Dated: July 27, 1994.

Mollie H. Beattie,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 94–18931 Filed 8–1–94; 8:45 am]

BILLING CODE 4310–55–P

50 CFR Part 17

RIN 1018–AC65

Endangered and Threatened Wildlife and Plants; Proposed Rule to List Two Plants From Southwestern California as Endangered and Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service (Service) proposes to list *Downingia concolor* var. *brevior* (Cuyamaca Lake downingia) as endangered and *Limnanthes gracilis* ssp. *parishii* (Parish's meadowfoam) as threatened throughout their respective ranges in southwestern California pursuant to the Endangered Species Act of 1973, as amended (Act). These species occur in vernally moist soils of montane wet meadows, near springs and seeps, or vernal pools within the Peninsular Ranges of southwestern California. These plants are imperiled by a variety of factors including alteration of wetland hydrology, cattle grazing, recreational activities, recreational development, off-road vehicle activity, and competition from exotic plant species. This proposed rule, if made final, would extend protection under the Act to these two plants. Critical habitat is not being proposed at this time. Additional data and information, which may assist the Service in making a final decision on this proposed action, is solicited on the status of these species.

DATES: Comments from all interested parties must be received by October 3, 1994. Public hearing requests must be received by September 19, 1994.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Field Office, 2730 Loker Avenue West, Carlsbad, California 92008. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Debbie Kinsinger, Botanist, at the above address (telephone 619/431–9440).

SUPPLEMENTARY INFORMATION:

Background

Downingia concolor var. *brevior* (Cuyamaca Lake downingia) and *Limnanthes gracilis* ssp. *parishii* (Parish's meadowfoam) occur in association with meadows and drainages of the Peninsular Ranges of southwestern California from the Santa Ana Mountains of extreme southwestern Riverside County, south to the Laguna Mountains of southern San Diego County, California. Both plant taxa are restricted to grassy meadows that are vernally wet (wet during the rainy season) with saturated soil conditions and shallow pools for several weeks at a time. Between the ponded areas are drier mounds, called mima mounds. This type of physiography is referred to as a montane meadow-vernal pool association.

The largest populations of both taxa are located within the Cuyamaca Valley in the Cuyamaca Mountains of central San Diego County, California. Although the vernal pool and mima mound topography is mostly obliterated, much of the unique, montane, vernal pool flora remains. This flora includes a number of disjunct species that are more frequently associated with vernal pools of coastal San Diego County or central California (e.g., *Deschampsia danthonioides* (annual hairgrass), *Blennosperma nanum* (common blennosperma), and *Delphinium hesperium* ssp. *cuyamacae* (Cuyamaca larkspur) (Beauchamp 1986a, Winter 1991)).

Historically, a depression at the southwestern end of the Cuyamaca Valley formed a small lake that dried up in the summer. This area was referred to as "Laguna Que Se Seca" (the lake that dries up) (Allen and Curto 1987). This area and the rest of the valley supported a complex of vernal pools and mima mounds. A dam was built in 1886 at the Boulder Creek outlet of Cuyamaca Lake. The dam created a permanent reservoir known as Cuyamaca Lake. A dike built in 1967 allowed water to be pumped from the reservoir so that the valley could be kept in a flooded condition throughout the summer (Ball et al., unpub. man.). In wet years, the reservoir and dike system allows the entire valley to remain flooded for extended periods (Bauder 1992). Many areas supporting these taxa have been moderately to heavily grazed in the past and some areas continue to be adversely affected by livestock and horses. For example, heavy grazing in the Laguna Mountains since the 1880's has resulted in the increased abundance of introduced annual grasses and forbs, the scarcity of organic matter, and severe gullying and erosion (Sproul 1979).

Downingia concolor var. *brevior* (Cuyamaca Lake downingia) was described by R. McVaugh (1941) based on a collection by L. Abrams at Cuyamaca Lake, Cuyamaca Mountains, San Diego County, California. Beauchamp (1986b) elevated the plant to a subspecies following the suggestions of Thorne (1978). However, Ayers (1993) also recognized this plant as *D. c.* var. *brevior* following McVaugh's (1941) treatment of this taxon.

Downingia concolor var. *brevior* is a member of the bellflower family (Campanulaceae). This plant is a low, slightly succulent annual herb, with stems 5 to 20 centimeters (cm) (2 to 8 inches (in)) long. The flowers are blue and white with a 4-sided purple spot at the base of the united petals. The fruit is 12 to 15 mm (0.5 in) long and the seeds have linear striations (lines). *D. concolor* var. *brevior* blooms from May to July and sets seed from June to August. The seeds are dispersed by flooding and require brief inundation for germination (Munz 1974, Bauder 1992).

Downingia concolor var. *brevior* can be distinguished from the only other member of this genus that occurs in southern California, *D. cuspidata*, by the form of the striations on the seed and by the color of the flower. It can be distinguished from the more northern *D. concolor* var. *concolor* by the size of the fruit and how rapidly the fruit splits open when the seeds are mature (Ayers 1993).

Downingia concolor var. *brevior* is restricted to a single population at Cuyamaca Lake in the Cuyamaca Valley of San Diego County, California on land owned by the Lake Cuyamaca Recreation and Park District. Historically, the population of *D. concolor* var. *brevior* was located throughout much of the valley floor. This population has now been largely restricted to the shore of the lake, penetrating into the valley floor during dry years. From 1988 to 1992 one population existed in the vicinity of Cuyamaca Lake, consisting of between 9 and 24 stands. Combined, these stands occupied less than 200 acres and frequently occupied less than 100 acres. The number of individuals within these stands, and the location and size of these stands vary in any given year in response to rainfall, the extent of winter flooding, and temperature (Bauder 1992).

Limnanthes gracilis ssp. *parishii* (Parish's meadowfoam) was first

described by W.L. Jepson (1936) as *Limnanthes versicolor* var. parishii. The description was based on specimens collected by S.B. Parish at the Stonewall Mine on the southern edge of the Cuyamaca Valley, San Diego County, California. Mason (1952) recognized *L. versicolor* var. *parishii* as *L. gracilis* var. *parishii*, based on flower and fruit morphology. Beauchamp (1986b) elevated the plant to a subspecies based on consistency with other treatments of this genus, and the geographic separation (over 1,200 kilometers (km) (800 miles (mi)) from *L.g.* ssp. gracilis, which is found in southern Oregon.

Limnanthes gracilis ssp. *parishii* is a member of the meadowfoam family (Limnanthaceae), a small family of wetland species found primarily along the Pacific coast of North America. The plant is a low, widely branching annual with stems 10 to 20 cm (4 to 8 in) long. The leaves are 2 to 6 cm (0.5 to 2 in) long and divided. The flowers are bowl-shaped, the petals are 8 to 10 mm (0.25 to 0.5 in) long with a white or occasionally with a cream-colored base that becomes pink (Ornduff 1993). The fruit is rough textured. *L. gracilis* ssp. *parishii* blooms from April through May, setting seed in the late spring and early summer. Germination requires saturated soils or inundation (Munz 1974, Bauder 1992).

The range of *Limnanthes gracilis* ssp. *parishii* is separated by over 480 km (300 mi) from any other species of *Limnanthes*. *L.g.* ssp. *parishii* is distinguished morphologically from *L.g.* ssp. *gracilis* by its smaller flowers, broader sepals, and smooth nutlets (Abrams 1951, Mason 1952).

Limnanthes gracilis ssp. *parishii* is restricted to moist montane meadows, mudflats, and along stream courses in the Palomar, Cuyamaca, and Laguna mountains of San Diego County, California. Fewer than 20 populations of this taxon exist. The largest population occurs in the Cuyamaca Valley in the vicinity of Cuyamaca Lake and Stonewall Creek and is restricted to the shore of Cuyamaca Lake at maximum inundation. The majority of this population is on private lands but extends onto California State Parks and Recreation lands.

Historically, the Cuyamaca Valley population of *Limnanthes gracilis* ssp. *parishii* occurred throughout much of the valley floor. Recently, the Cuyamaca Valley population of *L. gracilis* ssp. *parishii* was described as consisting of 100 stands by Bauder (1992), and 8 small populations by the California Natural Diversity Data Base (CNDDB) (1992). However, these smaller groupings are contiguous, separated by less than 1.5 km (1 mi), and concentrated within a 9 square km (4 square mi) area. Approximately 120 hectares (ha) (300 acres (ac)) of a potential 800 ha (2,000 ac) of the Cuyamaca Valley and Stonewall Creek area are occupied by *L. gracilis* ssp. *parishii*. The number of individuals and the location and size of stands within this area varies in any given year in response to rainfall, the extent of winter flooding, and temperature (Bauder 1992). Under favorable conditions, *L. gracilis* ssp. *parishii* can be a conspicuous element of the Cuyamaca Valley during the spring bloom (Craig Rieser, Pacific Southwest Biological Services, pers. comm., 1993).

Other populations of *Limnanthes gracilis* ssp. *parishii* are considerably smaller, both in number of individuals and the extent of occupied habitat relative to the Cuyamaca Valley population. They range in size from less than 2 ha (5 ac) to as much as 40 ha (100 ac) in extent, and most populations contain fewer than 1000 individuals. At least five of these other populations occur on National Forest lands. A single isolated population is located in vernal pools on the Santa Rosa Plateau of southwestern Riverside County, California. This area of approximately 2 ha (5 ac) is managed by The Nature Conservancy (TNC). One additional population has been introduced to National Forest lands in the Laguna Mountains from seeds gathered from the Cuyamaca Valley population (Winter 1991, CNDDB 1992).

Previous Federal Action

Federal government action on the two plant taxa considered in this rule began as a result of section 12 of the Endangered Species Act of 1973, which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct. This report, designated as House Document No. 94–51, and presented to Congress on January 9, 1975, recommended *Limnanthes gracilis* var. *parishii* (= *L.g.* ssp. *parishii*) for endangered status. The Service published a notice in the July 1, 1975, **Federal Register** (40 FR 27823), of its acceptance of the report as a petition within the context of section 4(c)(2) (now section 4(b)(3)(A)) of the Act, and of the Service's intention to review the status of the plant taxa named therein, including *L.g.* ssp. *parishii*. The Service published a proposal in the June 16, 1976, **Federal Register** (42 FR 24523) to determine approximately 1,700 vascular plants to be endangered species pursuant to section 4 of the Act. *Limnanthes gracilis* ssp. *parishii* was included in this **Federal Register** notice.

General comments received in response to the 1976 proposal were summarized in an April 26, 1978, **Federal Register** notice (43 FR 17909). The Endangered Species Act amendments of 1978 required all proposals over 2 years old to be withdrawn, although a 1-year grace period was given to those proposals. In the December 10, 1979, **Federal Register** (44 FR 70796), the Service published a notice of withdrawal for that portion of the June 6, 1976, proposal that had not been made final and which included *L. g.* ssp. *parishii*.

The Service published an updated Notice of Review of Plants in the **Federal Register** on December 15, 1980 (45 FR 82480). This notice included *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii* as category 1 candidate taxa (species for which data in the Service's possession are sufficient to support a proposal for listing). On November 28, 1983, the Service published a supplement to the Notice of Review of Plants in the **Federal Register** (48 FR 53640). This notice was again revised on September 27, 1985 (50 FR 39526). Both plant taxa were included in 1983 and 1985 supplements to the Notice of Review of Plants as category 2 candidate taxa (species for which data in the Service's possession indicate listing may be appropriate, but for which additional biological information is needed to support a proposed rule). The Notice of Review of Plants was again revised on February 21, 1990 (55 FR 6184), and again on September 30, 1993 (58 FR 51144). *Downingia concolor* var. *brevior* was included as a category 1 candidate taxon, and *Limnanthes gracilis* ssp. *parishii* as a category 2 candidate taxon in both notices.

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended in 1982, requires the Secretary to make findings on pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982 be treated as having been newly submitted on that date. This was the case for *Limnanthes gracilis* ssp. *parishii* because the 1975 Smithsonian report had been accepted as a petition. On October 13, 1983, the Service found that the petitioned listing of this species was warranted but precluded by other pending listing proposals of higher priority, pursuant to section 4(b)(3)(B)(iii) of the Act. Notification of this finding was published in the **Federal Register** on January 20, 1984 (49 FR 2485). Such a finding requires

the petition to be recycled, pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed in October of 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, and 1992.

The Service made a final "not warranted" finding on the 1975 petition with respect to *L. g.* ssp. *parishii* and 864 other species in the December 9, 1993, Federal Register (58 FR 64828–45). One reason was cited as the basis for this finding on this species that was based upon data not then available to the Service in late summer 1993: current threats (i.e., the five factors described below under 50 CFR 424.11) throughout a significant portion of the species' range. The species was retained in Category 2 on the basis that it may be subject to extinction or endangerment from uncontrolled loss of habitat or from other man-caused changes to its environment (58 FR 64840). Since the summer of 1993, the Service has completed or obtained survey and other data that adequately describe those factors that are placing *L. g.* ssp. *parishii* at risk of extinction. The Service has proceeded to propose this species along with the Lake Cuyamaca downingia that occupies the same general part of southern California.

On December 14, 1990, the Service received a petition dated December 5, 1990, from Mr. David Hogan of the San Diego Biodiversity Project, to list *Downingia concolor* ssp. *brevior* (=*D. c.* var. *brevior*) as an endangered species. The petitioner also requested the designation of critical habitat for this species. The Service evaluated the petitioner's requested action for *D. c.* var. *brevior* and published a 90-day finding on August 30, 1991 (56 FR 42968) that substantial information existed indicating that the requested action may be warranted. Publication of this proposal constitutes the final finding that the petitioned action is warranted for this species.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR Part 424) promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) and 50 CFR 424.11. These factors and their application to *Downingia concolor* E. Greene var. *brevior* McVaugh (Cuyamaca Lake downingia) and *Limnanthes gracilis* Howell ssp. *parishii* (Jepson) Beauch (Parish's meadowfoam) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

Impacts that result in the loss, degradation, and fragmentation of vernally moist wet meadows are contributing to the decline of *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior*. The habitat for both these taxa is threatened by recreational developments, off-road vehicle use, trampling, alterations of hydrology and the introduction of exotic plants.

Historically, montane wet meadow and vernal pool habitats were much more abundant in the Peninsular Ranges of San Diego County (Winter 1991). The wet meadows surrounding Cuyamaca Lake reservoir support the most significant populations of *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior*. The entire Cuyamaca Valley was originally a montane meadow-vernal pool complex. Dredging during dam construction in 1886 altered the natural topography of the valley and its vernal pools. Mima mounds were likely excavated since "much of the earth used for the dam was taken from the meadow north of the dam and from the valley floor" (Allen and Curto 1987). Later, 160 ha (400 ac) of the valley outside the reservoir was leased from Helix Water District and planted in grain.

Loss of wet meadow habitat continues as a result of excessive water inundation at Cuyamaca Lake reservoir and within Cuyamaca Valley above the dike. Studies of *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior*, conducted between 1988 and 1992, have demonstrated that extended inundation at Cuyamaca Lake caused extirpation of stands for these two species (Bauder 1992). The reservoir provides domestic water, flood control, and recreational activities such as fishing and duck hunting. These uses are administered through agreements between the Helix Water District, the City of San Diego's El Capitan Reservoir, and Lake Cuyamaca Recreation and Park District (Bauder 1992). Approximately 81 ha (150 ac) of potential meadow habitat are permanently inundated. The system of dikes built in 1967 allows an additional 273 ha (675 ac) to be inundated for extended periods of time during periods of high precipitation; that occurred as recently as 1993 (Hugh Marks, Cuyamaca Lake Recreation and Parks District Manager, pers. comm., 1993). *L. gracilis* ssp. *parishii* is less able to recover from excessive inundation than *D. concolor* var. *brevior, as shown by the lack of re-establishment in areas of previous inundation (Bauder 1992).*

A variety of indirect impacts are associated with the diversion of water entering the Cuyamaca Lake reservoir basin. Diversion often results in the alteration of small drainages by down cutting and streambank erosion, which contributes to the loss of potentially suitable habitat upstream of Cuyamaca Lake. Fluctuating lake levels also increase channel erosion by changing the gradient and velocity of surrounding drainages. Erosion is further intensified by the decrease in groundwater levels caused by numerous wells in the area. When streamflow velocities are high, *Downingia* and *Limnanthes* seeds and plants can be buried or washed away. In dry years, meadows exposed by the receding shoreline dry prematurely as the groundwater level falls. Roads without adequate culverts also divert water flow. Road maintenance and herbicidal weed abatement often preclude the re-establishment of seeds in areas of suitable habitat (Bauder 1992). In addition, the alteration of hydrology in Cuyamaca Valley promotes the invasion of exotic species (e.g., Lolium perenne (ryegrass) and *Poa pratensis* (Kentucky bluegrass)) known to displace native plant species. These indirect effects can have significant, long-term impacts on the meadow habitats and associated sensitive plant species.

Direct loss of both species' habitat at the reservoir is substantial. For example, a parking lot and a campground on the south end of Cuyamaca Lake reservoir at Los Caballos have displaced habitat (Bauder 1992). The Prado campground on the Cleveland National Forest also displaced *Limnanthes gracilis* ssp. *parishii* (Devoree Volgarino, Cleveland National Forest, pers. comm., 1993). The construction of a Boy Scout trail in 1976 destroyed a population of *L. g.* ssp. *parishii* in Canebrake Canyon, north of Cuyamaca Lake (CNDDB 1992). A trail around the perimeter of Cuyamaca Lake bisects several populations of both species (Ellen Bauder, Ph.D., Department of Biology, San Diego State University, pers. comm., 1993).

