issues. One such issue has been the question of the ability of employers to accurately measure formaldehyde emissions at the 0.1 ppm level. Petitioners have also urged OSHA to undertake additional rulemaking to reconsider the provisions of paragraph (m)(1)(i). Comments on this issue are also requested.

V. Public Participation

Interested persons are invited to submit written views and arguments as to whether the administrative stay petition (Exhibit 251–4, Docket H–225–C) should be granted and also whether the Agency should undertake additional rulemaking to reconsider the provisions of 29 CFR 1910.1048(m)(1)(i). These comments must be submitted in quadruplicate to the Docket Officer, Docket H–225–D, Room N–2634, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 and must be received in the Docket Office no later than November 29, 1988. All submissions will be available for public inspection and copying at the above address.

Authority and Signature

This document was prepared under the direction of John A. Pendergrass, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210.

This action is taken pursuant to sections 4(b), 6(b), and 8(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1593, 1597, 1599; 29 U.S.C. 653, 655, 657), Secretary of Labor's Order No. 9–83 (48 FR 35736) and 29 CFR Part 1911.

List of Subjects in 29 CFR Part 1910

Formaldehyde, Occupational Safety and Health, Chemicals, Cancer, Health, Risk assessment.

Signed at Washington, DC this 4th day of November 1988.

John A. Pendergrass,

Assistant Secretary of Labor.

Part 1910 of Title 29 of the Code of Federal Regulations is amended as set forth below:

PART 1910—[AMENDED]

1. The authority citation for Subpart Z of Part 1910 continues to read in part as follows:

Authority: Secs. 6, 8 Occupational Safety and Health Act, 29 U.S.C. 655, 657; Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736) as applicable; and 29 CFR Part 1911. Section 1910.1000, Tables Z–1, Z–2, and Z–3 also issued under 5 U.S.C. 553. * * * Section 1910.1048 also issued under 29 U.S.C. 653.

§ 1910.1048 [Amended]

2. By revising the language at the end of § 1910.1048 to read as follows:

(Approved by the Office of Management and Budget under Control Number 1218–0145)

[FR Doc. 88–25959 Filed 11–7–88; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 206

Revision of Gross Proceeds Definition in Oil and Gas Valuation Regulations

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: The Minerals Management Service (MMS) is amending the definition of "gross proceeds" in its recently adopted regulations governing the valuation for royalty purposes of oil and gas production from Federal and Indian leases (including leases on the Outer Continental Shelf) as the result of an adverse court decision. As amended, so-called "take-or-pay payments" no longer would be part of a lessee's gross proceeds. The MMS also is deleting the references to payments for advanced exploration or development costs and prepaid reserve payments in the "gross proceeds" definition.

The MMS also is amending Notice to Lessees of Federal Onshore Oil and Gas Leases Number 1 (NTL–1) and Notice to Lessees and Operators of Indian Oil and Gas Leases Number 1A (NTL–1A) to remove the requirement to pay royalties on take-or-pay payments. These notices to lessees and operators were effective from January 25, 1977, and April 5, 1977, respectively, to March 1, 1988.

EFFECTIVE DATES: Changes to 30 CFR Part 206—March 1, 1988; changes to NTL–1—January 25, 1977, and NTL–1A—April 5, 1977.

FOR FURTHER INFORMATION CONTACT: Dennis C. Whitcomb, Chief, Rules and Procedures Branch, (303) 231–3432, (FTS) 326–3432.

SUPPLEMENTARY INFORMATION: The principal author of this rulemaking is Charles Brook of the Royalty Valuation and Standards Division of the Royalty Management Program, MMS.

I. Background

On January 15, 1988, MMS published notices in the **Federal Register** (53 FR 1184 and 53 FR 1230) of final rulemaking governing the valuation, for royalty purposes, of oil and gas produced from Federal onshore and Outer Continental Shelf leases and from Indian Tribal and allotted leases. The rules amended previous valuation regulations and became effective March 1, 1988.

Under the definition of "gross proceeds" at 30 CFR 206.151, the new rules specifically included take-or-pay payments as part of "the total monies and other consideration accruing to an oil and gas lessee for the disposition of unprocessed gas, residue gas, or gas plant products." Accordingly, lessees were required to pay royalties on take-or-pay payments when those payments were received.

