

# Rules and Regulations

Federal Register

Vol. 47, No. 152

Friday, August 6, 1982

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each month.

## OFFICE OF THE FEDERAL REGISTER

### 1 CFR Part 51

#### Approval Procedures for Incorporation by Reference

**AGENCY:** Office of the Federal Register.

**ACTION:** Final rule.

**SUMMARY:** Under the Freedom of Information Act, the Director of the Federal Register has the responsibility for approval of materials incorporated by reference into the Federal Register system. This document removes a requirement that all materials incorporated by reference be reviewed and resubmitted for approval annually. The change is made because the purpose of annual review largely has been accomplished. The document also clarifies certain longstanding policies and reorganizes and rewrites existing regulations.

**EFFECTIVE DATE:** August 6, 1982.

**FOR FURTHER INFORMATION CONTACT:** Rose Anne Lawson at (202) 523-4534.

**SUPPLEMENTARY INFORMATION:** The Federal Register Act of 1935 provides for "an official publication called the 'Federal Register' in which all rules and regulations (of a Federal agency) shall systemically and uniformly be published." Under that Act, Federal agencies are directed to publish in the Federal Register, and codify in the Code of Federal Regulations (CFR), regulations of general applicability and legal effect.

However, under certain limited circumstances, an agency may meet Federal Register publication requirements without publishing a regulation full text. In 1966, Congress passed the Freedom of Information Act (FOIA). That Act formally established incorporation by reference as a device that an agency may use to include

certain regulatory material in its regulations without publishing the material full text in the Federal Register. Through incorporation by reference, an agency may meet the publication requirements of the Federal Register Act and FOIA by referring to material published outside the Federal Register system. For valid incorporation under the Act, the material referenced must be reasonably available to the class of persons affected by it, and the Director of the Federal Register must approve the incorporation by reference.

Office of the Federal Register (OFR) regulations on incorporation by reference are in 1 CFR Part 51. In March 1979, the Director of the Federal Register amended those regulations by adding a new § 51.13 to require a thorough annual review of all materials then approved for incorporation by reference. The purpose of the annual review was to determine whether incorporated material was available to the public, on file with the OFR, and appropriate for continued incorporation by reference.

OFR now has the incorporated material on file and has reviewed it for appropriateness and availability. It has published documents notifying the public of the material the Director has approved. The purpose in conducting the annual review has been served. Therefore, OFR is removing § 51.13. This action will reduce a recurring burden on Federal agencies. Although this document ends annual review, each agency must comply with the terms of any conditions stated in previous annual approval letters.

In addition, the Office is clarifying its policy and procedures in response to problems of which it became aware in making an inventory of the incorporation by reference system.

Approval by the Director of the Federal Register of material proposed for incorporation by reference was mandated (5 U.S.C. 552(a)(1)(E)) to safeguard the Federal Register system. Thus, OFR regulations contain a provision that matter incorporated by reference must not detract from the legal and practical attributes of that system (see 1 CFR 51.1(c)). An implied presumption has been that material developed and published by a Federal agency is inappropriate for incorporation by reference by that agency, except in limited circumstances. Otherwise, the Federal Register and

Code of Federal Regulations could become a mere index to material published elsewhere. This would be destructive of the central publication system for Federal regulations envisioned by Congress when it enacted the Federal Register Act and the Administrative Procedure Act.

To avoid misunderstanding about the presumption against the appropriateness of agency produced material for incorporation by reference, in § 51.7(b) OFR is clarifying § 51.1 to make this long-maintained presumption explicit.

Another provision, § 51.11(a), adds a requirement that if an agency seeks approval for changes to a publication already approved for incorporation by reference, the agency must send a letter to the Director, notifying OFR of the change. This will facilitate updating of the list of material in the incorporation by reference system. The other Part 51 requirements for amendments remain the same.