Several large wet meadows in the Laguna Mountains of the Cleveland National Forest support *Limnanthes gracilis* ssp. *parishii*. However, the creation of two shallow reservoirs in these meadows have resulted in year round inundation of potential *L.g.* ssp. *parishii* habitat (Winter 1991).

Traffic from off-road vehicles, horses, and hikers in the Laguna Mountain meadows indirectly impacts *Limnanthes gracilis* ssp. *parishii* by

altering the composition of the plant community over time. Such damage frequently occurs in spring when the soils are saturated and subject to compaction (Winter 1991). Loss and modification of *L. gracilis* ssp. *parishii* habitat has been documented as a result of trampling, erosion, and alteration of hydrology at most of the locations occupied by this species (Bauder 1992). *L. gracilis* ssp. *parishii* may be more subject to trampling than *Downingia concolor* var. *brevior* because it grows around the drier periphery of meadows. Some equestrian camps in Laguna Mountain meadows have displaced habitat of *L. g.* ssp. *parishii*, and its proximity to other camps has resulted in trampling (Bauder 1992).

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization is not known to be a threat to the two plant taxa under consideration in this proposed rule. Vandalism or collection are not known to threaten these species.

C. Disease or Predation

Disease is not known to be a factor affecting the taxa under consideration in this rule. Consumption of individual plants by grazing animals has been known to impact the reproduction of these annual plants and has had other affects, such as trampling, erosion (see Factor A) and the introduction of non-native species (see Factor E). Grazing was discontinued on Helix Water District-owned lands at Cuyamaca Lake in 1986 when *Downingia concolor* var. *brevior* was believed to be extinct as a result of grazing (David Hogan, San Diego Biodiversity Project, *in litt.*, 1990; Joseph Young, Helix Water District, pers. comm., 1993). The plant re-established itself the following season (Bauder 1992). Livestock grazing was terminated in Cuyamaca State Park in 1956, with the exception of a 16 ha (40 ac) parcel that was grazed until 1980 when it was acquired by the State Park. Grazing still continues on privately owned pastures east of the reservoir. The Cleveland National Forest still allows grazing in these sensitive meadows but recently adopted late season grazing regimes to avoid loss of individual plants due to actual consumption (Volgarino, pers. comm., 1993).

D. The Inadequacy of Existing Regulatory Mechanisms

Existing regulatory mechanisms that could provide some protection for these species include: (1) listing under the California Endangered Species Act (CESA); (2) the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA); (3) conservation provisions under section 404 of the Federal Clean Water Act (CWA) and section 1603 of the California Fish and Game Code, (4) occurrence with other species protected by the Federal Endangered Species Act; (5) land acquisition and management by Federal, State, or local agencies, or by private groups and organizations, and (6) local laws and regulations.

The California Fish and Game Commission has listed *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii* as endangered under the Native Plant Protection Act (NPPA) (Div. 2, chapter 10, section 1900 *et seq.* of the California Fish and Game Code) and the California Endangered Species Act (CESA) (Div. 3, chapter 1.5 section 2050 *et seq.*). After the California Department of Fish and Game notifies a landowner that a State-listed plant occurs on his or her property, the Fish and Game Code requires only that the landowner notify the agency "at least 10 days in advance of changing the land use to allow salvage of such plant" (Chapter 10, section 1913, California Fish and Game Code). Therefore, although NPPA and CESA both prohibit the "take" of State-listed plants (Chapter 10, sections 1908 and Chapter 1.5, section 2080, California Fish and Game Code), these statutes are not adequate to protect the taking of such plants via habitat modification or land use change by the landowner.

The California Environmental Quality Act (CEQA) (Public Resources Code, section 21000 *et seq.*) requires full disclosure of the potential environmental impacts of proposed projects. The public agency with primary authority or jurisdiction over the project is designated as the lead agency and is responsible for conducting a review of the project and for consulting with the other agencies concerned with the resources affected by the project. CEQA documentation is often inadequate or incomplete, and compliance with CEQA is not monitored. Section 15065 of the CEQA Guidelines requires a finding of significance if a project has the potential to "reduce the number or restrict the range of a rare or endangered plant or animal." However, even if significant effects are identified, the lead agency has the option to require mitigation through changes in the project or to decide that "overriding social and economic considerations" make mitigation infeasible (California Public Resources Code, Guidelines, section 15093). In the latter case, projects may be approved that cause significant environmental damage, such as destruction of endangered plant species. Protection of listed plant species under CEQA is therefore dependent upon the discretion of the lead agency, hence, this is not adequate to ensure the survival of a species.

The Cuyamaca Recreation and Park District is the lead agency that is empowered to uphold and enforce CEQA regulations at Cuyamaca Lake reservoir. However, unresolved conflicts exist regarding the use of this area for recreation and habitat protection for state endangered species. The Cuyamaca Recreation and Park District receives funding from CDFG, State Bonds, California Division of Parks and Recreation, U.S. National Park Service Land and Water Grants, and other sources, which have been used to stock the reservoir with fish, build duck blinds, a boat ramp, picnic facilities and a fishing trail around the western portion of the reservoir between the dam and the dike. Projects that use state money must comply with CEQA on each project or funding can be withdrawn. Impacts to *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* occur during implementation of these projects and may continue to occur as a result of maintenance and use of these facilities. The Cuyamaca Recreation and Park District, acting as the state lead agency, has issued negative declarations for its improvement and maintenance activities, which exempts them from the requirement for a full environmental analysis. Other signatory state agencies have not monitored CEQA compliance by the Cuyamaca Recreation and Park District (Jack Shu, California State Parks Department, pers. comm., 1993). These factors have resulted in removal of plants and habitat loss as discussed in factor A above.

While CEQA pertains to projects on non-Federal land, the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 to 4347) requires disclosure of the environmental effects of projects within Federal jurisdiction. Species that are listed by the State, but not proposed or listed as threatened or endangered by the Federal government, are not protected when a proposed Federal action meets the criterion for a "categorical exclusion". NEPA requires that each of the project alternatives recommend ways to "protect, restore and enhance the environment" and "avoid and minimize any possible adverse effects" when implementation poses significant adverse impacts. However, it does not require that the lead agency select an alternative with

the least significant impacts to the environment (40 CFR 1500 *et seq.*). Federal actions that may affect Federal threatened or endangered species require consultation with the Fish and Wildlife Service under section 7 of the Endangered Species Act and must avoid jeopardizing the continued existence of a listed plant species and destruction or adverse modification of critical habitat.

The Cuyamaca Recreation and Park District is also subject to NEPA because projects for recreational improvements may be funded through the Federal Land and Water Grant program that is administered by the National Park Service through the California Department of Parks and Recreation. These projects would require NEPA review. Land-use planning decisions at the local level are made on the basis of environmental review documents prepared in accordance with CEQA or NEPA that often do not adequately address "cumulative" impacts to non-listed species and their habitat. State listed species that are candidates for Federal listing receive no special consideration under NEPA.

Section 1603 of the California Fish and Game Code authorizes the Department of Fish and Game to regulate streambed alteration. The Department must be notified and approve any work that diverts, alters, or obstructs the natural flow or changes the bed, channel, or banks of any river, stream, or lake. If the Department does not respond within 30 days of the notification, the applicant may proceed with the work. All waterways of the State, including streams, intermittent streams, rivers, and lakes are subject to the Department's jurisdiction. However, the Department of Fish and Game does not consider the creation of wetlands for duck habitat to be regulated under section 1603. Thus, a Streambed Alteration Agreement was not required for flooding the streambed above Cuyamaca Lake reservoir for that purpose. Because the dam has been used continuously since its construction in 1886, justification of its continued use for recreation has been grandfathered into law (William D. Smith, Lake Cuyamaca Recreation and Park District, *in litt.*, 1993). Therefore, *Limnanthes gracilis* ssp. *parishii and Downingia concolor* var. *brevior* receive no protection under section 1603.

Section 404 of the Clean Water Act authorizes the Army Corps of Engineers (Corps) to regulate discharge of dredge or fill materials into waters of the United States, including wetlands. The objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Pub. L. 92–500), which include navigable and isolated waters, headwaters, and adjacent wetlands. However, no specific provisions exist that adequately address the need to conserve candidate species. Therefore, *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* currently receive no special consideration under section 404.

Even though some of the areas surrounding Cuyamaca Lake reservoir are wetlands, water management activities are not regulated under section 404 of the Clean Water Act, and these activities have the potential to adversely affect the two taxa under consideration in this proposed rule. Several small water impoundments in streams around Cuyamaca Lake reservoir may qualify for authorization under Nationwide Permit (NWP) No. 26 of the Clean Water Act if they are less than one acre (0.4 ha) in size. Because projects affecting such streams or wetlands may proceed without notifying the Corps, evaluation of their impacts under section 404 is precluded. An individual permit may be required by the Corps if projects otherwise qualifying under NWP 26 are likely to have significant environmental impacts. However, the Corps is generally reluctant to withhold authorization under NWP 26 unless the existence of a Federally listed species is likely to be jeopardized or if the action impacts a vernal pool (Bruce Henderson, Army Corps of Engineers, pers. comm., 1993).

Section 404 of the Clean Water Act regulates clearing of vegetation by mechanical means (e.g., bulldozing) but does not currently regulate any method of clearing that does not disturb the soil or channel bottom. Thus, the ongoing use of herbicides to remove vegetation from Cuyamaca Lake reservoir is not regulated under section 404, although water quality certification must be obtained from the Regional Water Quality Control Board under section 401 of the Clean Water Act (Bruce Henderson, pers. comm., 1993).

Limnanthes gracilis ssp. *parishii* and *Downingia concolor* var. *brevior* have been exposed to artificial flooding and draining of their habitat, herbicides, and trampling from maintenance vehicles and recreational activities. For these reasons, the Service finds that these species currently receive inadequate protection under section 404 of the Clean Water Act and section 1603 of the California Fish and Game Code.

No federally listed species inhabit vernally wet meadows in the Peninsular Ranges of southern California. Therefore, these two species proposed for listing receive no federal regulatory protection resulting from sympatry with listed species.

Limnanthes gracilis ssp. *parishii* is recognized by the Cleveland National Forest as a "sensitive species" (Winter 1991). The Cleveland National Forest has policies to protect sensitive plant taxa under its jurisdiction, including attempting to establish these species in unoccupied but suitable or historic habitat, encouraging land ownership adjustments to acquire and protect sensitive plant habitat, conserving meadow water tables, and protecting montane meadow habitats (Winter 1991). However, these guidelines have not been entirely effective. For example, implementation of plans to supply an equestrian campground with water from a well at Filaree Flat in the Laguna Mountains may alter meadow hydrology (Volgarino, pers. comm., 1993). The Cleveland National Forest has addressed trampling impacts to *L.g.* ssp. *parishii* by placing interpretive signs and fencing around populations at the Shrine Camp, Prado campgrounds, and Morris Ranch meadow. In addition, an alternative location for a proposed campground at Filaree Flat is being considered to avoid impacts to *L.g.* ssp. *parishii*. A late season grazing regime has been enacted at several of these meadows (Winter 1991; Volgarino, pers. comm., 1993). Fencing sensitive habitat areas minimizes impacts but does not prevent entry by hikers or mountain bikers. In some cases, plants that remain unprotected within campgrounds are severely trampled by campers. While Forest Service management practices have reduced impacts in certain areas, the majority of *L.g.* ssp. *parishii* populations are located on private lands that currently do not receive adequate protection. No populations of *Downingia concolor* var. *brevior* occur on lands under Forest Service jurisdiction.

The California Department of Parks and Recreation has eliminated grazing from meadows containing *Limnanthes gracilis* ssp. *parishii* at Cuyamaca State Park. However, other impacts to these species and their habitat continue to occur in this area, including trampling by horses, unauthorized trails, vehicle parking, off-road vehicle use, diversion of water flow, erosion, channelization, and water impoundment. No habitat has been set aside exclusively for the protection of *D. concolor* var. *brevior* (Bauder 1992).

The Santa Rosa Plateau Preserve is managed by The Nature Conservancy for the long-term protection of sensitive species. However, only a single, small population of *Limnanthes gracilis* ssp. *parishii* is located within the preserve.

Local laws and regulations are insufficient to protect habitat for *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii*. For example, the County of San Diego generally does not provide protection for sensitive plant species unless they are actually Federally listed (Hogan, pers. comm., 1993).

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Stochastic extinction threatens both *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii* by virtue of their small population size and restricted distribution. The likelihood of finding a normal distribution of genetic variability is reduced in small populations (Jensen 1987). Reduced genetic variability may lower the ability of these populations to survive. The potential for local extirpation due to small population size can be exacerbated by environmental conditions such as drought, flooding, or fire (Gilpin and Soule 1986, Falk and Holsinger 1991).

Due to their accessibility, populations of these two taxa are particularly vulnerable to trampling. As discussed under factor A above, trampling from cattle occurs in meadows occupied by *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* in the National Forest and private land holdings. As discussed under factor D above, several measures were initiated during the past decade to protect the vernally wet meadow ecosystem and associated sensitive plant species at Cuyamaca State Park and the Cleveland National Forest. However, these measures have not prevented trampling by hikers and horses.

Introduced species of grasses and forbs have invaded many of California's plant communities. Such weedy species can displace the native flora by out competing them for nutrients, water, light, and space. Weedy plant invasions are facilitated by disturbances such as grazing, urban and residential developments, and various recreational activities. Introduced weeds have become established in many portions of the Laguna Mountains thereby reducing the amount of suitable habitat for native plant species (Sproul 1979). For example, the invasion of exotic species including *Lolium perenne* (ryegrass) and *Poa pratensis* (Kentucky bluegrass) has altered the composition of habitats supporting the two plant taxa under consideration in this proposed rule (Sproul 1979).

Trampling by livestock typically changes the composition of native plant communities by reducing or eliminating those species that cannot withstand trampling and predation (see Factors A and C), and enabling more resistant (usually exotic) species to increase in abundance. Introduction of seed from non-sterile hay and animal feces increases the likelihood of invasion of exotic species and prevents re-establishment of native plants. Taxa that were not previously part of the native flora may be introduced and flourish under a grazing regime and may reduce or eliminate native plant species through competition for resources. Grazing is considered to be a threat to all populations of *Limnanthes gracilis* ssp. *parishii* within the Cleveland National Forest, primarily as a result of trampling and the invasion of non-native species into sensitive plant habitats (Winter 1991).

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining to propose this rule. Based on this evaluation, the Service finds that *Downingia concolor* var. *brevior* is in imminent danger of extinction throughout all or a significant portion of its range due to habitat destruction and degradation resulting from hydrologic alterations, grazing, trampling by recreational activities, the inadequacy of existing regulatory mechanisms, an increased probability of stochastic extinction, and competition from exotic plant species. The Service considered threatened status for this species, but determined that it such status would not be in keeping with the purposes of the Act because the single remaining population consists of only 8 to 23 stands within a restricted range, and is at risk of extirpation due to stochastic events such as water inundation. Therefore, the preferred action is to list *Downingia concolor* var. *brevior* as endangered.

For the reasons discussed below, the Service finds that *Limnanthes gracilis* ssp. *parishii* is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Threats to this taxon include the following: habitat destruction and degradation resulting from hydrologic alterations, grazing, trampling by recreational activities, the inadequacy of existing regulatory mechanisms, stochastic extinction, and competition from exotic plant species. The Service has determined that threatened rather than endangered status is appropriate for *L.g.* ssp. *parishii* primarily because the California Department of Parks and Recreation, the Cleveland National Forest, and The Nature Conservancy have initiated some measures to protect this species. Within these areas, management activities have included fencing, signing, and monitoring of habitat supporting *L.g.* ssp. *parishii*. However, most localities containing this taxon remain vulnerable to trespass and trampling and to hydrologic alterations. The largest population of this species occurs mostly on private lands that are not protected. For these reasons, the Service finds that *L.g.* ssp. *parishii* is likely to become endangered in the foreseeable future if present threats and declines continue. The alternative of not listing these species would result in inadequate protection for these species, and would be inconsistent with the purposes of the Act. For the reasons discussed below, the Service is not proposing to designate critical habitat for these species at this time.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary propose designation of critical habitat at the time a species is proposed for listing as endangered or threatened. Section 4(b)(6)(C) further indicates that a concurrent critical habitat designation is not required if the Service finds that a prompt determination of endangered or threatened status is essential to the conservation of the involved species, or that critical habitat is not then determinable. The Service finds that designation of critical habitat for *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* is prudent but not presently determinable. Within 2 years of the publication date of this rule the Service will designate critical habitat unless the designation is found to be not prudent.

The Service intends to propose designation of critical habitat for those populations of *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* that would not likely be imperiled by the threat of vandalism, collecting, or other human activities. Section 7(a)(2) of the Act requires Federal agencies to insure that their actions are not likely to destroy or adversely modify critical habitat, or jeopardize the continued existence of a listed species. On lands subject to Federal funding, authorization, or licensing, critical habitat would provide an added benefit to the conservation of these species. The populations of *L. gracilis* ssp. *parishii* and *D. concolor* var. *brevior* on land owned by the Cuyamaca Recreation and Park District, land subject to funding through the National Park Service and the five populations of *L. gracilis* ssp. *parishii*

on National Forest land would receive this added benefit from critical habitat designation. On non-federal land, additional protection may be provided as a result of the increased public awareness afforded by the critical habitat designation. In addition, the designation of critical habitat could be useful for State landowners and local regulatory agencies to identify areas of special concern and to establish priorities for land management and acquisition. Designation of critical habitat would be likely to result in more attention and hence protection by the State and county agencies (J. Shu, pers. comm., 1994).