The Department of the Interior's (Department) position requiring royalties on take-or-pay payments predated the new rulemaking and represented a long-standing policy. While the rulemaking process was ongoing, the take-or-pay position was being challenged in two U.S. District Courts and resulted in conflicting decisions. In *Mesa Petroleum Company v. U.S. Department of Interior*, 647 F. Supp. 1350 (W.D. La., November 10, 1986), the U.S. District Court for the Western District of Louisiana determined that there is no statutory, regulatory, or contractual authority to collect royalties on take-or-pay payments. However, in *Diamond Shamrock Exploration Co. v. Donald P. Hodel, et al.* (E.D. La., Civil No. 86–0537, and consolidated cases, January 23, 1987), the U.S. District Court for the Eastern District of Louisiana agreed with the Department that take-or-pay payments are part of the lessee's gross proceeds for the disposition of production and thus are royalty-bearing at the time the take-or-pay payments are received.

The two District Court decisions were consolidated on appeal to the Court of Appeals for the Fifth Circuit (Nos. 87–3207, 87–3195, and 87–4069, respectively). On August 17, 1988, the Court ruled that "* * * royalty payments are not due on take-or-pay payments and are only due on gas actually produced and taken (i.e., so-called "make-up" gas)." In reaching its decision, the Court held that the Department's position of treating take-or-pay payments, when made, as part of the value on which royalty is due did not comport with either the intent of the governing statutes or the language of the relevant leases and regulations, which require that royalties are due only on the value of "production" saved, removed, or sold from the leased property. The Court adopted as the legal

definition of the word "production", as used in the context of calculating royalty payments, the actual physical severance of minerals from the formation. Accordingly, the Court concluded that "royalty payments are due only on the value of minerals actually produced, i.e., physically severed from the ground. No royalty is due on take-or-pay payments unless and until gas (namely, make-up gas) is actually produced and taken."

A. Take-or-Pay Requirement in Section 206.151

The Fifth Circuit's ruling therefore requires that MMS amend its regulations to remove the requirement to pay royalties on take-or-pay payments at the time the payment is made. Of course, royalties still are due when make-up gas is taken.

B. Advanced Payments

The definition of "gross proceeds" in § 206.151 of the recently adopted gas valuation rules also requires the following:

> Payments or credits for advanced exploration or development costs or prepaid reserve payments that are subject to recoupment through credits against the purchase price or through reduced prices in later sales and which are made before production commences become part of gross proceeds as of the time of first production.

The advanced payment program was initiated in 1970 and was designed to facilitate capital formation by producers to finance development and production of new gas supplies in order to help alleviate the existing natural gas shortage. The advanced payment program was governed successively by a series of five "advanced payment orders" issued by the Federal Power Commission (FPC) until the program's termination at the end of 1975. FPC Orders Nos. 410, 410-A, 441, 465, and 499 governed advances made pursuant to contracts entered into after October 1, 1970, through December 31, 1975.

The program was conditionally supported in *Public Service Commission, State of New York v. FPC*, 151 U.S. App. D.C. 307, 467 F.2d 361 (1972), as a "justifiable experiment in the continuing search for solutions to our nation's critical shortage of natural gas."

Under the requirements of the FPC advanced payment program, pipelines provided production capital in the form of pre-payments to producers (advanced payments) for future deliveries of natural gas. Producers were expected to seek advanced payments because the advances would provide them with a source of interest-free capital. It was anticipated that pipeline participation in the program would be assured since pipeline rates could reflect a return on qualifying advanced payments. Furthermore, pipeline participation was encouraged by the prospect of securing needed gas reserves for the future while transferring to the rate payer the added cost of making advanced payments for gas.

The "cost" to the pipeline of an advanced payment was the cost of financing the amount advanced, a factor principally determined by interest rates in the bond market. Current purchasers from the pipeline would shoulder, in the rates they paid, the "carrying charges" on these interest-free loans to producers.

In effectuating an advanced payment, the producer and the pipeline would enter into a contract specifying the amount advanced, the potential production committed, and the rate of reimbursement whether through delivery of production or other arrangements such as periodic payments. When production was about to commence, the producer and the pipeline would enter into a typical gas purchase contract which was separate from the advanced payment contract. In some cases the gas purchase contract would reflect terms governing the reimbursement associated with the advanced payment.

Qualifying advance payments had to be made prior to deliveries under an associted purchase contract. Substantial lag times were inevitable between the date of the advance and its full repayment in gas, especially if the advance were made to fund exploration or other pre-production producer expenditures. Advances had to be fully recovered within a "reasonable period of time following commencement of deliveries," and in any case "within a 5-year period * * *" following initial delivery.