Finally, the Office increases the time allotted for processing agency requests for approval of incorporation by reference from 10 days to 20 (see § 51.5(a)). An agency has been required to submit its request and accompanying documents to OFR at least 10 days before the agency submits its final rule for publication. During this period, the Office determines whether new material submitted is appropriate for inclusion in the incorporation by reference system, whether the material already is on file at OFR, and whether all other requirements of Part 51 have been met. It is during this period that any problems with the request must be resolved. Experience has shown that 10 days is insufficient time to process agency requests. Therefore, the Office increases the time allotted to 20 days.

The other amendments to Part 51 clarify and simplify existing requirements by joining related provisions and by eliminating unnecessary text.

Public comment on the new Part 51 is not required under 5 U.S.C. 553(b) since it deals with interpretation, general policy, and agency procedures. These amendments end the burden of the annual review. They also make explicit longstanding OFR policies. OFR has determined that Part 51 is not a major rule under E.O. 12291 and it does not have a significant economic impact on a substantial number of small entities

under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) Revised Part 51 becomes effective August 6, 1982. Since Part 51 deals principally with agency procedures and relieves burdens previously imposed on Federal agencies, the OFR has determined that the 30 day delay in effectiveness prescribed by 5 U.S.C. 553(d) is unnecessary.

**Distribution and Derivation Tables**

For clarity and convenience, OFR directs users to the following tables that identify previous Part 51 section numbers and show where these sections have been integrated into revised Part 51.

**DISTRIBUTION TABLE**

Old Part 51	New Part 51
51.1(a)	Unchanged.
51.1(b)	Revised. See 51.1(d).
51.1(c)	Revised. See 51.1(b); 51.7(b).
51.1(c)(1)	Revised. See 51.1(b)(2).
51.1(c)(2)	Revised. See 51.1(b)(1).
51.1(c)(3)	Revised. See 51.1(b)(3).
51.1(c)(4)	Revised. See 51.1(b)(4).
51.1(d)	Revised. See 51.1(c).
51.1(d)(1)	Clarified. See 51.1(c)(2).
51.1(d)(2)	Removed.
51.1(d)(3)	Revised. See 51.1(c)(1).
51.1(e)	Revised. See 51.1(c)(2).
51.2	Revised. See 51.5(a), (b).
51.3(a)	Revised. See 51.7(a), (a)(1), (a)(2), (a)(4); Clarified. See 51.7(c), (c)(1), (c)(2).
51.3(b)	Clarified. See 51.7(c).
51.3(b)	Removed.
51.4 (undesignated)	Revised. See 51.3(a).
51.4(a)	Revised. See 51.3(a)(1).
51.4(b)	Revised. See 51.7(a)(3).
51.4(c)	Revised. See 51.7(a)(4).
51.4(d)	Revised. See 51.3(a)(2).
51.5	Revised. See 51.3(a)(3); 51.5(a)(3); 51.11(a)(2).
51.6(a)	Revised. See 51.3(a)(2); 51.9(a); (b).
51.6(b)	Revised. See 51.3(a)(2); 51.9(a), (b).
51.7(a)	Removed.
51.7(b)	Revised. See 51.9(b)(2).
51.7(c)	Revised. See 51.9(b)(3).
51.8(a)	Revised. See 51.9(b)(4).
51.8(b)	Revised. See 51.9(b)(4).
51.8(c)	Revised. See 51.1(f); 51.11(a); (a)(1).
51.10(a)	Revised. See 51.5(a)(1).
51.10(b)	Revised. See 51.3(b).
51.10(c)	Unchanged. See 51.1(e).
51.11	Revised. See 51.9(c).
51.12	Revised. See 51.9(c).
51.13	Removed.