Section 4(b)(2) of the Act requires the Service to consider economic and other impacts of designating a particular area as critical habitat. The Service must evaluate the effects of activities that occur within the ranges of these plants, and gather data on precise habitat requirements and ownership boundaries in order to precisely define the critical habitat of these two plant taxa. In addition, the Service must analyze the economics impacts that could result from the designation of particular areas as critical habitat. Designation of critical habitat for *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* is currently not determinable due to the need for this type of information. A proposal to designate critical habitat at this time would delay this proposed rule to list the species as threatened or endangered. The Service finds that a prompt determination of endangered or threatened status for these species is essential to ensure the full benefits of conservation measures under the Act. The Service intends to propose a critical habitat designation at a later date. After receiving additional information, the Service may determine that designation of critical habitat is not prudent for *L. gracilis* ssp. *parishii* or *D. concolor* var. *brevior*.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agencies expected to have involvement with *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior* include the Forest Service, Army Corps of Engineers, and National Park Service. These agencies either administer lands containing these species or authorize, fund, or otherwise conduct activities that may affect these species. In addition, the allocation of funding through the Federal Emergency Management Act, Housing and Urban Development, Federal mortgage programs, and the Veteran's Administration may be involved with these species.

The Act and its implementing regulations found at 50 CFR section 17.61, 17.62, and 17.63 for endangered, and 17.71 and 17.72 for threatened species, set forth a series of general prohibitions and exceptions that apply to all endangered or threatened plants. With respect to *Downingia concolor* var. *brevior* and *Limnanthes gracilis* ssp. *parishii*, all trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 or 17.71, would apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale any such species in interstate or foreign commerce, or to remove and reduce to possession any such species from areas under Federal jurisdiction.

Seeds from cultivated specimens of threatened plant species are exempt from these prohibitions provided that a statement of "cultivated origin" appears on their containers. In addition, for listed plants, the 1988 amendments (Pub. L. 100–478) to the Act prohibit the malicious damage or destruction on Federal lands and the removal, cutting, digging up, or damaging or destroying of listed plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62, 17.63, and 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered or threatened species under certain circumstances.

Permits may be issued to carry out otherwise prohibited activities involving endangered or threatened plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.62 and 17.63. Such permits are available for scientific purposes, to enhance the propagation or survival of the species. Trade permits will not likely be sought or issued for any of the plant species considered herein because they are not in cultivation.

Requests for copies of the regulations on plants and inquiries regarding them should be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon, 97232–4181 (telephone 503/231–6241).

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to *Limnanthes gracilis* ssp. *parishii* and *Downingia concolor* var. *brevior*.

(2) The location of any additional populations of these species and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range, distribution, and population size of these species; and

(4) Current or planned activities in the subject area and their possible impacts on these species.

The final decision on this proposal will take into consideration the comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal. Such requests must be made in writing and addressed to the Field Supervisor of the Carlsbad Field Office (see ADDRESSES section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein is available upon request from the U.S. Fish and Wildlife Service, Carlsbad Field Office (see ADDRESSES above).

Author

This rule was prepared by the staff of the Carlsbad Field Office (see ADDRESSES section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Proposed Regulation Promulgation

PART 17—[AMENDED]

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

1. The authority citation for Part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. It is proposed to amend § 17.12(h) by adding the following, in alphabetical order under the families indicated, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
*	*	*	*	*	*	*
Campanulaceae—Bellflower family:						
*	*	*	*	*	*	*
Downingia concolor var. *brevior.*	Cuyamaca Lake downingia	U.S.A. (CA)	E		NA	NA
*	*	*	*	*	*	*
Limnanthaceae—False mermaid family:						
*	*	*	*	*	*	*
Limnanthes gracilis ssp. *parishii.*	Parish's meadowfoam	U.S.A. (CA)	T		NA	NA
*	*	*	*	*	*	*

Dated: July 26, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 94–18930 Filed 8–1–94; 8:45 am]

BILLING CODE 4310–55–P

federal register

Thursday
August 4, 1994

Part IV

Department of Health and Human Services

Food and Drug Administration

21 CFR Ch. I

Food and Safety Assurance Program; Development of Hazard Analysis Critical Control Points; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Ch. I

[Docket No. 93N-0325]

Development of Hazard Analysis Critical Control Points for the Food Industry; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is asking for public comment about whether and how the agency should develop regulations that would establish requirements for a new comprehensive food safety assurance program for both domestically produced and imported foods. Such regulations, if promulgated, would enhance FDA's ability to ensure the safety of the U.S. food supply. In this document, FDA is proposing that this program be based upon the principles of Hazard Analysis Critical Control Points (HACCP). FDA is requesting comments on a number of specific issues, as well as on all aspects of such a food safety program.

DATES: Written comments by December 2, 1994.

ADDRESSES: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857, 301-443-1751.

FOR FURTHER INFORMATION CONTACT: John E. Kvenberg, Center for Food Safety and Applied Nutrition (HFS-10), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-205-4010.

SUPPLEMENTARY INFORMATION:

I. Background

A. Status of the Food Safety Assurance Program in the United States

FDA's mandate to ensure the safety of the nation's food supply is derived principally from the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321 *et seq*). Under the act, FDA has authority to ensure that all foods in interstate commerce, or that have been shipped in interstate commerce, are not contaminated or otherwise adulterated, are produced under sanitary conditions, and are not misbranded or deceptively packaged [1]. The agency also has authority to ensure food safety under the Public Health Service Act (the PHS act) (42 U.S.C. 264), which relates to the control of the spread of communicable diseases from one State, territory, or possession to another, or from outside the United States into this country.

To carry out its mandate to ensure the safety of the U.S. food supply, FDA conducts periodic inspections of food processors, shippers, food packers and repackers, food labelers and relabelers, and food warehouses. Some inspections are carried out by the States, under contract with FDA. In addition, although subject to FDA jurisdiction, the many hundreds of thousands of retail food outlets and restaurants in the United States are inspected by State and local health departments with technical assistance and training from FDA. FDA's program to ensure the safety of the U.S. food supply also includes sample analyses of food offered for import, research into rapid detection methodologies for potential hazards, enforcement activities, and education and information sharing programs. The goal of all of these regulatory and enforcement activities is to ensure that the food supply is, and remains, safe.

Although the current food safety assurance program has generally functioned effectively, it currently faces new stresses and challenges. New food processing and packaging technologies, new food distribution and consumption patterns, increasing public health concerns about low levels of certain chemical contaminants, and new microbial pathogens all contribute to today's food safety challenge. For example, the composition of the food supply has changed dramatically in the 55 years since passage of the act. More people consume commercially processed or commercially prepared foods than ever before, and there is increased consumer demand for "fresh" foods in convenient, ready-to-cook forms, which has fostered the development of sophisticated processing and packaging systems that can significantly extend the shelf life of a variety of foods. However, new food safety risks can be associated with these new food products, new packages, and new patterns of distribution and consumption.

One of the most important challenges to FDA's current food safety assurance program is the increasing number of new food pathogens. Although food borne illness has always been a public health problem, such illness appears to be on the rise, and new pathogens are appearing (Ref. 1). In addition, because foods are more extensively processed and handled, there is now a greater opportunity for food to be contaminated.

Food borne illness is a major cause of morbidity in the United States; estimates of the yearly incidence of food borne illness vary greatly, ranging from 6.5 million (Ref. 1) to 12.6 million cases per year (Ref. 2), and from 24 to 81 million cases per year (Ref. 3). In the 15 years between 1973 and 1988, the number of recognized food borne pathogens broadened considerably. During that period, bacteria not previously recognized as important food borne pathogens emerged, including *Campylobacter jejuni, Escherichia coli Listeria monocytogenes, Yersinia enterocolitica*, and a variety of *Vibrio* spp. During that same period, experts recognized that certain food borne illnesses may be followed by serious complications, such as arthritis, kidney damage, heart disease, and neurological damage (Ref. 3).

Pathogens are not the only potential contaminants of food, however. The extensive use of industrial chemicals, coupled with past failures to deal adequately with chemical waste, have resulted in significant chemical pollution of the environment in some regions. Many of these chemicals have found their way into the food chain. The legal use of pesticides in agriculture may also result in residues in food. Naturally occurring chemicals, such as toxic elements and mycotoxins, can also be found in food at levels of concern. The sheer number of these potential contaminants, the concerns about their toxicity even at very low levels, and the difficulty and expense associated with many of the analytical methods used to quantify their levels in food, make exhaustive endpoint monitoring of the food supply virtually impossible.

The size and diversity of the food industry adds to the stress on the current food safety assurance program. FDA's current inventory lists over 30,000 food manufacturers and processors, and in excess of 20,000 food warehouses. The number of foreign manufacturers and processors shipping food products to the United States continues to increase. In 1992, there were well over 1 million food import entries into the United States. In addition, the diversity of food imports

[1] Two other Federal agencies share with FDA the responsibility for regulating the safety of the food supply. The U.S. Department of Agriculture (USDA) has authority under the Meat Inspection Act (21 U.S.C. 601), the Poultry Inspection Act (21 U.S.C. 451), and the Egg Products Inspection Act (21 U.S.C. 1031) to inspect facilities in which meat, poultry, and eggs, respectively, are processed, and to regulate such products. The U.S. Environmental Protection Agency has authority, under provisions of the act, to establish legal limits (tolerances) for residues of pesticides on foods. FDA and USDA enforce such tolerances.

continues to increase, with a rising volume of foods entering the United States in processed forms.

Finally, the current food safety program is under stress internally. It is unlikely that FDA will ever have sufficient resources to inspect, sample, and analyze more than a small percentage of imported food shipments. State and local governments, on which FDA relies heavily for surveillance of the growing retail food sector, are also under severe resource constraints. Indeed, some States are considering proposals to reduce their food safety programs.

FDA's current regulatory strategy for ensuring food safety, with its emphasis on periodic visual inspection of food facilities and end-product testing, was designed to control the problems that were known to exist when the act was established in 1938. The agency has struggled to keep up with the enormous growth and changes in the food industry and the resulting new food safety challenges. FDA's current regulatory approach is relatively resource intensive and inefficient compared to other ways of ensuring food safety. Inspections that FDA conducts under the current system can determine the adequacy of conditions in a food plant at the time of the inspection but not whether the company has in place a food safety assurance program that is operating reliably and consistently to produce safe food at all times. Furthermore, the current inspectional approach is generally reactive, not preventive. It is effective in detecting and correcting problems after they occur, but, except in certain limited areas such as the regulation of infant formula and low acid canned foods, it is not currently based on a system of preventive controls.

For all of these reasons, FDA believes that it is appropriate at this time for the agency to consider improvements to its food safety assurance program to focus the program on prevention of food safety risks and problems. FDA's goals in establishing additional food safety regulations would be to: (1) Make the food supply safer through prevention of food safety problems; (2) enable FDA and its State and local counterparts to make more efficient use of the existing resources devoted to ensuring food safety, and (3) enhance the ability of the Federal Government to provide consumers with the assurance they seek that the U.S. food supply is safe.

FDA recognizes that risks vary across the food supply and that measures to make food safer should focus on the potential of particular foods or possible contaminants in those foods to cause illness. The agency also recognizes that there is no proven method or approach for ensuring the safety of food that will eliminate risk in all circumstances. Indeed, one purpose of this notice is to seek public comment on the degree of potential risks posed by those microorganisms, chemicals, and physical hazards (e.g., broken glass) that can get into food and be passed on to the consumer, if appropriate care is not exercised. FDA also desires comments on the consequences of these risks if they occur. In addition, the agency seeks comment on how these risks can best be controlled and which systems of quality control can best protect consumers from potentially unsafe food.

Although the agency has reached no final conclusions about how its regulatory programs should be revised to make food as safe as possible, FDA has tentatively concluded that the improvements in the agency's current food safety assurance program should be based on a state-of-the-art, preventive approach known as HACCP. HACCP was developed approximately 30 years ago by the U.S. food industry, and it is currently used in a number of domestic food processing facilities. HACCP is internationally regarded as the most effective system for producing safe food. FDA is considering HACCP as the foundation for revision of the U.S. food safety assurance program because, although simple in its basic concepts, HACCP is a sophisticated and powerful tool for ensuring food safety. HACCP is a science based, systematic approach to preventing food safety problems by anticipating how such problems are most likely to occur and by installing effective measures to prevent them from occurring. HACCP thus requires that the processor and the regulatory authority be aware of the state-of-the-art science relative to food safety and processing technology. HACCP appropriately affirms that the food industry has primary responsibility for producing safe food, and it provides an important opportunity to link the food industry's system for producing safe food with the Government's system of regulatory oversight. A more in-depth discussion of the HACCP concept follows.

B. The HACCP System

The HACCP concept (Ref. 4) is a systematic approach to the identification, assessment of risk (likelihood of occurrence and severity), and control of the biological, chemical, and physical hazards associated with a particular food production process or practice. HACCP is a preventive strategy. It is based on development by the food producer of a plan that anticipates food safety hazards and identifies the points in the production process where a failure would likely result in a hazard being created or allowed to persist; these points are referred to as critical control points (CCP's). Under HACCP, identified CCP's are systematically monitored, and records kept of that monitoring. Corrective actions are taken when control of a CCP is lost, including proper disposition of the food produced during that period, and these actions are documented.

Use of the HACCP system for the food industry will underscore the industry's role in continuous problem prevention and problem solving, rather than relying solely on traditional facility inspections by regulatory agencies to detect loss of control. HACCP provides for real time monitoring procedures to assess the effectiveness of control. Each HACCP plan would reflect the uniqueness of a food, its method of processing, and the facility in which it is prepared.

HACCP has been endorsed by the National Advisory Committee on Microbiological Criteria for Foods (NACMCF) as an effective and rational means of ensuring food safety from harvest to table. The NACMCF was established in 1988 by USDA in conjunction with FDA to fulfill a recommendation of the National Academy of Sciences, and includes officials from FDA, USDA, the National Oceanic and Atmospheric Administration, and the Department of Defense, as well as experts from academia and the food industry. HACCP is also recognized in the international food safety community as the state-of-the-art means to ensure the safety and integrity of food. In particular, the Committee on Food Hygiene of the United Nations' Codex Alimentarius Commission (Codex) has endorsed the HACCP concept as a world wide guideline. Indeed, the European Union (EU) and other countries around the world have begun to require that foods produced within their borders be processed under HACCP requirements.

The NACMCF has developed the following seven principles that describe the HACCP concept:

1. Hazard Analysis

The first step in the establishment of a HACCP system for a food process or practice is the identification of the hazards associated with the product. The NACMCF defines a hazard as a biological, chemical, or physical property that may cause a food to be unsafe for consumption. The hazard analysis step should include an assessment of both the likelihood that

such a hazard will occur and its severity if it does occur. This analysis should also involve the establishment of preventive measures to control identified hazards.

2. Identification of CCP's

A CCP is a point, step, or procedure at which control can be applied, the result being that a potential food safety hazard can be prevented, eliminated, or reduced to acceptable levels. Points in the manufacturing process that may be CCP's include cooking, chilling, specific sanitation procedures, product formulation control, prevention of cross contamination, and certain aspects of employee and environmental hygiene.

3. Establishment of Critical Limits for Preventive Measures Associated With Each Identified CCP

This step involves establishing a criterion that must be met for each preventive measure associated with a CCP. Critical limits can be thought of as boundaries of safety for each CCP and may be set for preventive measures such as temperature, time, physical dimensions, moisture level, water activity, pH, and available chlorine.

4. Establishment of Procedures to Monitor CCP's

Monitoring is a planned sequence of observations or measurements to assess whether a CCP is under control and to produce an accurate record for use in future verification procedures. Continuous monitoring is possible with many types of physical and chemical methods. When it is not possible to monitor a critical limit on a continuous basis, monitoring intervals must be frequent enough to permit the manufacturer to determine whether the step/process/procedure designed to control the hazard is under control.

5. Establishment of Corrective Actions To Be Taken When Monitoring Shows That a Critical Limit Has Been Exceeded

While the HACCP system is intended to prevent deviations in a planned process from occurring, total prevention can rarely, if ever, be achieved. Therefore, there must be a corrective action plan in place to ensure appropriate disposition of any food produced during a deviation, to fix or correct the cause of noncompliance to ensure that the CCP is once again under control, and to maintain records of corrective actions taken.

6. Establishment of Effective Recordkeeping Systems That Document the HACCP System

This principle requires the preparation and maintenance of a written HACCP plan that lists the hazards, CCP's, and critical limits identified by the firm, as well as the monitoring, recordkeeping, and other procedures that the firm intends to use to implement the plan. This principle also requires the maintenance of records generated during the operation of the plan.

7. Establishment of Procedures to Verify That the HACCP System is Working

This process involves verifying that the critical limits are adequate to control the hazards identified, ensuring that the HACCP plan is working properly and verifying that there is documented, periodic revalidation of the plan to confirm that the plan is still performing its intended function under existing plant conditions at any point in time.