Section 206.151 required that royalty be paid on the full amount of the advanced payment at the time when production first begins, when the amounts advanced become repayable in gas, because the payments become consideration for gas at that point. This requirement was analogous to the requirement to pay royalty when a take-or-pay payment was made, not when the make-up gas was produced, because the take-or-pay payment was part of the total consideration for all gas purchased under the contract when received. In view of the Fifth Circuit's ruling that royalty is not owed until make-up gas is actually produced and taken, it follows that no royalty is due on advanced payments until the specific gas which repays the advanced payment actually is produced. Therefore, MMS is removing the requirement from the rules. A similar advanced payment provision is being removed from the oil valuation rules, § 206.101.

C. Notice to Lessees—1 and 1A

For onshore Federal and Indian leases, a prior rule required royalties to be paid on take-or-pay payments. In 1977, following proposals and an opportunity to comment, the Department adopted Notice to Lessees and Operators of Federal Onshore Oil and Gas Leases (NTL-1, 42 FR 4546, January 25, 1977) and Notice to Lessees and Operators of Indian Oil and Gas Leases (NTL-1A, 42 FR 18135, April 5, 1977). Part III of both NTL-1 and NTL-1A provides:

> Payments made by a gas purchaser pursuant to a contractual "take-or-pay" clause are subject to royalty under the terms of the lease agreement.

Therefore, the Department by rule required royalty to be paid on take-or-pay payments for onshore Federal and Indian oil and gas leases as early as 1977. The Fifth Circuit's ruling thus requires that these rules also be amended so as to be consistent with the underlying statutes and lease terms.

NTL-1 and NTL-1A were terminated when the new product value rules became effective on March 1, 1988. Therefore, the rule change is being made for the 1977-1988 period so that the legally proper standard can be applied for audits, etc. which relate to the time period when the rules were effective.

The Department is continuing to review the Fifth Circuit's decision to determine whether any other regulations or royalty valuation policies are affected by the Court's ruling.

II. Final Rule Amendments

To be consistent with the Fifth Circuit Court of Appeals' decision regarding royalties on take-or-pay payments, MMS is amending its gas valuation regulations by revising the definition of "gross proceeds" in 30 CFR 206.151; the definition is amended by deleting the term "Take-or-pay payments" from the third sentence, and by deleting the following sentence from the definitions of "gross proceeds" in both §§ 206.101 and 206.151:

> Payments or credits for advanced exploration or development costs or prepaid reserve payments that are subject to recoupment through credits against the purchase price or through reduced prices in later sales and which are made before production commences become part of the gross proceeds as of the time of first production.

Today's changes to the regulations regarding take-or-pay payments and advanced payments are consistent with, and are the minimum necessitated by, the Fifth Circuit's recent decision. Until the Department completes its consideration as to whether or not additional alterations to regulations or royalty valuation policies are required or suggested by the Court's ruling, the product value regulations will be premised on the concept that royalty value cannot be less than the gross proceeds accruing to the lessee. The MMS, therefore, will carefully review all situations to ensure that lessees do not improperly attempt to use contractual devices to avoid royalties by denominating as take-or-pay or advance payments other consideration which is part of the gross proceeds for production.

The final oil and gas valuation regulations became effective March 1, 1988. Therefore, this final rule amendment is also effective March 1, 1988.

The MMS also is amending § 206.150 to reflect the amendment to NTL-1 and NTL-1A to remove the last paragraph of section III which requires the reporting and payment of royalties on take-or-pay payments. This modification is effective as of the date of issuance of NTL-1 and NTL-1A, respectively, and effective until March 1, 1988, the date of termination of the notices.

III. Procedural Matters

Administrative Procedure Act

The United States Court of Appeals for the Fifth Circuit has determined that, based on the underlying statutes and leases, the Department cannot require lessees to pay royalties on take-or-pay payments unless and until there is make-up gas production. The rule changes provided herein are necessary to make the Department's rules consistent with the court's decision. Accordingly, there is good cause to determine that notice and public comment are unnecessary.

Executive Order 12291 and the Regulatory Flexibility Act

The Department of Interior has determined that this document is not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This final rulemaking amends existing regulations to reflect a court decision that royalties are not due only until minerals actually are produced.

Paperwork Reduction Act of 1980

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act of 1969

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is not required.

