under § 1902.37(b). The Assistant Secretary's evaluation may include such other information on the application of the criteria and indices in § 1902.37 such as information developed from comments received from the public and the results of any hearings which may have been held under § 1902.40 concerning the proposed 18(e) determination.

§ 1902.37 Factors for determination.

(a) The Assistant Secretary shall determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§ 1902.3 and 1902.4 of this part.

(b) In determining whether a State has applied the criteria and indices of effectiveness in paragraph (a) of this section in actual operations, the Assistant Secretary will, among other things related to the application of the criteria and indices, consider whether:

(1) The State has a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan.

(2) The State has adhered to the procedures which it has adopted and which have been approved either under the State plan or in State plan changes or under any other procedures for approval authorized by the Assistant Secretary.

(3) The State has timely adopted all Federal standards, and amendments thereto, for issues covered under the plan or has timely developed and promulgated standards which are at least as effective as the comparable Federal standards and amendments thereto.

(4) If the State has adopted Federal standards, the State's interpretation and application of such standards have been consistent with the applicable Federal interpretation and application. Where the State has developed and promulgated its own standards, such standards have been interpreted and applied in a manner which is at least as effective as the interpretation and application of comparable Federal standards. This requirement acknowledges that State standards may have been approved by the Assistant Regional Director, but emphasizes the requirement that the standards are to be at least as effective as the comparable Federal standards in actual operations.

(5) If any State standard, whether it is an adopted Federal standard or a standard developed by a State, has been subject to administrative or judicial challenge, the State has taken the necessary administrative, judicial or legislative action to correct any deficiencies in its program resulting from such challenge.

(6) In granting permanent variances from a standard the State has assured that the employer provides conditions of employment which are as safe and healthful as those which would prevail if he complied with the standard.

(7) In granting temporary variances from a standard, the State has ensured that the recipient of the variance has come into compliance with the standard as early as possible.

(8) The State inspection program is being implemented in a manner which allows a sufficient allocation of resources to be directed toward target industries and target health hazards as designated by the State while providing adequate attention to all other workplaces covered under the plan, or any modification thereof.

(9) The State exercises the authority through appropriate means, to enforce its right of entry and inspection wherever such right of entry or inspection is refused.

(10) Inspections of workplaces are conducted by State inspectors in a competent manner, following approved enforcement procedures. This includes a requirement that the inspectors obtain adequate information to support any citations which may be issued.

(11) The State issues citations, proposed penalties and notices for failure to abate in a timely manner.

(12) The State proposes penalties in a manner at least as effective as under the Federal program, including the proposing of penalties for first instance violations and the consideration of factors comparable to those required to be considered under the Federal program.

(13) The State ensures the abatement of hazards for which a citation has been issued, including the issuance of notices of failure to abate and appropriate penalties.

(14) Wherever appropriate, the State agency has sought administrative and

judicial review of adverse adjudications. This factor also addresses whether the State has taken the appropriate and necessary administrative, legislative or judicial action to correct any deficiencies in its enforcement program resulting from an adverse administrative or judicial determination.

(15) Insofar as it is available, analysis of the annual occupational safety and health survey by the Bureau of Labor Statistics, as well as of other available Federal and State measurements of program impact on worker safety and health, which analysis also takes into consideration various local factors, indicates that trends in worker safety and health injury and illness rates under the State program compare favorably to those under the Federal program.

[40 FR 54782, Nov. 26, 1975; 40 FR 58143, Dec. 15, 1975]

PROCEDURES FOR 18(E) DETERMINATION

§ 1902.38 Evaluation of plan following certification.

(a) Following the publication in the FEDERAL REGISTER under § 1902.34 of the certification acknowledging the completion of all developmental steps specified in the plan, or any portion thereof, the Assistant Secretary will evaluate and monitor the actual operations under the State plan for at least 1 year before determining whether the State is eligible for an 18(e) determination. The evaluation will assess the actual operation of the State's fully implemented program in accordance with the criteria in § 1902.37 and take into account any information available to the Assistant Secretary affecting the State's program.

(b) The Assistant Regional Director shall prepare a semi–annual report of his evaluation of the actual operations under the State plan or any portion thereof in narrative form. The Assistant Regional Director's evaluation report will be transmitted to the Assistant Secretary who will then transmit the report to the State. The State shall be afforded an opportunity to respond to each evaluation report.

[40 FR 54782, Nov. 26, 1975, as amended at 42 FR 58746, Nov. 11, 1977]

§ 1902.39 Completion of evaluation.

(a) After evaluating the actual operations of the State plan, or any portion thereof, for at least 1 year following publication of the certification in the FEDERAL REGISTER under § 1902.34, the Assistant Secretary shall notify the State whenever he determines that the State will be eligible for an 18(e) determination. In addition, a State may request an 18(e) determination following the evaluation period noted above. In no case shall this determination of eligibility be later than 2 years following the publication of the certification of the completion of developmental steps in the FEDERAL REGISTER under § 1902.34. In the case of a plan which was not developmental, the determination of eligibility shall not be sooner than 3 years following the date of commencement of operations under the plan.

(b) After it has been determined that a State will be eligible for an 18(e) determination, the Assistant Regional Director shall prepare a final report of his evaluation of the actual operations under a State's plan or portion thereof which may be subject to the 18(e) determination. The Assistant Regional Director's report shall be transmitted to the Assistant Secretary. The Assistant Secretary shall transmit such report to the State and the State shall have an opportunity to respond to the report.

(c) Whenever it has been determined that a State's plan, or separable portion thereof, is eligible for an 18(e) determination, the Assistant Secretary shall publish a notice in the FEDERAL REGISTER. The notice shall meet the requirements of the remaining paragraphs of this section. No later than 10 days following the publication of the notice in the FEDERAL REGISTER, the affected State agency shall publish, or cause to be published, within the State, reasonable notice containing the same information.

(d) The notice shall indicate that the plan, or any separable portion thereof, is in issue before the Assistant Secretary for a determination as to whether the criteria in section 18(c) of the Act are being applied in actual operation, and indicate the particular substantive issues, if any, for consideration in making such determination.