C. FDA's Authority to Mandate HACCP

In the **Federal Register** of January 28, 1994 (59 FR 4142), FDA proposed regulations that would require HACCP controls in the seafood industry. The agency believes that it is now appropriate to explore the application of HACCP to segments of the industry other than seafood. At this time the agency would plan to proceed in a stepwise fashion with those segments of the industry that are suitable candidates for adoption of HACCP principles. This document is intended to explore how the agency should pursue that broader HACCP program. FDA is doing so because the agency believes that such a program would be an effective and efficient way to ensure that food meets the act's safety standards and to implement section 402(a)(4) of the act (21 U.S.C. 342(a)(4)). As explained below, if FDA proceeds with a HACCP proposal covering additional segments of the food industry, such proposal would be made pursuant to the authority of sections 402 and 701(a) of the act (21 U.S.C. 371(a)).

Section 201 of the act defines the term "food" as "articles used for food or drink for man or other animals." Under section 402(a)(4) of the act, a food is deemed adulterated if it has been "prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health." Proof that a food is actually contaminated or otherwise hazardous is not required to establish that a food is adulterated under section 402(a)(4) of the act. (See *United States* v. *H. B. Greggory Co.*, 502 F.2d 700, 704 (7th Cir. 1974), cert. denied, 422 U.S. 1007 (1975).) Instead, such adulteration requires only a showing that the conditions under which food is prepared, packed, or held create a "reasonable possibility" of contamination. (See *Berger* v. *United States*, 200 F.2d 818, 821 (8th Cir. 1952).)

In its enforcement of section 402(a)(4) of the act, FDA has considered, among other things, prevailing industry standards and the technical state-of-the-art in determining, on a case-by-case basis, whether the conditions under which a company is processing or otherwise handling food violate the standard of section 402 (a)(4). FDA's current intention is to propose to codify, in a future rulemaking, a state-of-the-art standard based upon HACCP principles. This standard would establish those conditions of food manufacturing, packing, and holding that are consistent with section 402(a)(4) of the act. Such regulations would thus ensure the agency's efficient enforcement of section 402(a)(4) and the other food safety provisions of the act, as authorized by section 701(a) of the act.

At this juncture, the regulations that FDA is considering for proposal would specify the requirements that the agency believes are the minimum necessary to ensure that food products under FDA's jurisdiction are not adulterated under section 402(a)(4) of the act. Under the program that FDA is considering, if a food purveyor covered by the program does not adopt and implement a HACCP plan that complies with the program's requirements or does not operate the plan in accordance with the program, food prepared, packed, or held in that facility would be adulterated under section 402(a) (4) of the act and potentially subject to regulatory action by FDA.

D. Rationale for a HACCP Approach

FDA expects that adoption of HACCP by some or all segments of the food industry, coupled with Government verification through inspections of the HACCP system, will more effectively and efficiently ensure the safety of the American food supply. The agency has tentatively chosen a HACCP approach because HACCP addresses the root causes of food safety problems in production, storage, transportation, etc., and is preventive. Two principal alternatives to HACCP exist; end-product testing and comprehensive current good manufacturing practice (CGMP) regulations. End-product testing does not address the root causes of food

safety problems; it is not preventive by design and requires that a large number of samples be analyzed to ensure product integrity. Similarly, CGMP's are not a practical approach because of the breadth and diversity of the food industry, the limited resources available within FDA to prepare the many specific CGMP regulations that would be needed to cover effectively such a diverse industry, and the time required to implement such regulations. However, FDA may consider the promulgation of CGMP's for certain food processes or types if such regulations would be more effective than a HACCP system for such processes. For example, some of the comments have suggested that sanitation would be better addressed through CGMP's than through a HACCP plan.

A HACCP system for food safety assurance has numerous distinct advantages including the following: (1) HACCP focuses on prevention and is designed to prevent hazards from entering food; (2) HACCP permits more effective and efficient Government oversight; (3) HACCP places primary responsibility for ensuring food safety appropriately on the food manufacturer/distributor; and (4) HACCP assists food companies in competing more effectively in the world market.

The primary purpose of any HACCP system is to prevent problems through the systematic analysis and control of the production system by industry. This analysis and control would be confirmed by Government verification of the industry's monitoring. As such, a HACCP approach provides an appropriate balance between the responsibilities of industry and Government in ensuring food safety. A HACCP based program will also allow FDA and its State and local government counterparts to conduct more efficient and focused inspections of food facilities.

In addition to being preventive in nature and more efficient, a HACCP approach offers two additional benefits over conventional inspection techniques. First, in contrast to FDA's current regulatory approach, a HACCP approach requires industry to analyze, in a rational, scientific manner, its production processes in order to identify CCP's and to establish critical limits and monitoring procedures. An essential part of the industry's role under HACCP is to establish and maintain records to document adherence to the critical limits relating to the identified CCP's, which will result in continuous self inspection.

Second, HACCP allows the regulator to monitor more effectively a firm's compliance with food safety laws. With its current system of inspection, FDA can determine the conditions at a food plant only during the period of inspection. The agency must therefore make assumptions about conditions before and after the inspection based on a snapshot of plant conditions and practices at the time of the inspection.

With an HACCP-based program in place, an investigator can determine and evaluate both current and past conditions critical to ensuring the safety of food produced by the facility. As discussed above, an essential part of a HACCP system is maintenance of monitoring records. By examining such records, the Government inspector can, in effect, look back through time at the conditions of a facility. Under the proposal that FDA currently envisions, the agency would have access to CCP monitoring records to verify that the HACCP plan is working. Government monitoring under a HACCP system would provide assurance that systems of preventive controls are in place and functioning properly and thus afford greater public assurance of food safety.

Current Federal inspection and surveillance strategies attempt to gauge the industry's knowledge of hazards and preventive control measures largely by inference, i.e., whether a company's products are in fact adulterated, or whether conditions in a plant are in compliance with CGMP's. Consequently, the current inspection system places a great deal of responsibility on Government regulators to uncover problems and to take regulatory action to address those problems. Under a HACCP-based inspection system, it would be the responsibility of the company to develop a plan for producing safe food, and the role of Government inspectors would be to verify that the company is carrying out its plan.

Finally, adopting a HACCP system could potentially enhance international trade opportunities for the United States. Although enhancing trade has no direct effect on public health, participation in international trade in food products is critical to the U.S. economy. The United States is by far the world's major food exporter, with exports of raw agricultural and processed food products of over $40 billion per year. The United States also imports a substantial quantity of food products each year from many countries around the world. HACCP will improve FDA's ability to monitor such imports and thus ensure confidence in their safety. Also, HACCP is becoming the world-wide standard to ensure the safety of food and will thus serve as basis for harmonizing U.S. food safety regulations with those of other nations.

The Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) has resulted in further focus on this area. The Agreement on the Application of Sanitary and Phytosanitary Measures states the desire of member countries, including the United States, to further "* * * the use of harmonized sanitary and phytosanitary measures between members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission * * *" (Ref. 5). This trend toward harmonization, coupled with the current recommendations of the Codex Alimentarius Commission encouraging the international use of HACCP, provide further support for FDA's serious consideration of a HACCP program for all or part of the food industry.

E. How the Agency Intends to Proceed

FDA began its initiative to mandate HACCP with a proposal covering the seafood industry due in large part to the fact that a substantial amount of work on the application of HACCP to seafood processing and importation, including the development of specific HACCP models, has already been done by the Federal Government, some States, academia, and by the seafood industry itself. Thus, there is a considerable body of literature and expertise, which can facilitate the development of HACCP systems by seafood processors and importers. Moreover, seafood industry representatives have been urging the Federal Government to adopt a mandatory HACCP program. The National Fisheries Institute, the largest seafood industry trade association, has testified repeatedly at congressional hearings in support of legislation that would mandate such a system. The agency recommends that interested persons refer to the seafood proposal to understand how the HACCP approach might work with respect to one category of food product.

The body of knowledge and experience on the application of HACCP to food production has not, as far as the agency is aware, been developed for other commodities to the extent that it has for seafood. (One possible exception is the low acid canned food industry, where much work has been done in HACCP's application due to FDA's long standing regulatory program for this industry.) Moreover, the food industry is extremely diverse and complex. For these reasons, FDA has decided to issue this advance notice of proposed

rulemaking to request comments on various aspects of the implementation of a mandatory HACCP program for some or all other sectors of the food industry. Those comments may suggest that an industry-wide HACCP requirement is appropriate or may indicate that such a program should be phased-in as data on individual commodities is compiled. FDA is open to any other suggestions. Specific issues on which FDA is particularly interested in receiving comments are set out below.

The agency believes that it could benefit from experience with the application of HACCP to selected commodities outside the seafood area. To gain this experience the agency has announced a voluntary pilot HACCP program and invited interested food producers to participate.

Some of the objectives of this pilot program are to obtain data on the hazards associated with particular types of food, and to develop and implement HACCP plans to control those hazards in conjunction with the participating firms. The pilot program could provide the agency and the industry with the practical knowledge and experience that would assist in the development and implementation of a HACCP program for particular segments of the food industry.

FDA recognizes that an ongoing exchange of scientific, technical, and operational information between the agency, the food industry, trade associations, consumer groups, FDA's State and local counterparts, and other affected parties is essential for the successful implementation of HACCP in the food industry. Consequently, FDA intends to maintain a dialogue with all affected parties during the process of developing its proposed regulations. In particular, FDA will meet with the food industry, consumer groups, and other interested parties during the comment period on this advance notice of proposed rulemaking.

FDA anticipates that it will receive a substantial number of comments in response to this document. The agency will review these comments and have further dialogue with industry and consumer representatives, as well as other groups and organizations knowledgeable in food safety, as part of its process for determining the appropriate regulatory approach prior to publication of a proposed rule.

FDA intends to work closely with USDA, as it considers development of its own HACCP regulations for meat and poultry products, to ensure that the two regulatory bodies have a consistent approach in applying HACCP principles to the food industry, while recognizing that inherent differences may exist between food commodity groups that will necessitate different approaches.

FDA also intends to work closely with its State and local counterparts that regulate the retail segment of the food industry. One principal way FDA conveys its recommended food regulatory policy to the nation's State and local food control agencies is through FDA's model Food Code. A notice of availability of the latest revision of the Food Code, which incorporates certain HACCP principles and terminology, was published in the **Federal Register** of January 28, 1994 (59 FR 4085).

II. Request for Comments

Under the act, the food industry has the primary responsibility for ensuring the safety of the food it produces and distributes. In its simplest terms, the role of Government is to verify that the industry is carrying out its responsibility and to initiate regulatory or other appropriate action when the industry fails to do so. FDA believes that establishing a HACCP program throughout the food industry could enable both the industry and FDA to carry out their respective responsibilities far more efficiently and effectively. FDA invites comments on this point, as well as on specific issues relating to the application of HACCP to foods other than seafood, as set out below.

A. Scope of a HACCP Regulation

NACMCF supports the adoption of HACCP throughout the food industry ((Ref. 4). Additionally, the Codex Ailmentarius Committee on Food Hygiene considers HACCP to be the most efficient and cost effective means to manage food safety (Ref. 4). FDA recognizes, however, that not all foods pose the same inherent risks. The agency intends to work with the Centers for Disease Control and Prevention and other Federal and State agencies as well as health professionals, industry, and consumer groups to access and evaluate data on the relative risks associated with various foods. FDA has concluded that HACCP has great potential to improve food safety and can be successfully used beyond seafood. However, specific HACCP requirements established for the various segments of the industry may be different because of differences in risk as well as differences in processes, etc. The agency encourages the food industry generally to begin using HACCP more widely.

FDA specifically requests comments on the scope of any mandatory HACCP program proposed by the agency. Should FDA mandate HACCP for all segments of the food industry? Or should HACCP be required only for certain segments of the food industry? In deciding whether to cover all or some segments of the food industry by a mandatory HACCP rule, what criteria should FDA use? In particular, should any exclusions from a HACCP requirement be determined on any basis other than the risk presented by the particular activity? Are there categories of activities, such as the warehousing of certain types of foodstuffs, that deserve exclusion?

The agency also requests comment on how a mandatory HACCP rule should apply to those in the chain of distribution of imported foods. How should the agency ensure that imported foods are produced and handled safely? In the seafood proposal, FDA is proposing that all domestic and foreign processors and importers adopt HACCP controls, and FDA is proposing to take steps to ensure that the HACCP controls are in fact implemented by foreign processors. The seafood proposal broadly defines "processor" to include packers, repackers, wholesalers, and warehousers. Should the agency adopt the same approach with respect to foreign processors, handlers, and importers of all other foods?

FDA also solicits comments on whether and how a mandatory HACCP rule should apply to food retailers. The agency's seafood proposal specifically excludes retailers from the definition of "processor." Should a similar exclusion be made for retailers of all other foods as well? The agency notes that its updated Food Code, which serves as guidance to the States as part of an ongoing cooperative program for regulating the retail sector, incorporates several HACCP elements. The agency requests comment on this cooperative program for the retail sector and on how governments at all levels can best collaborate to ensure the safety of food from farm or fishery to the dinner table, including food sold ready-to-eat at the retail level. Should HACCP be required in restaurants and other retail outlets? Should HACCP requirements be applied directly to raw material suppliers and transportation companies? Or should such requirements be imposed indirectly through the HACCP plans of processors and others who receive food (e.g., by using purchase specifications)?

FDA also specifically requests comment on how small firms should be covered by any mandatory HACCP regulations. In the seafood proposal, FDA has made no distinctions in the application of proposed requirements based on firm size. If small firms should

be exempt, on what basis should the exemption be made?

B. Focus of HACCP

NACMCF believes that HACCP and HACCP plans should address food safety, including all biological, chemical, and physical hazards that would affect a particular food. Consistent with this view, FDA has limited the scope of the HACCP requirements in the seafood proposal to safety concerns and has not included food quality and labeling standards and requirements. Although the agency believes that the primary focus of a HACCP program should be safety, FDA is aware that food quality is also important to consumers and is an issue in international trade.

Should FDA's HACCP program for the broader food industry be limited to food safety and the hazards presented by a particular activity? If so, how broadly should hazard be defined? What level of risk warrants HACCP-type control? Should different levels of control be required in HACCP plans for different levels of risk? Or should FDA's proposal mandate that food quality issues be included in HACCP plans? Should sanitation practices within the plant be required to be included in HACCP plans?

C. Implementation of HACCP

FDA recognizes that, because of the size and diversity of the overall food industry, any mandatory HACCP program would likely be costly for some segments of the food industry and need to be phased in gradually. Development of HACCP plans would require at least some segments of the industry to adopt new ways of thinking and operating. Review by FDA of HACCP plans and monitoring records as part of its plant inspections would necessitate additional training of FDA, State, and local investigators.

In view of the scope of the task, what would be a reasonable time period for the implementation of HACCP? In the seafood proposal, FDA is proposing a 1-year period for implementation, measured from the date of the final regulations. This proposed lead time takes into account the fact that a considerable amount of developmental work has already been done on the application of HACCP to seafood processing. Are there special considerations for other types of foods that could affect implementation time? Are there circumstances that would require some industry segments to need an implementation period longer than 1 year after final rule promulgation?

If implementation of HACCP is to be phased in (i.e., certain segments would gradually be subject to the HACCP requirements established), how should this be accomplished? How should firms or segments of the food industry be differentiated for purposes of such a phased in implementation? What would be appropriate time intervals between each implementation phase? What criteria should be used to decide the order of implementation for the various segments of the food industry? For example, should potential food safety risks associated with the product be considered in determining an implementation schedule, and if so, what factors should be used in ranking foods with respect to potential risk? Likewise, for example, should firm size be considered in determining the order of implementation?

The agency is interested in learning about the experiences that food manufacturers have had with the implementation of HACCP and therefore requests comments from firms who have had actual experience in the application of HACCP concepts to food production, both on what has worked and on what has not worked. In particular, FDA seeks information on: (1) How long it took to implement a HACCP program; (2) the start-up and maintenance costs; and (3) the impact of implementing HACCP on the safety of the product, the efficiency of the firm's operation, and any long-term savings (cost effectiveness). The agency is also interested in any measures that have been, or could be, used to measure the effectiveness of HACCP to improve product safety. The agency is particularly interested in the experiences of small food firms on all of the above.

D. Evaluation of the HACCP System

FDA believes that implementation of HACCP beyond the seafood industry, whether voluntary or mandatory, will more effectively and efficiently ensure the safety of the American food supply. The agency recognizes, however, that there may be alternatives to the HACCP approach and invites comment on such alternatives and their effectiveness.

The agency also invites comment on whether there are factors that would limit the effectiveness of the HACCP approach. What information is needed in order to judge the effectiveness of a HACCP program? Should HACCP programs be pilot tested before implementation? Should there be a minimum level of certainty that a HACCP plan would be effective in controlling hazards prior to implementation?

What should be the qualifications of individuals responsible for developing HACCP plans? What should be the qualifications of individuals responsible for verification of HACCP plans? Is the current state of knowledge sufficient to make adequate hazard analyses? Is there a need for microbiological criteria in HACCP plans? Will end-product microbiological testing be necessary?

How should the appropriate frequency of monitoring CCP's be determined? Should a processing plant be required to submit a report to FDA each time a process is found to be out of control? What, if any, circumstances should trigger mandatory reporting to FDA? Is it necessary to require that a food processor have a reliable and well-tested method of recall as part of its HACCP plan?