**DERIVATION TABLE—Continued**

New Part 51	Old Part 51
51.5(a)	51.1(e) revised.
51.5(a)(1)	51.10(a) revised.
51.5(a)(2)	51.4(d) revised.
51.5(a)(3)	51.5 revised.
51.5(b)	51.1(e) revised.
51.7(a)	51.2 revised.
51.7(a)(1)	51.2 revised.
51.7(a)(2)	51.2 revised.
51.7(a)(3)	51.4(b) revised.
51.7(a)(4)	51.2 revised; 51.4(c) clarified.
51.7(b)	51.1(c); 51.1(d)(3); 51.2 clarified.
51.7(c)(1)	51.1(a) clarified.
51.7(c)(2)	51.1(a) clarified.
51.9(a)	51.6(a); (b) revised.
51.9(b)	51.6(a) revised.
51.9(b)(1)	51.6(b) revised.
51.9(b)(2)	51.7(b) revised.
51.9(b)(3)	51.7(c) revised.
51.9(b)(4)	51.8(a); (b) revised.
51.9(b)(5)	51.6(b) clarified.
51.9(c)	51.12 revised; see also 1 CFR 18.12; 18.20.
51.11(a)	51.8(c) revised.
51.11(a)(1)	51.8(c) revised.
51.11(a)(2)	51.5 revised; 51.8(c) clarified.
51.11(a)(3)	Added.
51.11(b)	Added.

(3) The regulations of the Administrative Committee of the Federal Register under the Federal Register Act (1 CFR Ch. I); and  
 (4) The acts which require publication in the Federal Register (See CFR volume entitled "CFR Index and Finding Aids.")

(c) The Director will assume in carrying out the responsibilities for incorporation by reference that incorporation by reference—

(1) Is intended to benefit both the Federal Government and the members of the class affected; and

(2) Is not intended to detract from the legal or practical attributes of the system established by the Federal Register Act, the Administrative Procedure Act, the regulations of the Administrative Committee of the Federal Register, and the acts which require publication in the Federal Register.

(d) The Director will carry out the responsibilities by applying the standards of Part 51 fairly and uniformly.

(e) Publication in the Federal Register of a document containing an incorporation by reference does not of itself constitute an approval of the incorporation by reference by the Director.

(f) Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included.

**§ 51.3 When will the Director approve a publication?**

(a) The Director will approve the incorporation by reference of a publication when the following requirements are met:

- (1) The publication is eligible for incorporation by reference (See § 51.7).
- (2) The language of incorporation meets the requirements of this part (See § 51.9).

(3) The publication is on file with the Office of the Federal Register.

(4) The Director has received a written request from the agency to approve the incorporation by reference of the publication.

(b) The Director will notify the agency of the approval or disapproval of an incorporation by reference within 20 working days after the agency has met all the requirements for requesting approvals (See § 51.5).

**§ 51.5 How does an agency request approval?**

(a) Formal approval of a publication

**List of Subjects in 1 CFR Part 51**

Administrative practice and procedure, Incorporation by reference.

For the reasons set out in the preamble, Chapter II of Title 1 of the Code of Federal Regulations is amended as set forth below:

Part 51 is revised to read as follows:

**PART 51—INCORPORATION BY REFERENCE**

Sec.

51.1 Policy.

51.3 When will the Director approve a publication?

51.5 How does an agency request approval?

51.7 What publications are eligible?

51.9 What is the proper language of incorporation?

51.11 How does an agency change or remove an approved incorporation?

Authority: 5 U.S.C. 552(a).

**§ 51.1 Policy.**

(a) Section 552(a) of Title 5, United States Code, provides, in part, that "matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

(b) The Director will interpret and apply the language of section 552(a) together with other requirements which govern publication in the Federal Register and the Code of Federal Regulations. Those requirements which govern publication include—

(1) The Federal Register Act (44 U.S.C. 1501 et seq.)

(2) The Administrative Procedure Act (5 U.S.C. 551 et seq.);

for incorporation by reference applies to a final rule document. For timely approval by the Director of the Federal Register, the agency must—

(1) Make a written request for approval at least 20 working days before the agency intends to submit the final rule document for publication;

(2) Send with the written request a copy of the final rule document that uses the proper language of incorporation; and

(3) Ensure that a copy of the publication is on file at the Office of the Federal Register.