List of Subjects in 30 CFR Part 206

Coal, Continental Shelf, Geothermal energy, Government contracts, Indian lands, Minerals royalties, Natural gas, Petroleum, Public lands-mineral resources, Reporting and recordkeeping requirements.

Date: October 12, 1988.

James E. Cason,

Deputy Assistant Secretary—Land and Minerals Management.

For the reasons set out in the preamble, 30 CFR Part 206, is amended as follows:

PART 206—PRODUCT VALUATION

1. The authority citation for Part 206 is revised to read as follows:

Authority: 25 U.S.C. 396 *et seq.*; 25 U.S.C. 396a *et seq.*; 25 U.S.C. 2101 *et seq.*; 30 U.S.C. 181 *et seq.*; 30 U.S.C. 351 *et seq.*; 30 U.S.C. 1001 *et seq.*; 30 U.S.C. 1701 *et seq.*; 31 U.S.C. 9701.; 43 U.S.C. 1301 *et seq.*; 43 U.S.C. 1331 *et seq.*; and 43 U.S.C. 1801 *et seq.*

2. The definition of "gross proceeds" in § 206.101 of Subpart C is amended by deleting the fifth sentence. The revised definition reads as follows:

§ 206.101 Definitions.

* * * * *

"Gross proceeds" (for royalty payment purposes) means the total monies and other consideration accruing to an oil and gas lessee for the disposition of the oil produced. Gross proceeds includes, but is not limited to, payments to the lessee for certain services such as dehydration, measurement, and/or gathering to the extent that the lessee is obligated to perform them at no cost to the Federal Government or Indian lessor. Gross proceeds, as applied to oil also includes, but is not limited to, reimbursements for harboring or terminaling fees. Tax reimbursements are part of the gross proceeds accruing to a lessee even though the Federal or Indian royalty interest may be exempt from taxation. Monies and other consideration, including the forms of consideration identified in this paragraph, to which a lessee is contractually or legally entitled but which it does not seek to collect through reasonable efforts are also part of gross proceeds.

* * * * *

3. Paragraphs (c)(1) and (e)(2) of § 206.150 of Subpart D are amended to reflect the amendment of Notice to Lessees and Operators of Federal Oil and Gas Leases Number 1 (NTL-1) and Notice to Lessees and Operators of Indian Oil and Gas Leases Number 1A (NTL-1A) to remove the requirement to pay royalties on take-or-pay payments during the effective periods of the notices. The revised paragraphs read as follows:

§ 206.150 Purpose and scope.

* * * * *

(e)(1) Notice to Lessees and Operators of Federal Onshore Oil and Gas Leases Number 1 (NTL-1) is amended as of January 25, 1977, the effective date of NTL-1, by deleting the last paragraph of section III. NTL-1 was terminated effective March 1, 1988.

(e)(2) Notice to Lessees and Operators of Indian Oil and Gas Leases Number 1A (NTL-1A) is amended as of April 5, 1977, the effective date of NTL-1A, by deleting the last paragraph of section III. NTL-1A was terminated effective March 1, 1988.

* * * * *

4. The definition of "gross proceeds" in § 206.151 of Subpart D is amended by deleting the term "take-or-pay payments" from the third sentence and by deleting the fifth sentence. The revised definition reads as follows:

§ 206.151 Definitions.

* * * * *

"Gross proceeds" (for royalty payment purposes) means the total monies and other consideration accruing to an oil and gas lessee for the disposition of unprocessed gas, residue gas, or gas plant products produced. Gross proceeds includes, but is not limited to, payments to the lessee for certain services such as compression, dehydration, measurement, and/or field gathering to the extent that the lessee is obligated to perform them at no cost to the Federal Government or Indian lessor, and payments for gas processing rights. Gross proceeds, as applied to gas, also includes but is not limited to reimbursements for severance taxes and other reimbursements. Tax reimbursements are part of the gross proceeds accruing to a lessee even

though the Federal or Indian royalty interest may be exempt from taxation. Monies and other consideration, including the forms of consideration identified in this paragraph, to which a lessee is contractually or legally entitled but which it does not seek to collect through reasonable efforts are also part of gross proceeds.

* * * * *

[FR Doc. 88-25800 Filed 11-7-88; 8:45 am]
BILLING CODE 4310-MR-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 95

[DoD Directive 1005.13]

Gifts From Foreign Governments

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This Part is issued to reflect revised General Services Administration (GSA) regulations concerning the acceptance of gifts from foreign governments and their limits of monetary value. In addition, this Part now conforms to current organizational arrangements within the Office of the Secretary of Defense.

