conception or measurement of past adverse effect for most States. Disregards most recent empirical and theoretical analyses. Base rates related primarily to manufacturing wage rate changes 1950–65 (a conceptual approach which DOL has since rejected in 1981) and an attempt to set minimum rates in agriculture in the absence of FLSA coverage at the time (1965).
2. Add enhancement to USDA rate in all States to compensate for: (a) past adverse effect, (b) social security and FUTA taxes, (c) one-year lag, and (d) underrepresentation of H-2A type work.	2. Such enhancement is inappropriate, for the reasons discussed above for each of these points. Would also be inflationary, adversely affect competitive position of U.S. agriculture, and thereby adversely affect U.S. workers, both those "similarly employed" and complementary workers.
3. Add enhancement to USDA rate in States where adverse effect can be demonstrated, as did under H-2.	3. While this approach has merit conceptually, there is currently no supportable basis for determining State-by-State adverse effect. In this connection, it bears repeating that the States with the highest estimated penetration of illegals (particularly California) also tend to have the highest agricultural wage rates.
4. Use USDA piece rate average hourly earnings as AEWR (higher than combined average), since most H-2A workers paid by piece.	4. Under IRCA, expect almost all kinds of farm work with a wide variety in methods of payment may have H-2A applications. In addition, DOL does not believe the average hourly earnings under incentive methods of payment are appropriate for an hourly rate standard.
5. Adjust USDA rate for agricultural-manufacturing wage differential.	5. Inappropriateness of this approach discussed above. DOL rejected this approach in 1981.
6. Set AEWR at or above non-farm rate	6. No suitable conceptual or theoretical support for this approach.
7. Establish separate hourly AEWR for piece rate work	7. AEWR meant to be floor or minimum for all agricultural work. DOL has never tried to protect earnings above this floor.
8. Establish separate hourly AEWR for seasonal work	8. See response to item 7. Also, "seasonal" would vary by crop and activity. Not administratively feasible.
9. AEWR should include value of perquisites	9. Not administratively feasible to cost these out and factor into hourly AEWR. In addition, AEWR has always related to cash wages; perquisites such as housing, transportation, tools, etc. dealt with elsewhere in the regulations.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 556 and 558

Animal Drugs, Feeds, and Related Products; Halofuginone

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Hoechst-Roussel Agri-Vet Co. The NADA provides for the safe and effective use of a Type A medicated article containing halofuginone hydrobromide in making Type C medicated turkey feeds for the prevention of coccidiosis. The regulations are also amended to establish a tolerance and safe concentrations for drug residues in edible turkey tissue.

EFFECTIVE DATE: July 5, 1989.

FOR FURTHER INFORMATION CONTACT: Dianne T. McRae, Center for Veterinary Medicine (HFV–135), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4913.

SUPPLEMENTARY INFORMATION: Hoechst-Roussel Agri-Vet Co., Route 202–206 North, Somerville, NJ 08876, has filed NADA 140–824 providing for the use of a Type A medicated article containing 2.72 grams of halofuginone hydrobromide per pound to make Type C medicated feeds containing 1.36 to 2.72 grams of halofuginone hydrobromide per ton for growing turkeys. The Type C medicated feeds are for the prevention of coccidiosis