(b) Agencies may consult with the Office of the Federal Register at any time with respect to the requirements of this part.

#### § 51.7 What publications are eligible?

(a) A publication is eligible for incorporation by reference under 5 U.S.C. 552(a) if it—

(1) Conforms to the policy stated in § 51.1;

(2) Is published data, criteria, standards, specifications, techniques, illustrations, or similar material;

(3) Substantially reduces the volume of material published in the Federal Register; and

(4) Is reasonably available to and usable by the class of persons affected by the publication. In determining whether a publication is usable, the Director will consider—

(i) The completeness and ease of handling of the publication; and

(ii) Whether it is bound, numbered, and organized.

(b) The Director will assume that a publication produced by the same agency that is seeking its approval is inappropriate for incorporation by reference. A publication produced by the agency may be approved, if, in the judgment of the Director, it meets the requirements of paragraph (a) and possesses other unique or highly unusual qualities. A publication may be approved if it cannot be printed using the Federal Register/Code of Federal Regulations printing system.

(c) The following materials are not appropriate for incorporation by reference:

(1) Material published previously in the Federal Register.

(2) Material published in the *United States Code*.

#### § 51.9 What is the proper language of incorporation?

(a) The language incorporating a publication by reference shall be as precise and complete as possible and shall make it clear that the incorporation

by reference is intended and completed by the final rule document in which it appears.

(b) The language incorporating a publication by reference is precise and complete if it—

(1) Uses the words "incorporated by reference;"

(2) States the title, date, edition, author, publisher, and identification number of the publication;

(3) Informs the user that the incorporated publication is a requirement;

(4) Makes an official showing that the publication is in fact available by stating where and how copies may be examined and readily obtained with maximum convenience to the user; and

(5) Refers to 5 U.S.C. 552(a).

(c) If the Director approves a publication for incorporation by reference, the agency must—

(1) Include the following under the DATES caption of the preamble to the final rule document (See 1 CFR 18.12 *Preamble requirements*):

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of \_\_\_\_\_.

(2) Includes the term "incorporation by reference" in the list of index terms (See 1 CFR 18.20 *Identification of subjects in agency regulations*).

#### § 51.11 How does an agency change or remove an approved incorporation?

(a) An agency that seeks approval for a change to a publication that is approved for incorporation by reference must—

(1) Publish notice of the change in the Federal Register and amend the Code of Federal Regulations;

(2) Ensure that a copy of the amendment or revision is on file at the Office of the Federal Register; and

(3) Notify the Director of the Federal Register in writing that the change is being made.

(b) If a regulation containing an incorporation by reference fails to become effective or is removed from the Code of Federal Regulations, the agency must notify the Director of the Federal Register in writing of that fact within 5 working days of the occurrence.

Dated: August 3, 1982.

John E. Byrne,

Director of the Federal Register.

[FR Doc. 82-21305 Filed 8-5-82; 8:45 am]

BILLING CODE 1505-02-M

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 301

[Docket No. 82-330]

#### Mediterranean Fruit Fly

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule.

**SUMMARY:** The Mediterranean fruit fly quarantine and regulations quarantine California and impose restrictions on the movement of regulated articles from regulated areas in California. This document amends the quarantine and regulations by deleting portions of Santa Clara and Santa Cruz Counties from the list of regulated areas. The effect of this action is to delete restrictions on the interstate movement (movement from California into or through any other State, Territory, or District of the United States) of regulated articles from the areas removed from regulated area status. This action is warranted because such restrictions are no longer necessary for the purpose of preventing the artificial spread of the Mediterranean fruit fly.

**DATES:** Effect date of amendment August 6, 1982. Written comments concerning this rule must be received on or before October 4, 1982.

**ADDRESSES:** Written comments should be submitted to Thomas Lanier, Assistant Director, Regulatory Services Staff, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 643 Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Written comments received may be inspected at Room 641 of the Federal Building between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** B. Glen Lee, Emergency Programs Coordinator, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 610 Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8365.