EFFECTIVE DATE: October 13, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. R. Kennedy, Office of the Director for Administration and Management, Washington, DC 20301-1155, telephone (202) 697-1142.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 95

Foreign relations, DoD and Military Employees.

Accordingly, Title 32, Chapter I, is amended to add Part 95 as follows:

PART 95-GIFTS FROM FOREIGN GOVERNMENTS

Sec.

Authority: 10 U.S.C. 113.

§ 95.1 Purpose.

This Part:

(a) Updates policy governing the acceptance and retention of gifts from foreign governments.

(b) Implements DoD Directive 1005.13 and 5 U.S.C. 2105, 3109, and 7342 that allow Federal employees to accept certain gifts from foreign governments.

(c) Assigns responsibilities and prescribes procedures.

§ 95.2 Applicability.

This Part applies to:

(a) The Office of the Secretary of Defense (OSD); the Military Departments; the Joint Chiefs of Staff (JCS); the Joint Staff; the Unified and Specified Commands; and the Defense Agencies (hereafter referred to collectively as "DoD Components"). The term "Military Services," as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

(b) All DoD military and civilain personnel, their spouses (unless legally separated), and their dependents as defined in 26 U.S.C. 152 (hereafter called "employees").

§ 95.3 Definitions.

Employee. An employee of a DoD Component, as defined in 5 U.S.C. 2105; an expert or consultant under contract with a DoD Component, including any individual performing services for a DoD Component under 5 U.S.C. 3109 and members of the Military Services (including retired members and Reservists) regardless of duty status; the spouses of all such individuals (unless legally separated) and their dependents as defined in 26 U.S.C. 152.

Employing Component. The DoD Component in which the recipient is appointed, employed, or enlisted. If a recipient is a spouse or dependent of a serving individual, then the following Component is that in which the serving individual is appointed, employed, or enlisted.

(a) The Military Departments are considered the employing Components for all military and civilian personnel assigned to them. The Military Department also act as the employing Component for all personnel, military and civilian, either directly employed or assigned to the headquarters of Unified Commands.

(b) The OSD is considered the employing Component for its military and civilian personnel, the Joint Staff, the Defense Advanced Research Projects Agency (DARPA), the Defense Security Assistance Agency (DSAA), Strategic Defense Initiative Organization (SDIO), the DoD Field Activities, and other DoD activities not specifically designated an employing Component.

(c) The Defense Agencies (except DARPA, DSAA, and SDIO) are considered the employing Components for their civilian employees and for military members assigned to duty with them.

Foreign Government. Includes any unit of a foreign governmental authority, including any foreign national, state, local, and municipal government; any international or multinational organization whose membership is composed of any unit of foreign government; and any agent or representatives of any such unit or organization while acting as such.

Gift. Any tangible or intangible present by or received from a foreign government.

Minimal Value. A retail value in the United States at the time of acceptance not in excess of $180 or such amount specified by the Administrator of General Services under 5 U.S.C. 7342.

Responsible Accountable Official. The official designated by the employing Component to approve the annual report of foreign gifts.

Travel Expenses. Costs of transportation, food, and lodging incurred during the travel period.

§ 95.4 Policy.

No DoD employee may accept, request, or otherwise encourage the offer of a gift from a foreign government. Whenever possible, employees shall refuse accepance of gifts of any type or nature.

§ 95.5 Responsibilities.

(a) The *Director of Administration and Management, Office of the Secretary of Defense* (DA&M, OSD), shall:

(1) Develop policy and provide guidance to DoD employees regarding the acceptance and retention of gifts offered by foreign governments.

(2) Implement this Part for all OSD personnel as defined in paragraph (b) of definition *Employing Component*, § 95.3.

(b) The *Heads of DoD Components* shall designate an official who shall be responsbile for monitoring compliance with this Part and who shall:

(1) Establish procedures to ensure that employees are familiar with the requirements and restrictions governing acceptance of gifts from foreign governments under 5 U.S.C. 7342.

(2) Review cases in which there exists evidence of failure of any employee to comply with requirements, and establish disciplinary procedures.

(3) Report to the Attorney General, through the General Counsel of the Department of Defense (GC, DoD), when it is determined administratively that an employee who is the donee of a gift, or is the recipient of travel or travel