E. Roles of FDA, the States, and the Food Industry

FDA's interest in institutionalizing HACCP for the food industry is based on the agency's recognition of the need to revise the current regulatory approach and make it more effective and comprehensive. This revision must coordinate and maximize the efforts of all levels of Government and the food industry to provide effective coverage of food from farm or fishery to table. The respective roles of industry, State and local authorities, and FDA must be clearly articulated, and they must be integrated and coordinated. FDA's preliminary thinking on the nature of these respective roles follows.

If FDA decides to make HACCP mandatory for some or all segments of the food industry, firms would be required to develop, implement, and maintain an effective HACCP system in their facility, and to verify that the system is adequate to ensure a safe product. The HACCP system developed by the firm would have to include all relevant critical limits (such as tolerances) contained in existing FDA regulations and guidelines, as well as other CCP's judged necessary by the firm to ensure the safety of the food. Firms would also be responsible for taking appropriate corrective actions whenever a CCP deviation has occurred. The system would be considered out of compliance when a critical limit of a CCP has been exceeded and corrective actions are not taken or are ineffective.

Regulated industry segments would also be responsible for providing appropriate training for personnel involved in implementing HACCP in each facility. Each facility would have to maintain an accurate, up-to-date HACCP plan, which would be available for review by FDA investigators during

an inspection. Records pertinent to the monitoring of the CCP's in the HACCP plan would also have to be available for review by FDA.

FDA is seeking comment on the appropriateness of imposing these obligations on the food industry under a mandatory HACCP system. The agency is especially interested in receiving comments on records access, including:

(1) What records should be considered HACCP records, and therefore be accessible to FDA (and State and local) investigators? Under FDA's proposed HACCP regulations for seafood, HACCP records include the HACCP plan itself, records of the monitoring of critical control points, and records of corrective actions. In the case of seafood, FDA tentatively concluded that the agency should have access to all records deemed to be HACCP records, because without such access, the regulatory requirements would not be meaningful.

(2) How should consumer complaint files relating to CCP failures be utilized in a HACCP system? In FDA's proposed HACCP regulations for seafood, the agency tentatively concluded that each HACCP system should take advantage of consumer complaints as they relate to the operation of CCP's. The agency proposed that procedures for monitoring CCP's include procedures for monitoring relevant consumer complaints, and that consumer complaints that potentially relate to the performance of critical control points be considered HACCP records. FDA invites comment on this approach for foods generally. Should FDA have access to consumer complaint files relating to CCP failures? What criteria should be used to determine whether a consumer complaint is linked to a CCP failure?

(3) How long should HACCP records be kept? The proposed HACCP regulations for seafood mandate 1 year for fresh products and 2 years for frozen and preserved products.

As an additional matter, FDA is aware that there is substantial public interest in the extent to which industry-generated HACCP records could or should be publicly available. FDA invites comment on the general question of public disclosure of HACCP records and on the agency's preliminary analysis of the availability of such records, which follows.

FDA has long had explicit statutory authority to obtain access to certain industry records during inspections involving infant formula, drugs, and devices (21 U.S.C. 374), and has had access by virtue of agency regulations to certain processing records during inspections of low acid canned food processors and manufacturers of infant formula. The agency has the right to copy and take possession of these records, but does not routinely do so. FDA typically copies and takes possession of records only when they may be needed for regulatory purposes. As a preliminary matter, FDA expects to continue this practice with regard to HACCP records.

The public availability of those HACCP documents that would become part of FDA's official records as a result of copying during an inspection would be governed by section 301(j) of the act and by the Freedom of Information Act (FOIA) and regulations issued under the FOIA by the Department of Health and Human Services (HHS) and by FDA. Section 301(j) of the act expressly prohibits any person from disclosing trade secret information obtained during the course of an inspection. The agency's FOIA regulations also state that FDA will not disclose either trade secret or confidential commercial information. FDA's preliminary view is that HACCP plans and monitoring records fall within these two categories of protected records. As a consequence, FDA may have little discretion to disclose such records. Moreover, under HHS FOIA regulations, processors may be entitled to challenge in court a pending disclosure of records on the ground that the records to be disclosed are confidential commercial or trade secret.

Additionally, there are significant legal and practical questions as to whether FDA has the authority to require disclosure of industry records that are not in FDA's possession.

The agency is also seeking comments on whether there should be a standardized format (structure and organization) for written HACCP plans. If so, how should this standard format be developed and who should develop it?

As is the case today, the overall goal of FDA's inspection program would be to ensure that foods are safely prepared, packed, and held. To achieve this goal under a HACCP system, FDA's inspection would seek to verify that a HACCP plan is adequate to ensure food safety and that it is being implemented and maintained properly. The agency is seeking comments on the appropriate frequency of agency inspections under a mandatory HACCP program to achieve its goal of ensuring food safety.

The agency is also interested in receiving comments on the possible role that FDA could play to assist the food industry in developing and establishing HACCP programs. This assistance could take the form of agency guidelines for developing HACCP plans and generic HACCP plans developed in cooperation with the industry. FDA could also promote and participate in educational programs to encourage the use of HACCP and FDA could continue to represent the United States at international meetings on HACCP. The agency could work with interested groups to identify new food safety hazards and to develop new strategies for their control.

The agency expects that the States would play a major role in enhancing FDA's enforcement coverage. State authorities could participate in HACCP inspections both as part of their own enforcement activities and under FDA contract. State and local authorities could also be involved in actively promoting the use of HACCP at the retail level.

The agency is seeking comments on what its role should be relative to the review, verification, monitoring, and certification of HACCP plans. In the seafood proposal, FDA is not proposing to require that HACCP plans be submitted to FDA in advance, or that preapproval by FDA be a condition of the adoption or implementation of these plans. If FDA proposes to make HACCP mandatory for other portions of the food industry, should it adopt this approach? Should FDA indentify CCP's and establish critical limits in its HACCP regulation, or should it defer to firms to develop these themselves? What role should FDA serve in overseeing the corrective actions taken when a deviation has occurred? Can any HACCP oversight function, including review of plans and monitoring, be performed by certified third parties? If so, how should they be certified and by whom?

For implementation of HACCP for fish and fishery products, FDA is developing guidelines for processors. These guidelines inventory and describe the likely hazards associated with both products and processes, and provide advice on how these hazards can be controlled. These guidelines also include a fill-in-the-blank HACCP plan to serve as an example of how a basic HACCP plan could be developed. Are such guidelines necessary for other commodities and, if so, who should develop them? What specifically should be included? What role should the food industry play in the development of these materials? What other forms of assistance should FDA provide? To what extent, if any, should any of this additional guidance be made mandatory?

F. Training and Education

The agency's experience with low acid canned foods established that appropriate training is critical to the successful implementation of HACCP in the food industry. The industry will need training on how to develop HACCP plans, i.e., how to identify hazards and establish critical limits, control measures, corrective actions, and recordkeeping procedures. Investigators employed by regulatory agencies, including FDA, will need training to understand how to review HACCP plans as well as industry records pertaining to implementation and operation of such plans.

Based upon its low acid canned food experience, FDA believes that employee training is an essential element of an effective HACCP program. Should FDA mandate training for plant personnel responsible for developing and maintaining the HACCP program? In the seafood proposal, FDA is proposing to require that each processor and importer employ at least one individual who has successfully completed a training course on the application of HACCP to fish and fishery products processing. Moreover, the regulations propose to require that those at each establishment who have received training be responsible for reviewing records of CCP monitoring, recognizing critical limit deficiencies, and assessing the need for corrective actions relative to the product in question and the HACCP plan itself. FDA seeks comment on the question of training. Are there reasons why such training should not be mandated? If such training is required, as FDA currently believes it should be, who should conduct these training courses? Who should be required to attend? What role, if any, should FDA have regarding course materials and instructors? Should a third party be certified by FDA to review and approve the training courses? Should one, some, or all responsible plant employees be certified?

G. International Harmonization

As the international community moves toward HACCP, FDA believes an opportunity exists to improve the safety of the U.S. food supply by working toward harmonized approaches that would elevate FDA's confidence that food entering the United States meets U.S. safety standards. Such harmonization would also support U.S. exports. For example, after January 1, 1995, unless seafood products for import into the EU are produced under HACCP, the EU will carry out extensive end-product testing, and the competitiveness of importers will be significantly affected. How should FDA approach any effort to harmonize HACCP standards with those of other countries? What role should the Codex play?

H. Potential Costs and Benefits

The agency is also requesting relevant economic information. In particular, FDA seeks estimates of the following costs: (1) The initial costs of developing a HACCP plan and the frequency and costs of altering the plan; (2) costs of monitoring and recordkeeping by type of process, product, and packaging, and the costs of reviewing records before shipment; (3) costs of necessary training of employees, and rate of turnover of employees; (4) administrative costs to oversee all phases of HACCP implementation and operation; (5) the cost of monitoring equipment and other types of equipment needed to implement a HACCP program; (6) the cost and frequency of corrective actions when critical limits are exceeded; (7) the potential cost to the industry of FDA inspections of HACCP programs; (8) cost of testing for chemical and contaminant residues as a component of HACCP; (9) cost of process redesign; (10) cost of new product design; and (11) the costs of any consultants that might be required under a HACCP approach. FDA also seeks comments about the costs of expanding HACCP to elements of the food industry other than manufacturers and processors, such as retail supermarkets and restaurants, food transporters, and raw material suppliers. FDA is particularly interested in the cost experience of small firms who have implemented HACCP, and how HACCP implementation by these firms is different from that of large firms.

FDA is also announcing its intention to survey the food processing industry (except for seafood) to estimate the costs of complying with mandatory HACCP requirements and requests comments on how such a survey should be designed and implemented.

FDA is also interested in receiving comments on benefits of mandating HACCP for particular products, processes, and packaging. Thus, FDA is seeking information about the existing risk levels presented by various foods, including risk from microorganisms, contaminants, and chemical residues from all interested parties, including State and other Federal agencies. FDA is also interested in receiving information concerning any quantitative reductions in risk that have been documented by firms now using HACCP, or other evidence that would document that illness or other food borne risks have been reduced through use of HACCP. FDA also is interested in receiving information that documents savings in production costs or indirect benefits, such as increased quality, that firms using HACCP have experienced. Because many risks are the result of consumer mishandling, FDA requests comments on the extent of this source of illness or other food borne risks, and how this information should be used to target HACCP efforts. Finally, FDA requests comments on the benefits of extending HACCP to the other areas of the food industry that are mentioned above.

I. Potential Environmental Effects

The agency is also requesting relevant environmental information because, under the National Environmental Policy Act, FDA must consider the environmental impact of its actions. The agency does not currently possess the data that would permit detailed analysis of the environmental impact of the action under consideration by the agency, as described in this document.

Therefore, the agency is requesting information on the potential environmental impact including: (1) Potential for increased energy consumption, (2) potential for increased disposal of defective foods, (3) potential for new or increased disposal of sanitizing products, (4) a description of measures that could be taken to avoid or mitigate adverse environmental impacts that might result from this action, and (5) potential for increased paper consumption.

III. References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Bennett, J. V., S. D., Holmberg, M. F., Rogers, and S. L., Solomon, "Infectious and Parasitic Diseases," in "Closing the Gap: The Burden of Unnecessary Illness,"Amlet, R. W. and H. B., Dull, ed., Oxford University Press, pp. 102–114, New York, 1987.

2. Todd, E. C. D., "Preliminary Estimates of the Costs of Food borne Disease in the United States," *Journal of Food Protection*, 52:595–601.

3. Archer, D. L., and J. E., Kvenberg, "Incidence and Cost of Food borne Diarrheal Disease in the United States," *Journal of Food Protection*, 48:887–894.

4. NACMCF, "National Advisory Committee on Microbiological Criteria for Foods, Hazard Analysis and Critical Control Point System Adopted March 20, 1992," "HACCP: Principles and Applications," Van Nostrand Reinhold, 1992.

5. GATT Secretariat, "Final Act Embodying the Results of the Uruguay Round of

Multilateral Trade Negotiations," December 15, 1993.

IV. Comments

Interested persons may, on or before December 2, 1994, submit to the Dockets Management Branch (address above) written comments regarding this document. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This document is issued under sections 402, 404, 701, and 704 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342, 344, 371, and 374).

Dated: July 29, 1994

David A. Kessler,

Commissioner of Food and Drugs.

Donna E. Shalala,

Secretary of Health and Human Services.

[FR Doc. 94-18970 Filed 8-1-94; 8:45 am]

BILLING CODE 4160-01-F

Federal Register

Thursday
August 4, 1994

Part V

Department of Justice

Equal Employment Opportunity Commission

28 CFR Part 37
29 CFR Part 1640

Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973; Final Rule

DEPARTMENT OF JUSTICE

28 CFR Part 37

[A.G. Order No. 1899–94]

RIN 1190–AA29

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1640

RIN 3046–AA42

Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973

AGENCIES: Department of Justice and Equal Employment Opportunity Commission.

ACTION: Joint final rule.

SUMMARY: Section 107(b) of the Americans with Disabilities Act of 1990 (ADA) requires that the Department of Justice (the Department), the Equal Employment Opportunity Commission (the Commission or the EEOC), and the Department of Labor's Office of Federal Contract Compliance Programs issue regulations setting forth procedures to coordinate the processing of complaints that fall within the overlapping jurisdiction of title I of the ADA and the Rehabilitation Act of 1973, to ensure that such complaints are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards. Pursuant to this mandate, the Department of Justice and the EEOC are publishing a joint final rule implementing section 107(b) as it pertains to title I of the ADA and section 504 of the Rehabilitation Act of 1973. In addition, this regulation describes the existing procedures for processing: Employment complaints that fall within the overlapping jurisdiction of title II of the ADA and either title I or section 504 of the Rehabilitation Act, or both; and employment complaints that arise solely under title I or section 504. A joint final rule developed by the EEOC and the Department of Labor implementing section 107(b) as it pertains to title I and section 503 of the Rehabilitation Act has been published separately in the **Federal Register** of January 24, 1992.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Merrily A. Friedlander, Acting Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66118, Washington, D.C. 20035–6118. She can also be contacted through the Division's ADA Information Line at (202) 514–0301 or (800) 514–0301 (voice), or (202) 514–0383 or (800) 514–0383 (TDD).

Elizabeth M. Thornton, Deputy Legal Counsel, Equal Employment Opportunity Commission, 1801 L Street NW., Washington, DC 20507, (202) 663–4638 (voice), (202) 663–7026 (TDD). Only the 800 numbers listed above are toll-free numbers.

Copies of this rule are available in the following alternate formats: large print, Braille, electronic file or computer disk, and audio tape. Copies may be obtained by calling (800) 669–3362 (voice) or (800) 800–3302 (TDD).

SUPPLEMENTARY INFORMATION:

Background

Title I of the ADA, 42 U.S.C. 12111–12117, prohibits discrimination against qualified individuals with disabilities in all aspects of employment. Title I of the ADA became effective on July 26, 1992, with respect to employers with 25 or more employees. 42 U.S.C. 12111(5)(A). On July 26, 1994, this coverage will be extended to employers with 15 or more employees. *Id.* The EEOC is authorized to investigate and attempt to resolve charges of employment discrimination under title I.

Subtitle A of title II of the ADA, 42 U.S.C. 12131–12134, prohibits discrimination against qualified individuals with disabilities on the basis of disability by State and local governmental entities in their services, programs, and activities, including employment. As of January 26, 1992, the effective date of title II, all State and local governmental entities, regardless of the number of persons they employ, were prohibited from discriminating on the basis of disability in employment. The Department of Justice has issued a regulation implementing title II, which provides that eight designated Federal agencies shall investigate and attempt to resolve complaints of discrimination under title II. Complaints that arise solely under title II are investigated by the designated agency most closely related to the functions exercised by the governmental component against which the complaint is lodged. See 28 CFR part 35 (56 FR 35694, July 26, 1991).

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, prohibits discrimination on the basis of disability (formerly, "handicap") in programs and activities receiving Federal financial assistance or conducted by any Executive agency. The nondiscrimination requirements of section 504 are applicable to employment in Federally-assisted programs. Each Federal agency that extends Federal financial assistance is responsible for compliance with section 504 in the programs it funds. More than twenty-five Federal agencies have issued regulations implementing section 504 for their Federally-assisted programs. These agencies are referred to in this rule as section 504 agencies.

The substantive prohibitions and coverage of title I, title II, and section 504 overlap to a significant extent. There is, therefore, a potential for duplicative efforts by the many Federal agencies responsible for ensuring compliance with these laws in their processing of complaints. Thus, pursuant to section 107(b) of the ADA, the Department and the Commission are promulgating this joint final rule to establish procedures for coordinating the processing of complaints that fall within the overlapping jurisdiction of section 504 and title I of the ADA. For convenience and clarity in processing complaints, this rule also incorporates the provisions established by the Department's title II rule at 28 CFR 35.171(b)(2)–(3) for coordinating the processing of complaints against public entities: (i) that fall within the jurisdiction of title II and title I (but are not covered by section 504); and (ii) that are covered by title II, but not title I (whether or not they are also covered by section 504). This reiteration of title II procedures does not amend or change the title II regulation as previously published. The Commission does not express an opinion on the title II procedures set forth herein, since they merely repeat a previously published regulation over which the Commission has no direct authority. The Commission and the Department of Labor also have published joint rules implementing section 107(b) of the ADA as it pertains to title I and section 503 of the Rehabilitation Act. See 29 CFR part 1641, 41 CFR part 60–742 (57 FR 2960, January 24, 1992).