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12291

This interim rule is issued in conformance with Executive Order 12291, and has been determined to be not a "major rule." Based on information compiled by the Department, it has been determined that this proposed rule

would have an annual effect on the economy of less than \$25,000; would not cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; and would not have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this rulemaking action, the Office of Management and Budget has waived the review process required by Executive Order 12291. Also, the Assistant Secretary for Marketing and Inspection Services has waived the requirements of Secretary's Memorandum 1512-1.

#### Certification Under the Regulatory Flexibility Act

Harry C. Mussman, Administrator of the Animal and Plant Health Inspection Service, has determined that this action will not have a significant economic impact on a substantial number of small entities. This action affects the interstate movement of regulated articles from a portion of Santa Clara and Santa Cruz Counties in California. There are thousands of small entities that move such articles interstate from California and many more thousands of small entities that move such articles interstate from other States. However, based on information compiled by the U.S. Department of Agriculture, it has been determined that fewer than 5 small entities move such articles interstate from the regulated areas being released by this document in Santa Clara and Santa Cruz Counties. Further, the overall economic impact from this action is estimated to be less than \$25,000.

#### Emergency Action

Harvey L. Ford, Deputy Administrator of the Animal and Plant Health Inspection Service for Plant Protection and Quarantine, has determined that an emergency situation exists which warrants publication of this document without opportunity for a public comment period because otherwise there would be unnecessary restrictions imposed on the interstate movement of certain articles. This situation requires immediate action to delete such unnecessary restrictions.

Therefore, pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that notice and other public procedure with respect to this final rule are impracticable and contrary to the public interest and good cause is found for

making this action effective less than 30 days after publication of this document in the Federal Register. Comments have been solicited for 60 days after publication of this document, and a final document discussing comments received and any changes required will be published in the Federal Register as soon as possible.

#### Background

Because of infestations of the Mediterranean fruit fly found in areas in California, the Mediterranean fruit fly quarantine and regulations were made effective on July 20, 1981 (46 FR 37708-37713), and amendments to the quarantine and regulations were made effective on August 7, August 19, September 2, 1981, and June 1, June 17, July 2, and July 6, 1982 (46 FR 40203-40205, 42072-42073, 44144-44145; 47 FR 23682-23683, 26121-26122, 29207-29209, and 28909-28911). The quarantine and regulations are set forth in 7 CFR 301.78 through 301.78-10.

For the purpose of preventing the artificial spread of the Mediterranean fruit fly to noninfested areas in the United States, the quarantine and regulations restrict the interstate movement (movement from California into or through any other State, Territory, or District of the United States) of articles designated as regulated articles from areas designated as regulated areas. The quarantine and regulations currently list as regulated areas all of San Mateo County and portions of San Joaquin and Santa Clara Counties. Prior to the effective date of this document, the quarantine and regulations also listed as regulated areas part of Santa Cruz County and a larger portion of Santa Clara County.

Based on trapping and sampling surveys conducted by inspectors of the U.S. Department of Agriculture and State agencies of California, it has now been determined that the Mediterranean fruit fly has been eradicated from Santa Clara and Santa Cruz Counties, except for the following portion of Santa Clara County:

*Santa Clara County.* That portion of the county beginning at a point where Interstate 280 intersects the San Mateo-Santa Clara County line; then southeasterly along Interstate 280 to its intersection with El Monte Avenue; then northeasterly along said Avenue to its intersection with Foothill Expressway; then southeasterly along said expressway to its intersection with Fremont Avenue; then east on Fremont Avenue to its intersection with Hollenbeck Avenue; then north on Hollenbeck Avenue to its intersection with El Camino Real; then southeasterly

on El Camino Real to its intersection with Fair Oaks Avenue; then northerly on said avenue to its intersection with Central Expressway; then easterly on said expressway to its intersection with Lawrence Expressway; then northerly on Lawrence Expressway to its intersection with State Route 237; then due north from said intersection along an imaginary line to its intersection with the Alameda-Santa Clara County line; then westerly along said county line to the San Mateo-Santa Clara County line; then southerly along said county line to the point of beginning.