Analysis of Comments and Revisions

Overview

The Commission received ten comments in response to a notice of proposed rulemaking (NPRM) published jointly with the Department of Justice on April 21, 1992. 57 FR 14630. In addition, the Commission received comments from various affected Federal agencies on both the proposed regulation and on the draft final regulation, pursuant to interagency coordination under Executive Order 12067. The Commission and the Department of Justice have carefully

considered all of the comments and made various revisions in response to them. A number of commenters expressed reservations about the feasibility of the procedures set forth in the NPRM and suggested various alternative procedures. Several commenters strongly urged that procedures similar to those set forth in the regulation promulgated to coordinate processing of complaints of employment discrimination filed against recipients of federal financial assistance be adopted. See 28 CFR part 42; 29 CFR part 1691 (hereinafter, the title VI/title VII regulation). The title VI/title VII regulation established procedures for handling complaints of employment discrimination filed against recipients of Federal financial assistance subject to title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the State and Local Fiscal Assistance Act of 1972, as amended, and other provisions of Federal law that prohibit discrimination on grounds of race, color, religion, sex, or national origin, in programs or activities receiving Federal financial assistance, when there is overlapping jurisdiction under title VII of the Civil Rights Act of 1964.

Under the NPRM's "first filed approach," the EEOC and any section 504 agency with jurisdiction over a charge or complaint would process those charges or complaints that were actually filed with it, pursuant to title I of the ADA or section 504, respectively. In the case of a charge or complaint that was physically filed with both the EEOC and a section 504 agency with jurisdiction, the agency that first received the complaint or charge would process it, absent special circumstances, while the second agency would defer processing pending the conclusion of the first agency's investigation. Numerous section 504 agencies expressed concern about the practical difficulties inherent in the NPRM's approach, including ascertaining which agency actually received a charge or complaint first in the case of a charge or complaint filed with both the EEOC and a section 504 agency. Accordingly, as suggested by a number of commenters, the final regulation adopts an approach similar to that of the title VI/title VII regulation. Under the final rule, a complaint solely alleging employment discrimination against a single individual (hereinafter, an individual complaint) that is filed with a section 504 agency with jurisdiction over the complaint will ordinarily be transferred to the EEOC for processing, unless the complainant specifically requests processing by the section 504 agency. Section 504 agencies, however, will retain for processing any complaints that allege: (i) a pattern or practice of discrimination in employment; or (ii) discrimination both in employment and in other services or practices of a respondent that are covered by section 504. For a comprehensive analysis of the new procedures, see the discussion of § ____.6, below.

The NPRM presented two options regarding the legal standard to be applied by section 504 agencies, and the preamble to the NPRM discussed the rationale for each option. Although numerous comments on these options were received in response to the NPRM, recent amendments to the Rehabilitation Act have resolved this issue. See section 506 of the Rehabilitation Act Amendments of 1992, Pub. L. 102–569, 106 Stat. 4344. Therefore, as provided in that amendment, the final regulation directs section 504 agencies to apply the standards of title I of the ADA. See the discussion of § ____.12, below.

Commenters also requested that time frames for the processing of complaints be added to the final regulation. Because, in certain cases, individual agencies may have requirements that preclude meeting fixed time frames for certain stages of the complaint investigation process, this suggestion has not been adopted. For example, when disclosure of the complainant's identity is necessary for the investigation of a section 504 or title II complaint, the Department requires receipt of a signed consent form from the complainant prior to notifying a respondent that the Department has received a complaint of discrimination. Therefore, the final regulation retains the more general requirement that agencies act promptly and in accordance with applicable law.

Various commenters also noted the inefficiency of the requirement that a section 504 agency refer a complaint to the Civil Rights Division for a determination of jurisdiction when the agency does not have section 504 jurisdiction, but does have title II jurisdiction. In response, the regulation has been revised to require that a complaint be referred to the Civil Rights Division only when the section 504 agency that initially receives the complaint has neither section 504 nor title II jurisdiction.

Section-by-Section Analysis

Section ____.1 Purpose and Application

Section ____.1 of the final rule, "Purpose and application," explains that the rule establishes the coordination procedures to be followed by the Federal agencies responsible for processing complaints of employment discrimination filed against recipients of Federal financial assistance and arising under section 504 and title I of the ADA. In addition to establishing those new procedures, the rule also restates and integrates into one comprehensive regulation those provisions of the Department's existing title II regulation that established the procedures for coordinating the processing of complaints covered by title II of the ADA and either title I or section 504, or both. The rule does not amend the title II regulation, but simply locates all of the applicable regulations regarding coordination in a single source.

Section ____.2 Definitions

Section ____.2 defines a number of terms used in the rule. A definition of the term "due weight" has been added, supplementing the discussion in the preamble.

The definitions of *Federal financial assistance* and *program or activity*, both of which relate to the determination of whether jurisdiction exists under section 504, have been revised from those contained in the NPRM. The NPRM originally contained a detailed definition of *Federal financial assistance*. However, in recognition of the fact that this definition may vary among section 504 agency regulations due to the nature of financial assistance provided by each agency, the new definition simply refers to the definitions adopted by each section 504 agency in its regulation implementing section 504 for Federally-assisted programs.

The definition of *program or activity* under section 504 was modified by the Civil Rights Restoration Act of 1987, Pub. L. 100–259, 102 Stat. 29, for all section 504 agencies. Therefore, to avoid any inconsistency between this rule and any agency regulations implementing section 504 that may not have been amended to reflect this change to the Rehabilitation Act, the new definition references the statutory definition.

Section ____.3 Exchange of Information

Section ____.3 requires the agencies responsible for enforcing the ADA and section 504 to share information.

Section ____.4 Confidentiality

Section ____.4(a) states that the confidentiality obligations applicable to the EEOC under the ADA also apply to section 504 agencies and designated agencies when information obtained by the EEOC is transmitted to such agencies, except when the agency

receives the same information from a source other than the EEOC. Section ____.4(b) states that when the EEOC receives information from section 504 or designated agencies, the EEOC shall comply with any confidentiality requirements applicable to that information.

Section ____.5 Date of Receipt

Section ____.5 states that a complaint or charge of employment discrimination is deemed to be filed, for purposes of determining timeliness, on the date the complaint or charge is first received by a Federal agency with jurisdiction under section 504 or the ADA, regardless of whether it is subsequently transferred to another agency for processing.

Section ____.6 Processing of Complaints of Employment Discrimination Filed With an Agency Other Than the EEOC

Section ____.6 describes the basic procedures that section 504 agencies and the agencies designated to process complaints under the Department's title II regulation will follow in determining whether to process an employment complaint or to refer it to another agency. The primary purpose of the rule is to establish procedures for coordinating the processing of complaints or charges of employment discrimination arising under section 504 and title I of the ADA. However, the procedures for coordinating the processing of complaints or charges of employment discrimination against public entities: (i) that fall under the jurisdiction of title II and title I (but not section 504); and (ii) that fall under the jurisdiction of title II, but not title I (whether or not covered by section 504) established by § 35.171 of the Department's title II regulation, have been restated here and integrated with the section 504 processing procedures for clarity and ease in processing by the affected agencies.

Section ____.6 has been revised to eliminate the requirement that the initial receiving agency, or the Civil Rights Division, when a complaint is forwarded to it for a determination of jurisdiction, provide notice to the affected parties. As previously written, the regulation required notification by any agency that came into contact with a complaint or charge even if the complaint or charge was immediately forwarded to another agency. Instead of multiple notifications, the final rule now provides for a more efficient single notification at such time as the appropriate processing agency receives the complaint or charge, in accordance with agency policy and applicable law.

Paragraph (b) of § ____.6 has been revised to provide that, if an agency determines pursuant to paragraph (a) that it does not have jurisdiction under section 504 or title II, and that the EEOC does not have jurisdiction under title I, the agency shall promptly refer the complaint to the Civil Rights Division. This is a change from the procedure set forth in the NPRM, which required a section 504 agency to refer all title II complaints to the Civil Rights Division. The revision was made in response to various comments pointing out that this was an inefficient procedure when the section 504 agency was certain that it was the designated agency under title II, and that the complaint would be referred back to it by the Civil Rights Division.

Upon receipt of a referred complaint, the Civil Rights Division will determine whether another Federal agency may have jurisdiction over the complaint under section 504 (that is, a Federal agency may be providing financial assistance to the respondent) or under title II (that is, the entity that is the subject of the complaint may be a public entity). When the Civil Rights Division finds such jurisdiction, it shall promptly refer the complaint to the appropriate agency.

Paragraph (c) of § ____.6 sets forth the circumstances under which an agency that is a section 504 agency, a designated agency, or both, will promptly refer a complaint to the EEOC for investigation and processing. In addition to: (i) revising the regulation to reflect the procedures of the title VI/title VII regulation (which generally results in individual complaints being referred for processing to the EEOC); and (ii) incorporating the procedures already established by the title II regulation, paragraph (c) and the balance of § ____.6 more specifically set forth the requirements for either referral or retention applicable to each type of agency. Unlike the procedural scheme set forth in the NPRM, under which a complaint or charge could only be dual filed if it were actually filed with both a section 504 agency and the EEOC, a complaint or charge filed with one agency will now be deemed to be dual filed under both title I and section 504 under certain circumstances, as set forth in this section and in § ____.7.

Paragraph (c)(1) of § ____.6 describes the rule applicable to an agency that receives a complaint of employment discrimination under section 504 or title II and determines that it does not have jurisdiction over the complaint. If the agency determines that the EEOC may have jurisdiction, the agency is required to promptly forward the complaint to the EEOC for processing. In certain instances this may require consultation with the EEOC. This paragraph establishes the requirements for section 504 and other agencies and includes the requirements established by § 35.171(b)(2) of the title II regulation with respect to designated agencies.

Paragraph (c)(2) establishes the referral requirements applicable to section 504 agencies and requires a section 504 agency that otherwise has jurisdiction over a complaint of employment discrimination to refer the complaint to the EEOC when the complaint solely alleges discrimination against an individual, unless the EEOC lacks jurisdiction over the complaint under title I, or the complainant requests that the section 504 agency retain jurisdiction, either independently, or following receipt of the notice letter described in paragraphs (c)(2)(ii)(A) and (c)(2)(ii)(B).

The referral to the EEOC of complaints solely alleging employment discrimination against individuals is a significant change in procedure from the NPRM. The revision was made in response to numerous comments urging this approach, which is consistent with the title VI/title VII regulation. This approach will serve to minimize duplicative efforts because the EEOC, in general, will be the primary agency investigating individual complaints of disability discrimination in employment. An individual's private right of action under title I of the ADA will also be preserved under this approach, since these section 504 complaints also will be deemed to be dual filed under title I. However, in order to preserve an individual's right to have his or her complaint processed by the section 504 agency, paragraph (c)(2)(i)(B) requires the section 504 agency to retain the complaint for investigation if the complainant so requests.

Paragraphs (c)(2)(ii)(A) and (c)(2)(ii)(B) describe the notice letter a section 504 agency is required to send promptly to each complainant before the agency refers a complaint solely alleging employment discrimination against an individual to the EEOC. The purpose of the letter is to inform an individual who has initially filed his or her complaint with the appropriate section 504 agency of the basic implications of a referral of that complaint to the EEOC. It is anticipated that the vast majority of individual complaints will be referred to the EEOC, with the section 504 agency deferring its review and processing until the conclusion of the EEOC's processing. However, because an automatic referral

to the EEOC of a complaint filed with a section 504 agency may be contrary to the complainant's expectations, complainants will be given the choice of having the EEOC or the section 504 agency investigate the complaint.

Each agency will develop its own letter informing the complainant that the agency will refer the complaint to the EEOC for investigation and processing, unless the agency receives a written request to the contrary from the complainant within twenty days of the date of the notice letter. The agency notice letter shall explain: (i) that agency's procedures for processing section 504 complaints; and (ii) the EEOC's procedures for processing complaints under title I. The agency notice letter shall also inform individuals of the potential for differing remedies under each statute.

Paragraph (c)(3) describes the procedure for referral by designated agencies, as established by § 35.171(b)(2) of the title II regulation. If a designated agency does not have section 504 jurisdiction, and determines that the EEOC may have title I jurisdiction, it shall promptly refer the complaint to the EEOC.

Paragraph (c)(4)(i) provides that complaints referred to the EEOC by an agency with section 504 jurisdiction will be deemed to be dual filed under both section 504 and title I. As a consequence, the section 504 agency, although required to defer its processing of the complaint, will have an opportunity to review the EEOC's findings and take any further action it deems appropriate, as provided in §____.10. Paragraph (c)(4)(ii) further provides that a complaint referred to the EEOC by an agency that has jurisdiction over the complaint under title II only (and not under section 504) will be treated as a complaint filed under title I only. See 28 CFR 35.171(b)(2).

The distinction between the treatment of these two types of complaints, those falling within the province of section 504 and those arising only under the ADA, is based on the ADA's statutory mandate to preserve the rights, remedies, and procedures of any Federal law that provides greater or equal protection to individuals with disabilities than are afforded by the ADA. Permitting section 504 agencies to review complaints originally filed with those agencies preserves section 504 remedies, including an agency's prerogative to terminate the federal funding of the respondent. It is anticipated that the fact that fund termination is ultimately available as an administrative remedy will encourage respondents to resolve valid claims through negotiation with the EEOC rather than through litigation. Because §____.10(c) requires the reviewing section 504 agency to give due weight to the EEOC's findings and conclusions, it is also anticipated that, in most instances, further action by the section 504 agency will not be necessary.

Paragraph (c)(4)(iii) states that any complaint referred to the EEOC shall be processed pursuant to title I procedures. Specifically, the EEOC will notify respondents of its receipt of a complaint in accordance with its usual procedures for notification following receipt of a charge.

Paragraph (d) of §____.6 describes the circumstances under which an agency shall retain a complaint for investigation (rather than referring it to the EEOC or the Civil Rights Division). The general rule applicable to section 504 agencies, as stated in paragraph (d)(1), is that a section 504 agency shall retain a complaint when it determines that it has section 504 jurisdiction over the complaint and that any one or more of the following are true: (i) the EEOC does not have jurisdiction over the complaint; (ii) the EEOC has jurisdiction over the complaint, but the complainant requests that the complaint be investigated by the agency rather than being referred; (iii) the complaint alleges discrimination in both employment and in other services or practices of the respondent that are covered by section 504; or (iv) the complaint alleges a pattern or practice of discrimination in employment. Such complaints will not be deemed dual filed under title I of the ADA.

This procedure is consistent with the approach taken in the title VI/title VII regulation. For reasons of efficiency, section 504 agencies will ordinarily process complaints that allege disability discrimination in both employment and other practices of a recipient, because the EEOC has no jurisdiction over the latter. Historically, under both section 504 and other civil rights statutes, agencies have also had a particular interest in the enforcement of pattern or practice cases of employment discrimination against recipients of Federal assistance, and agencies shall continue to investigate such complaints. It should be noted that the term "pattern or practice" of discrimination is intended to mean systemic or class complaints generally. Although the term "pattern or practice" of discrimination is sometimes used in a more narrow sense to refer to intentional discrimination or disparate treatment on a classwide level, the term was used in the title VI/title VII rule to refer to both adverse impact cases and cases of intentional discrimination affecting a class of protected individuals.

The provisions described above only apply when a complaint is filed with a section 504 agency. The EEOC will always process all charges, including class charges, that are solely filed with the EEOC.

Paragraph (d)(2) restates the principle established in the title II regulation that an agency shall retain a complaint for investigation when it determines that: (i) it has jurisdiction over the complaint as a designated agency; and (ii) that the EEOC does not have jurisdiction over the complaint under title I. See 28 CFR 35.171(b)(2).

Paragraph (d)(3) states the rule that complaints retained for investigation under paragraphs (d)(1) and (d)(2) will be investigated and processed under section 504, title II, or both, as applicable, and will not be considered to be dual filed under title I.

Section ____.7 Processing of Charges of Employment Discrimination Filed With the EEOC

Section ____.7 outlines the procedures that the EEOC will take in determining whether to process a charge or to refer it to another agency.

Section .7(a)(1) requires the EEOC, as a first step, to determine whether it has jurisdiction over the charge. If the EEOC has jurisdiction, it shall process the charge in accordance with its customary title I procedures, including notification of the respondent.

Paragraph (a)(2) sets forth the procedures that apply when the EEOC determines that it does not have jurisdiction over the charge. Under such circumstances, the charge will be promptly forwarded to the Civil Rights Division for referral to the appropriate agency, or retention by the Department for processing, as applicable.

Paragraph (b)(1) of §____.7 states the basic rule applicable to charges filed with the EEOC, that is, when the EEOC determines that it has jurisdiction over the charge under title I, it shall retain the charge. Because EEOC processing of a charge filed with the EEOC is consistent with the charging party's expectations when filing the charge, no notice letter to the charging party, similar to the letter required to be sent to complainants under paragraph (c)(2)(ii) of §____.6, is required.

Paragraph (b)(2) has been newly added to the final rule. It provides that the EEOC shall refer to a section 504 agency for further action, as appropriate, any cause finding against a recipient that has failed conciliation and that the EEOC has declined to litigate. By providing for agency review under these

circumstances, paragraph (b)(2) should promote the ADA's statutory goal of preserving section 504 remedies, while the requirement that section 504 agencies give due weight to EEOC findings should eliminate any need for duplicative agency action.