Under these circumstances there is no longer a basis for imposing restrictions on the movement of articles from Santa Clara and Santa Cruz Counties, except for the portion of Santa Clara County described above. Therefore, in order to relieve unnecessary restrictions on the interstate movement of certain articles, it is necessary as an emergency measure to delete from the list of regulated areas the list regulated portion of Santa Cruz County and those regulated areas in Santa Clara County that are not included in the description set forth above.

Also, nonsubstantive changes are made in the description of the regulated area in San Joaquin County to improve clarity.

#### List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant pests, Plants (agriculture), Quarantine, Transportation.

#### PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, § 301.78-3(c) of the Mediterranean fruit fly quarantine and regulations (7 CFR 301.78-3(c)) is revised to read as follows:

##### § 301.78-3 Regulated areas.

(c) The areas described below are designated as regulated areas:

##### *California*

*San Joaquin County.* That portion of the county beginning at a point where Interstate 5 intersects the Calaveras River; then easterly along said river to its intersection with West Lane; then easterly from said intersection along an imaginary line to the intersection of Cherryland Road and Waterloo Road; then northeasterly along Waterloo Road to its intersection with Beyer Lane; then southerly along Beyer Lane to its intersection with the Stockton Terminal and Eastern Railroad; then easterly along said railroad to its intersection with Baldwin Lane; then southerly along said lane to its intersection with State Highway 26; then easterly along said highway to its intersection with Alpine Road; then southerly

along said road to its intersection with the Southern Pacific Railroad; then easterly along said railroad to an imaginary point due north of the intersection of Farmington Road and Kaiser Road; then due south from said point along an imaginary line to the intersection of Farmington Road and Kaiser Road; then southerly along Kaiser Road to its end; then south from the end of Kaiser Road along an imaginary line to its intersection with Lone Tree Creek; then westerly from said intersection along an imaginary line to the intersection of Union Road and Lovelace Road; then westerly along Lovelace Road to its intersection with Airport Way (Durham Ferry Road); then westerly from said intersection along an imaginary line to the intersection of Interstate 5 and Manila Road; then westerly along Manila Road to its end; then westerly from the end of Manila Road along an imaginary line to the beginning of Carlin Road; then westerly along Carlin road to its intersection with Roberts Road; then northerly along Roberts Road to its intersection with Mueller road; then due north from said intersection along an imaginary line to its intersection with the San Joaquin River; then northerly and easterly along said river to its intersection with the Smith Canal; then easterly along said Canal to its intersection with Interstate 5; then northerly along Interstate 5 to the point of beginning.

*San Mateo County.* The entire county.

*Santa Clara County.* That portion of the county beginning at a point where Interstate 280 intersects the San Mateo-Santa Clara County line; then southeasterly along Interstate 280 to its intersection with El Monte Avenue; then northeasterly along said avenue to its intersection with Foothill Expressway; then southeasterly along said expressway to its intersection with Fremont Avenue; then east on Fremont Avenue to its intersection with Hollenbeck Avenue; then north on Hollenbeck Avenue to its intersection with El Camino Real; then southeasterly on El Camino Real to its intersection with Fair Oaks Avenue; then northerly on said avenue to its intersection with Central Expressway; then easterly on said expressway to its intersection with Lawrence Expressway; then northerly on Lawrence Expressway to its intersection with State Route 237; then due north from said intersection along an imaginary line to its intersection with the Alameda-Santa Clara County line; then westerly along said county line to the San Mateo-Santa Clara County line; then southerly along said county line to the point of beginning.

(Secs. 8 and 9, 37 Stat. 318, as amended (7 U.S.C. 161, 162); 37 FR 28464, 28477, as amended; 38 FR 19141)

Done at Washington, D.C., this 3d day of August 1982.

**A. P. Ford,**

*Deputy Administrator, Plant Protection and Quarantine, Animal and Plant Health Inspection Service.*

[FR Doc. 82-21355 Filed 8-5-82; 8:45 am]

BILLING CODE 3410-34-M

## Soil Conservation Service

### 7 CFR Part 650

#### Support Activities: Compliance With NEPA

**AGENCY:** Soil Conservation Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** These rules codify Soil Conservation Service (SCS) policy for compliance with Executive Order 11990, Protection of Wetlands, in assistance programs administered by SCS. These rules are in accordance with U.S. Department of Agriculture Secretary's Memorandum No. 9500-2, Implementation of Executive Orders 11988, Floodplain Management, and 11990, Protection of Wetlands. The rule gives SCS additional flexibility over previous rules in providing technical assistance to alter wetlands when denial of assistance could lead to detrimental consequences on soil and water resources or on human welfare and safety.

**EFFECTIVE DATE:** August 6, 1982.

**FOR FURTHER INFORMATION CONTACT:** Thomas N. Shiflet, Director, Ecological Sciences, Soil Conservation Service, P.O. Box 2890, Washington, D.C. 20013, telephone (202) 447-2587.

**SUPPLEMENTARY INFORMATION:** On May 24, 1977, the President issued a comprehensive environmental message that included Executive Order (E.O. 11990, Protection of Wetlands.

To implement the President's Executive Order on Protection of Wetlands, SCS promulgated rules and regulations for wetland protection (44 FR 147, pages 44464-44467, July 30, 1979). Since that time, questions have arisen about policy interpretation and implementation, and concern has been expressed about conflicts between conserving wetlands and protection of other resources.

A review showed a need to provide a margin of flexibility with respect to SCS technical assistance for new construction in wetlands when denial of such assistance could lead to detrimental consequences on soil and water resources or on human welfare and safety. Based on this finding, new rules were proposed (46 FR 206, pages 52119-52121, October 26, 1981) for public review and comment. During the review period, SCS received 247 written comments on the proposed rules, most of which contained specific and detailed suggestions for improving them.

SCS evaluated the proposed rules in light of the comments received and their relation to E.O. 11990. SCS staff

analyzed each comment and developed recommendations for responding to them. There was no clear majority of comments in favor of or opposed to the proposed rules.

When SCS determined that comments raised valid issues, the rules were modified accordingly if E.O. 11990 supported modification. When reasons supporting the rules were stronger than those for challenging them, the rules were left unchanged. The full text of all comments received is on file and available for public inspection in room 6153, Agriculture South Building, USDA, SCS, Ecological Sciences, Washington, D.C. 20013.

The more significant comments, described section by section, and SCS responses to them are as follows:

#### Comments on § 650.26(a) Background

*Comment:* The value of wetlands is more appropriately recognized in technical publications than in a policy statement.

*Response:* SCS agrees. This section has been deleted in the final rules and replaced with a new section that states the purpose of the rules.

#### Comments on § 650.26(b) Applicability

*Comment 1:* The proposed rule continues to use the wetland classification system described in U.S. Fish and Wildlife Circular 39. Consideration should be given to using the new classification system proposed by Cowardin et al. in *Classification of Wetlands and Deepwater Habitats of the United States* (FWS/OBS-79/39).

*Response:* SCS has not adopted the new system, nor does it officially use the system for defining wetlands at present because (1) the system is not fully operational because the lists of hydric soils and hydrophytic vegetation are incomplete (these lists are used in conjunction with the definition of wetlands), and (2) SCS has identified several unresolved problems believed to be obstacles to successful use of the new system within the agency.

*Comment 2:* Objection was raised to exemption from these rules of projects under construction or to projects for which all funds have been appropriated through FY 1977. It was suggested that the rules apply to all projects because unaltered wetlands exist in some project areas that have been under construction for years.

*Response:* Exemption of projects for which all funds have been appropriated through FY 1977 or projects that were under construction before May 24, 1977, is consistent with Section 8 of Executive