Section ____.8 Processing of Complaints or Charges of Employment Discrimination Filed With Both the EEOC and a Section 504 Agency

Section ____.8 sets forth the procedures that the EEOC and section 504 agencies shall follow in processing complaints or charges of employment discrimination that have been dual filed with both the EEOC and a section 504 agency.

Paragraph (a) of § ____.8 sets forth the procedures applicable to complaints or charges of employment discrimination that are dual filed with both a section 504 agency and the EEOC, both of which have jurisdiction over the complaint or charge.

Under those circumstances, the rule follows the general pattern established by the title VI/title VII regulation, and requires the EEOC to process charges that solely allege employment discrimination against an individual when the individual has not elected section 504 agency processing. Section 504 agencies will process all complaints that allege: (i) discrimination in both employment and other practices or services of the respondent; (ii) a pattern or practice of employment discrimination; or (iii) discrimination solely against an individual, when the individual has elected section 504 agency processing. This allocation of responsibility for complaint processing is the same as the allocation of responsibility for processing complaints originally filed solely with a section 504 agency under § ____.6. However, as discussed below, paragraph (e) of § ____.8 sets forth exceptions to this general scheme for special circumstances.

Paragraph (b) requires complaints or charges to be referred to the Civil Rights Division if both the EEOC and the section 504 agency determine that they do not have jurisdiction over the complaint or charge. The Civil Rights Division is then responsible for making the appropriate referral to a section 504 or designated agency.

Paragraph (c) requires the EEOC and each agency with jurisdiction under section 504 to develop procedures for determining whether complaints or charges of discrimination have been filed with the EEOC and with one or more agencies. It is anticipated that the Department, the Commission, and the section 504 agencies will work together to develop materials, such as a uniform filing form (or uniform portion of a filing form) that will facilitate coordination in processing employment complaints.

Although some commenters requested that these procedures be stated in the final rule, it was decided that this activity is more appropriately conducted at a sub-regulatory level, which will permit more flexibility in developing efficient procedures. In addition, because the rule has been restructured to follow the title VI/title VII regulation rather than the "first-filed" approach, there is less need to determine whether a complaint or charge has been filed with more than one agency. For example, under the title VI/title VII model, the EEOC will become the primary agency processing complaints or charges that solely allege discrimination against an individual. Therefore, there is no need to determine whether these complaints or charges have been dual filed in order to establish responsibility for processing. In addition, the notice letter required to be sent to section 504 complainants prior to such a referral should provide an efficient mechanism for determining whether a charge has also been filed with the EEOC because it could be used to require complainants to reveal whether they had filed a complaint or charge with another agency.

Paragraph (d) requires the agency that will process a dual-filed complaint or charge to notify all concerned parties that the other agencies will be deferring their processing, and of the possibility of further action by such agencies pursuant to §§ ____.10 or ____.11.

Paragraph (e) establishes that, under certain special circumstances where deferral may be inappropriate, the agencies involved may jointly agree to reallocate investigatory responsibilities. For example, if the section 504 agency would normally process the complaint, but the agency does not receive information that another charge has been filed with the EEOC until after an investigation has been started by the EEOC, this exception permits the agencies jointly to decide that the EEOC should continue processing the charge and that the section 504 agency should defer further action. This exception could also be used in connection with subsequent complaints or charges, such as allegations of retaliation, related to the original complaint or charge.

The special circumstances listed in paragraph (e) are illustrative and agencies may agree to reallocate investigatory responsibilities under other appropriate circumstances. In such circumstances a complaint or charge will be treated as a deferred complaint or charge with respect to any right to review under §§ ____.10 and ____.11.

It is not anticipated that most aggrieved individuals will separately file with both a section 504 agency and the EEOC. Since the substantive protections provided by title I and section 504 are now identical, an individual's rights against discrimination on the basis of disability can be vindicated under either statute. However, an individual who files a complaint with a section 504 agency alleging discrimination both in employment and services, a pattern or practice of discrimination, or who requests section 504 processing, will not preserve a private right of action under title I of the ADA, unless the individual also files a charge with the EEOC under title I of the ADA.

Section ____.9 Processing of Complaints or Charges of Employment Discrimination Filed With a Designated Agency and Either a Section 504 Agency, the EEOC, or Both

Section ____.9 adds new procedures to the final rule to address the processing of complaints filed with a designated agency and with either a section 504 agency, the EEOC, or both. Generally, the EEOC and the section 504 agencies have primary responsibility for processing complaints of employment discrimination. Therefore, § ____.9 provides that a designated agency shall investigate and process a complaint only when: (i) it is either the only agency with jurisdiction to process the complaint; or (ii) it also has jurisdiction to process the complaint under section 504. If another agency has sole jurisdiction over the complaint under either section 504 or title I (and the complaint was actually filed with that agency under section 504 or title I), § ____.9 requires the designated agency to forward the complaint to that agency. If a section 504 agency and the EEOC both have jurisdiction over a complaint or charge of employment discrimination, the rule allocates complaint-processing responsibility according to the established pattern of the title VI/title VII rule, that is, individual complaints are forwarded to the EEOC and complaints alleging discrimination in both employment and in other practices or services of the respondent or a pattern or practice of employment discrimination are forwarded to the section 504 agency with jurisdiction.

Section ____.10 Section 504 Agency Review of Deferred Complaints

Section ____.10 describes the steps that shall be taken when the EEOC processes a dual-filed complaint or charge (either an individual complaint that is referred to the EEOC or a dual-filed complaint or charge that the EEOC processes) and a section 504 agency defers its investigation.

Because the rule requires the section 504 agency to defer action until the EEOC resolves the complaint, paragraph (a) outlines the different ways in which any title I charge may be resolved, including litigation by the EEOC. Although the EEOC is the agency primarily responsible for the enforcement of title I, resolution by the Civil Rights Division is also included under paragraphs (a) (3) and (4) because, under title I of the ADA, when there is a cause finding pursuant to 29 CFR 1601.21, the Civil Rights Division has litigation authority for charges against State and local governments, government agencies, and political subdivisions. See 29 CFR 1601.29. The Civil Rights Division is also responsible for issuing right-to-sue letters in such cases. See 29 CFR 1601.28(d).

Paragraph (b) of § ____.10 provides that, upon resolution of the dual-filed complaint or charge, the EEOC or the Civil Rights Division shall inform the section 504 agency of the resolution. Paragraph (d) provides that, upon written request by the section 504 agency, the EEOC or the Civil Rights Division shall provide the section 504 agency with the materials necessary to evaluate its resolution of the case, such as investigative reports.

Paragraph (c) of § ____.10 provides that, upon receipt of notification from the EEOC or the Civil Rights Division, as appropriate, the section 504 agency shall determine what further action is warranted. Because, pursuant to the 1992 amendments to the Rehabilitation Act, the substantive standards to be applied to complaints of employment discrimination are now identical, it is anticipated that, except in rare circumstances, the section 504 agency's findings and conclusions as to whether a violation has occurred will be consistent with those of the EEOC and those of the Civil Rights Division, as applicable. In order to further promote consistency and avoid duplication of effort, the rule requires that the section 504 agency accord due weight to the findings and conclusions of the EEOC and the Civil Rights Division, as applicable. The term "due weight" is adopted from the title VI/title VII regulation, which is referenced in section 107(b) of the ADA. 28 CFR part 42, subpart H; 29 CFR part 1691. In giving due weight to the findings and conclusions of the EEOC or the Civil Rights Division, a section 504 agency shall give such full and careful consideration to the findings and conclusions as is appropriate, taking into account such factors as: (i) the extent to which the underlying investigation is complete and the evidence supports the findings and conclusions; (ii) the nature and results of any subsequent proceedings; (iii) the extent to which the findings, conclusions and any actions taken under title I are consistent with the effective enforcement of section 504; and (iv) the agency's responsibilities under section 504.

Moreover, if the agency proposes to take an action that is inconsistent with such findings and conclusions, the section 504 agency is required to provide written notification of the action that it proposes to take and the basis for that action to the Assistant Attorney General of the Civil Rights Division, the Chairman of the EEOC, and the head of the EEOC office that processed the complaint or charge. This is intended to enable the agencies to identify and resolve any potentially conflicting or inconsistent standards before they are imposed and to prevent duplication of effort.

What further action the section 504 agency will take will depend on the EEOC's (or, as appropriate, the Civil Rights Division's) findings, conclusions, and resolution. This rule contemplates that in most cases the "further action" would be that the section 504 agency would notify the complainant and the respondent that it is closing its file based upon the EEOC's resolution of the charge. For example, closure by the section 504 agency would be the appropriate action when: (i) the EEOC found no cause and issued a right-to-sue letter, and the section 504 agency agreed with the determination that no violation occurred; or (ii) the EEOC found cause and the violation was completely remedied through either a conciliation agreement or litigation, and the section 504 agency agreed that the violation had been remedied.

Section ____.11 EEOC Review of Deferred Charges

Section ____.11 describes the steps that shall be taken when a section 504 agency processes a dual-filed complaint or charge and the EEOC defers its processing of the charge. Paragraph (a) of § ____.11 outlines the different ways in which a section 504 complaint may be resolved. Referral to, and action by, the Civil Rights Division is included in § ____.11(a) because one of the options available to a section 504 agency, when it has found a violation and it has not been able to negotiate a voluntary compliance agreement, is referral to the Civil Rights Division for judicial enforcement.

Paragraphs (b) and (d) of § ____.11 impose the same types of obligations on the section 504 agency to notify the EEOC of its resolution of the complaint and to share with the EEOC any materials related to the resolution of the complaint that would permit the EEOC to evaluate the findings, as paragraphs (b) and (d) of § ____.10 impose on the EEOC.

Paragraph (c) of § ____.11 imposes requirements on the EEOC analogous to those § ____.10(c) imposes on a section 504 agency. This paragraph contemplates that in most cases the appropriate "further action" would be that the EEOC would notify the charging party and the respondent that it is closing its file based upon the resolution of the complaint by the section 504 agency, and, where appropriate, would issue a right-to-sue letter. For example, closure and issuance of a right-to-sue letter by the EEOC would be the appropriate action when the section 504 agency found no violation and the EEOC agreed. Alternatively, closure alone would be appropriate when the section 504 agency found a violation and the EEOC agreed that the violation was completely remedied through either a conciliation agreement, an administrative hearing, or judicial enforcement.

Section ____.12 Standards

In the NPRM, this section addressed the requirement established by section 107(b) of the ADA to "[prevent] imposition of inconsistent or conflicting standards for the same requirements under [title I and section 504]."

As noted earlier, in order to comply with this statutory mandate, the NPRM presented two options for the legal standard to be applied by section 504 agencies in their investigation of complaints that are also subject to title I, and requested comment as to the appropriate standard. However, in the period between the publication of the NPRM and the publication of this final rule, the Rehabilitation Act was specifically amended to provide that the standards of title I of the ADA and the provisions of sections 501 through 504, and 510, of the ADA, as such sections relate to employment, shall be the standards applied by section 504 agencies in investigating complaints of employment discrimination. See section

506 of the Rehabilitation Act Amendments of 1992, Public Law 102–569, 106 Stat. 4344, 4428. The final rule tracks the language of the amendment.

Section ____.13 Agency Specific Memoranda of Understanding

This section has been newly added to the final rule, to allow maximum flexibility for the development of agency specific memoranda of understanding (MOU) that would further serve to minimize duplication of effort and fully preserve an aggrieved individual's rights under both statutes. When a section 504 agency amends its regulations to make them consistent with title I of the ADA, the EEOC and the individual section 504 agency may enter into an MOU providing for the investigation and processing by the section 504 agency of complaints or charges dual filed under both section 504 and title I of the ADA by the section 504 agency. Execution of an MOU would be discretionary on the part of both the EEOC and the particular section 504 agency. Section 504 agencies that amend their regulations to make them consistent with title I standards would have, in agreement with the EEOC, the option of acting as the EEOC's agent for investigating and processing under title I all complaints covered by both title I and section 504 that are filed with the section 504 agency. It is contemplated that the terms of the MOU would be similar to the joint rule implementing section 107(b) as it pertains to section 503 of the Rehabilitation Act and title I. 29 CFR part 1641; 41 CFR part 60–742.

Regulatory Process Matters

This rule takes effect immediately, rather than 30 days after publication, because it solely concerns agency procedure and practice.

This final rule has been drafted in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department of Justice and the Equal Employment Opportunity Commission have determined that it is not a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 12875 prohibits executive departments and agencies from promulgating any regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government unless certain conditions are met. Although the procedures for processing complaints or charges of employment discrimination established by this regulation may affect complaints or charges of employment discrimination filed against such entities, the final rule does not create any mandates affecting such entities and may, in fact, reduce any current burden by streamlining the processing of complaints and charges at the Federal level.

The Attorney General and the Chairman of the EEOC have reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), and by approving it certify that this regulation will not have a significant economic impact on a substantial number of small entities.

This final rule does not establish reporting or record-keeping requirements that are considered to be information collection requirements as that term is defined by the Office of Management and Budget in 5 CFR part 1320.

This part will be added to the rules of the Department of Justice at 28 CFR chapter I as a new part 37, and to the rules of the Equal Employment Opportunity Commission at 29 CFR chapter XIV as a new part 1640. Since the parts are identical, the text of the joint final rule is set out only once at the end of the joint preamble. The part heading, list of subjects, table of contents, and authority citation for the parts as they will appear in each CFR title follow the text of the joint rule.

Text of Final Joint Rule

The text of the final joint rule, as adopted by the agencies specified in this document, appears below:

PART ____—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Sec.

§ ____.1 Purpose and application.

(a) This part establishes the procedures to be followed by the Federal agencies responsible for processing and resolving complaints or charges of employment discrimination filed against recipients of Federal financial assistance when jurisdiction exists under both section 504 and title I.

(b) This part also repeats the provisions established by 28 CFR 35.171 for determining which Federal agency shall process and resolve complaints or charges of employment discrimination:

(1) That fall within the overlapping jurisdiction of titles I and II (but are not covered by section 504); and

(2) That are covered by title II, but not title I (whether or not they are also covered by section 504).

(c) This part also describes the procedures to be followed when a complaint or charge arising solely under section 504 or title I is filed with a section 504 agency or the EEOC.

(d) This part does not apply to complaints or charges against Federal contractors under section 503 of the Rehabilitation Act.

(e) This part does not create rights in any person or confer agency jurisdiction not created or conferred by the ADA or section 504 over any complaint or charge.

§ ____.2 Definitions.

As used in this part, the term:

Americans with Disabilities Act of 1990 or *ADA* means the Americans with Disabilities Act of 1990 (Pub. L. 101–336, 104 Stat. 327, 42 U.S.C. 12101–12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, or his or her designee.

Chairman of the Equal Employment Opportunity Commission refers to the Chairman of the United States Equal Employment Opportunity Commission, or his or her designee.

Civil Rights Division means the Civil Rights Division of the United States Department of Justice.

Designated agency means any one of the eight agencies designated under § 35.190 of 28 CFR part 35 (the Department's title II regulation) to implement and enforce title II of the ADA with respect to the functional areas within their jurisdiction.

Dual-filed complaint or charge means a complaint or charge of employment discrimination that:

(1) Arises under both section 504 and title I;

(2) Has been filed with both a section 504 agency that has jurisdiction under section 504 and with the EEOC, which has jurisdiction under title I; and

(3) Alleges the same facts and raises the same issues in both filings.

Due weight shall mean, with respect to the weight a section 504 agency or the EEOC shall give to the other agency's findings and conclusions, such full and careful consideration as is appropriate, taking into account such factors as:

(1) The extent to which the underlying investigation is complete and the evidence is supportive of the findings and conclusions;

(2) The nature and results of any subsequent proceedings;

(3) The extent to which the findings, conclusions and any actions taken:

(i) Under title I are consistent with the effective enforcement of section 504; or

(ii) Under section 504 are consistent with the effective enforcement of title I; and

(4) The section 504 agency's responsibilities under section 504 or the EEOC's responsibilities under title I.

Equal Employment Opportunity Commission or *EEOC* refers to the United States Equal Employment Opportunity Commission, and, when appropriate, to any of its headquarters, district, area, local, or field offices.

Federal financial assistance shall have the meaning, with respect to each section 504 agency, as defined in such agency's regulations implementing section 504 for Federally- assisted programs.

Program or activity shall have the meaning defined in the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394, 29 U.S.C. 794), as amended.

Public entity means:

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act, 45 U.S.C. 502(8)).

Recipient means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary under such program.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394, 29 U.S.C. 794), as amended.

Section 504 agency means any Federal department or agency that extends Federal financial assistance to programs or activities of recipients.

Title I means title I of the ADA.

Title II means subtitle A of title II of the ADA.

§ ___.3 Exchange of information.

The EEOC, section 504 agencies, and designated agencies shall share any information relating to the employment policies and practices of a respondent that may assist each agency in carrying out its responsibilities, to the extent permissible by law. Such information shall include, but is not limited to, complaints, charges, investigative files, compliance review reports and files, affirmative action programs, and annual employment reports.

§ ___.4 Confidentiality.

(a) When a section 504 agency or a designated agency receives information obtained by the EEOC, such agency shall observe the confidentiality requirements of section 706(b) and section 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(b) and 2000e-8(e)), as incorporated by section 107(a) of the ADA, to the same extent as these provisions would bind the EEOC, except when the agency receives the same information from a source independent of the EEOC. Agency questions concerning the confidentiality requirements of title I shall be directed to the Associate Legal Counsel for Legal Services, Office of Legal Counsel, the EEOC.

(b) When the EEOC receives information from a section 504 or a designated agency, the EEOC shall observe any confidentiality requirements applicable to that information.

§ ___.5 Date of receipt.

A complaint or charge of employment discrimination is deemed to be filed, for purposes of determining timeliness, on the date the complaint or charge is first received by a Federal agency with section 504 or ADA jurisdiction, regardless of whether it is subsequently transferred to another agency for processing.

§ ___.6 Processing of complaints of employment discrimination filed with an agency other than the EEOC.

(a) *Agency determination of jurisdiction.* Upon receipt of a complaint of employment discrimination, an agency other than the EEOC shall:

(1) Determine whether it has jurisdiction over the complaint under section 504 or under title II of the ADA; and

(2) Determine whether the EEOC may have jurisdiction over the complaint under title I of the ADA.

(b) *Referral to the Civil Rights Division.* If the agency determines that it does not have jurisdiction under section 504 or title II, and determines that the EEOC does not have jurisdiction under title I, the agency shall promptly refer the complaint to the Civil Rights Division. The Civil Rights Division shall determine if another Federal agency may have jurisdiction over the complaint under section 504 or title II, and, if so, shall promptly refer the complaint to a section 504 or a designated agency with jurisdiction over the complaint.

(c) *Referral to the EEOC.—(1) Referral by an agency without jurisdiction.* If an agency determines that it does not have jurisdiction over a complaint of employment discrimination under either section 504 or title II and determines that the EEOC may have jurisdiction under title I, the agency shall promptly refer the complaint to the EEOC for investigation and processing under title I of the ADA.

(2) *Referral by a section 504 agency.* (i) A section 504 agency that otherwise has jurisdiction over a complaint of employment discrimination under section 504 shall promptly refer to the EEOC, for investigation and processing under title I of the ADA, any complaint of employment discrimination that solely alleges discrimination against an individual (and that does not allege discrimination in both employment and in other practices or services of the respondent or a pattern or practice of employment discrimination), unless:

(A) The section 504 agency determines that the EEOC does not have jurisdiction over the complaint under title I; or

(B) The EEOC has jurisdiction over the complaint under title I, but the complainant, either independently, or following receipt of the notification letter required to be sent to the complainant pursuant to paragraph (c)(2)(ii) of this section, specifically requests that the complaint be investigated by the section 504 agency.

(ii) Prior to referring an individual complaint of employment discrimination to the EEOC pursuant to paragraph (c)(2)(i) of this section (but not prior to making such a referral pursuant to paragraph (c)(1) of this section), a section 504 agency that otherwise has jurisdiction over the complaint shall promptly notify the complainant, in writing, of its intention to make such a referral. The notice letter shall:

(A) Inform the complainant that, unless the agency receives a written request from the complainant within twenty days of the date of the notice letter requesting that the agency retain the complaint for investigation, the agency will forward the complaint to the EEOC for investigation and processing; and

(B) Describe the basic procedural differences between an investigation under section 504 and an investigation under title I, and inform the complainant of the potential for differing remedies under each statute.

(3) *Referral by a designated agency.* A designated agency that does not have section 504 jurisdiction over a complaint of employment discrimination and that has determined that the EEOC may have jurisdiction over the complaint under title I shall promptly refer the complaint to the EEOC.

(4) *Processing of complaints referred to the EEOC.* (i) A complaint referred to the EEOC in accordance with this section by an agency with jurisdiction over the complaint under section 504 shall be deemed to be a dual-filed complaint under section 504 and title I. When a section 504 agency with jurisdiction over a complaint refers the complaint to the EEOC, the section 504 agency shall defer its processing of the complaint pursuant to § —.10, pending resolution by the EEOC.

(ii) A complaint referred to the EEOC by an agency that has jurisdiction over the complaint solely under title II (and not under section 504) will be treated as a complaint filed under title I only.

(iii) Any complaint referred to the EEOC pursuant to this section shall be processed by the EEOC under its title I procedures.

(d) *Retention by the agency for investigation*—(1) *Retention by a section 504 agency.* A section 504 agency shall retain a complaint for investigation when the agency determines that it has jurisdiction over the complaint under section 504, and one or more of the following conditions are met:

(i) The EEOC does not have jurisdiction over the complaint under title I; or

(ii) The EEOC has jurisdiction over the complaint, but the complainant elects to have the section 504 agency process the complaint and the section 504 agency receives a written request from the complainant for section 504 agency processing within twenty days of the date of the notice letter required to be sent pursuant to paragraph (c)(2)(ii) of this section; or

(iii) The complaint alleges discrimination in both employment and in other practices or services of the respondent that are covered by section 504; or

(iv) The complaint alleges a pattern or practice of employment discrimination.

(2) *Retention by a designated agency.* A designated agency that does not have jurisdiction over the complaint under section 504 shall retain a complaint for investigation when the agency determines that it has jurisdiction over the complaint under title II of the ADA and that the EEOC does not have jurisdiction over the complaint under title I.

(3) *Processing of complaints retained by an agency.* Any complaint retained for investigation and processing by an agency pursuant to paragraphs (d)(1) and (d)(2) of this section will be investigated and processed under section 504, title II, or both, as applicable, and will not be considered to be dual filed under title I.

§ ____.7 Processing of charges of employment discrimination filed with the EEOC.

(a) *EEOC determination of jurisdiction.* Upon receipt of a charge of employment discrimination, the EEOC shall:

(1) Determine whether it has jurisdiction over the charge under title I of the ADA. If it has jurisdiction, except as provided in paragraph (b)(2) of this section, the EEOC shall process the charge pursuant to title I procedures.

(2) If the EEOC determines that it does not have jurisdiction under title I, the EEOC shall promptly refer the charge to the Civil Rights Division. The Civil Rights Division shall determine if a Federal agency may have jurisdiction over the charge under section 504 or title II, and, if so, shall refer the charge to a section 504 agency or to a designated agency with jurisdiction over the complaint.

(b) *Retention by the EEOC for investigation.* (1) The EEOC shall retain a charge for investigation when it determines that it has jurisdiction over the charge under title I.

(2) *Referral to an agency.* Any charge retained by the EEOC for investigation and processing will be investigated and processed under title I only, and will not be deemed dual filed under section 504, except that ADA cause charges (as defined in 29 CFR 1601.21) that also fall within the jurisdiction of a section 504 agency and that the EEOC (or the Civil Rights Division, if such a charge is against a government, governmental agency, or political subdivision) has declined to litigate shall be referred to the appropriate section 504 agency for review of the file and any administrative or other action deemed appropriate under section 504. Such charges shall be deemed complaints, dual filed under section 504, solely for the purposes of the agency review and action described in this paragraph. The date of such dual filing shall be deemed to be the date the complaint was received by the EEOC.

§ ____.8 Processing of complaints or charges of employment discrimination filed with both the EEOC and a section 504 agency.

(a) *Procedures for handling dual-filed complaints or charges.* As between the EEOC and a section 504 agency, except as provided in paragraph (e) of this section, a complaint or charge of employment discrimination that is dual filed with both the EEOC and a section 504 agency shall be processed as follows:

(1) *EEOC processing.* The EEOC shall investigate and process the charge when the EEOC determines that it has jurisdiction over the charge under title I and the charge solely alleges employment discrimination against an individual, unless the charging party elects to have the section 504 agency process the charge and the section 504 agency receives a written request from the complainant for section 504 agency processing within twenty days of the date of the notice letter required to be sent pursuant to § ____.6(c)(2)(ii).

(2) *Section 504 agency processing.* A section 504 agency shall investigate and process the complaint when the agency determines that it has jurisdiction over the complaint under section 504, and:

(i) The complaint alleges discrimination in both employment and in other practices or services of the respondent; or

(ii) The complaint alleges a pattern or practice of discrimination in employment; or

(iii) In the case of a complaint solely alleging employment discrimination against an individual, the complainant elects to have a section 504 agency process the complaint and the section 504 agency receives a written request from the complainant for section 504 agency processing within twenty days of

the date of the notice letter required to be sent pursuant to § ____.6(c)(2)(ii).

(b) *Referral to the Civil Rights Division.* If the EEOC determines that it does not have jurisdiction under title I, and the section 504 agency determines that it does not have jurisdiction under section 504 or title II, the complaint or charge shall be promptly referred to the Civil Rights Division. The Civil Rights Division shall determine if another Federal agency may have jurisdiction over the complaint under section 504 or title II, and, if so, shall promptly refer the complaint to a section 504 or a designated agency with jurisdiction over the complaint.

(c) *Procedures for determining whether a complaint or charge has been dual filed.* The EEOC and each agency with jurisdiction to investigate and process complaints of employment discrimination under section 504 shall jointly develop procedures for determining whether complaints or charges of discrimination have been dual filed with the EEOC and with one or more other agencies.

(d) *Notification of deferral.* The agency required to process a dual-filed complaint or charge under this section shall notify the complainant or charging party and the respondent that the complaint or charge was dual filed with one or more other agencies and that such other agencies have agreed to defer processing and will take no further action except as provided in § ____.10 or § ____.11, as applicable.

(e) *Exceptions.* When special circumstances make deferral as provided in this section inappropriate, the EEOC, and an agency with investigative authority under section 504, may jointly determine to reallocate investigative responsibilities. Special circumstances include, but are not limited to, cases in which the EEOC has already commenced its investigation at the time that the agency discovers that the complaint or charge is a dual-filed complaint or charge in which the complainant has elected section 504 processing, alleged discrimination in both employment and in other practices or services of the respondent, or alleged a pattern or practice of employment discrimination.

§ ____.9 Processing of complaints or charges of employment discrimination filed with a designated agency and either a section 504 agency, the EEOC, or both.

(a) *Designated agency processing.* A designated agency shall investigate and process a complaint that has been filed with it and with the EEOC, a section 504 agency, or both, when either of the following conditions is met:

(1) The designated agency determines that it has jurisdiction over the complaint under title II and that neither the EEOC nor a section 504 agency (other than the designated agency, if the designated agency is also a section 504 agency) has jurisdiction over the complaint; or

(2) The designated agency determines that it has jurisdiction over the complaint under section 504 and the complaint meets the requirements for processing by a section 504 agency set forth in § ____.8(a)(2).

(b) *Referral by a designated agency.* A designated agency that has jurisdiction over a complaint solely under title II (and not under section 504) shall forward a complaint that has been filed with it and with the EEOC, a section 504 agency, or both, to either the EEOC or to a section 504 agency, as follows:

(1) If the designated agency determines that the EEOC is the sole agency, other than the designated agency, with jurisdiction over the complaint, the designated agency shall forward the complaint to the EEOC for processing under title I; or

(2) If the designated agency determines that the section 504 agency is the sole agency, other than the designated agency, with jurisdiction over the complaint, the designated agency shall forward the complaint to the section 504 agency for processing under section 504; or

(3) If the designated agency determines that both the EEOC and a section 504 agency have jurisdiction over the complaint, the designated agency shall forward the complaint to the EEOC if it determines that the complaint solely alleges employment discrimination against an individual, or it shall forward the complaint to the section 504 agency if it determines that the complaint meets the requirements for processing by a section 504 agency set out in § ____.8(a)(2)(i) or (a)(2)(ii).

§ ____.10 Section 504 agency review of deferred complaints.

(a) *Deferral by the section 504 agency.* When a section 504 agency refers a complaint to the EEOC pursuant to § ____.6(c)(2) or when it is determined that, as between the EEOC and a section 504 agency, the EEOC is the agency that shall process a dual-filed complaint or charge under § ____.8(a)(1) or §.____.8(e), the section 504 agency shall defer further action until:

(1) The EEOC issues a no cause finding and a notice of right-to-sue pursuant to 29 CFR 1601.19; or

(2) The EEOC enters into a conciliation agreement; or

(3) The EEOC issues a cause finding and a notice of failure of conciliation pursuant to 29 CFR 1601.21, and:

(i) If the recipient is not a government, governmental agency, or political subdivision, the EEOC completes enforcement proceedings or issues a notice of right-to-sue in accordance with 29 CFR 1601.28; or

(ii) If the recipient is a government, governmental agency, or political subdivision, the EEOC refers the charge to the Civil Rights Division in accordance with 29 CFR 1601.29, and the Civil Rights Division completes enforcement proceedings or issues a notice of right-to-sue in accordance with 29 CFR 1601.28(d); or

(4) The EEOC or, when a case has been referred pursuant to 29 CFR 1601.29, the Civil Rights Division, otherwise resolves the charge.

(b) *Notification of the deferring agency.* The EEOC or the Civil Rights Division, as appropriate, shall notify the agency that has deferred processing of the charge upon resolution of any dual-filed complaint or charge.

(c) *Agency review.* After receipt of notification that the EEOC or the Civil Rights Division, as appropriate, has resolved the complaint or charge, the agency shall promptly determine what further action by the agency is warranted. In reaching that determination, the agency shall give due weight to the findings and conclusions of the EEOC and to those of the Civil Rights Division, as applicable. If the agency proposes to take an action inconsistent with the EEOC's or the Civil Rights Division's findings and conclusions as to whether a violation has occurred, the agency shall notify in writing the Assistant Attorney General, the Chairman of the EEOC, and the head of the EEOC office that processed the complaint. In the written notification, the agency shall state the action that it proposes to take and the basis of its decision to take such action.

(d) *Provision of information.* Upon written request, the EEOC or the Civil Rights Division shall provide the section 504 agency with any materials relating to its resolution of the charge, including its findings and conclusions, investigative reports and files, and any conciliation agreement.

§ ____.11 EEOC review of deferred charges.

(a) *Deferral by the EEOC.* When it is determined that a section 504 agency is the agency that shall process a dual-filed complaint or charge under § ____.8(a)(2) or § ____.8(e), the EEOC shall defer further action until the

section 504 agency takes one of the following actions:

(1) Makes a finding that a violation has not occurred;

(2) Enters into a voluntary compliance agreement;

(3) Following a finding that a violation has occurred, refers the complaint to the Civil Rights Division for judicial enforcement and the Civil Rights Division resolves the complaint;

(4) Following a finding that a violation has occurred, resolves the complaint through final administrative enforcement action; or

(5) Otherwise resolves the charge.

(b) *Notification of the EEOC.* The section 504 agency shall notify the EEOC upon resolution of any dual-filed complaint or charge.

(c) *Agency review.* After receipt of notification that the section 504 agency has resolved the complaint, the EEOC shall promptly determine what further action by the EEOC is warranted. In reaching that determination, the EEOC shall give due weight to the section 504 agency's findings and conclusions. If the EEOC proposes to take an action inconsistent with the section 504 agency's findings and conclusions as to whether a violation has occurred, the EEOC shall notify in writing the Assistant Attorney General, the Chairman of the EEOC, and the head of the section 504 agency that processed the complaint. In the written notification, the EEOC shall state the action that it proposes to take and the basis of its decision to take such action.

(d) *Provision of information.* Upon written request, the section 504 agency shall provide the EEOC with any materials relating to its resolution of the complaint, including its conclusions, investigative reports and files, and any voluntary compliance agreement.

§ ___.12 Standards.

In any investigation, compliance review, hearing or other proceeding, the standards used to determine whether section 504 has been violated in a complaint alleging employment discrimination shall be the standards applied under title I of the ADA and the provisions of sections 501 through 504, and 510, of the ADA, as such sections relate to employment. Section 504 agencies shall consider the regulations and appendix implementing title I of the ADA, set forth at 29 CFR part 1630, and case law arising under such regulations, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice.

§ ___.13 Agency specific memoranda of understanding.

When a section 504 agency amends its regulations to make them consistent with title I of the ADA, the EEOC and the individual section 504 agency may elect to enter into a memorandum of understanding providing for the investigation and processing of complaints dual filed under both section 504 and title I of the ADA by the section 504 agency.

Adoption of the Joint Final Rule

The agency-specific adoption of the joint final rule, which appears at the end of the joint preamble, appears below:

Title 28—Judicial Administration Department of Justice

28 CFR Part 37

List of Subjects in 28 CFR Part 37

Administrative practice and procedure, Individuals with disabilities, Equal employment opportunity, Intergovernmental relations.

Accordingly, title 28, chapter I of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, D.C. this 26th day of July, 1994.

For the Department:

Janet Reno,

Attorney General.

Part 37 is added to 28 CFR chapter I to read as set forth at the end of the joint preamble.

PART 37—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Sec.

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 29 U.S.C. 794 (d); 42 U.S.C. 12117(b); 28 CFR 0.50(l).

Title 29—Labor

Equal Employment Opportunity Commission

29 CFR Part 1640

List of Subjects in 29 CFR Part 1640

Administrative practice and procedure, Individuals with disabilities, Equal employment opportunity, Intergovernmental relations.

Accordingly, title 29, chapter XIV of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, DC this 27th day of June, 1994.

For the Commission:

Tony E. Gallegos,

Chairman.

Part 1640 is added to 29 CFR chapter XIV to read as set forth at the end of the joint preamble.

PART 1640—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Sec.

Authority: 5 U.S.C. 301; 29 U.S.C. 794(d); 42 U.S.C. 12117(b).

[FR Doc. 94–18935 Filed 8–3–94; 8:45 am]

BILLING CODE 4410–01–P, 6750–06–P