

**§ 1902.38**

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.

Where a portion of a plan is in issue for such a determination, the notice shall specify such portions of the plan as well as those portions of the plan which are not in issue for the determination.

(e) The notice shall afford interested persons an opportunity to submit in writing, data, views, and arguments on the proposed 18(e) determination, and the affected State an opportunity to respond to such submissions.

(f) The notice shall also state that any interested person or the affected State may request an informal hearing concerning the proposed 18(e) determination whenever particularized written objections thereto are filed within 35 days following publication of the notice in the FEDERAL REGISTER.

(g) If the Assistant Secretary finds that substantial objections are filed which relate to the proposed 18(e) determination, the Assistant Secretary shall, and in any other case may, publish a notice of informal hearing in the FEDERAL REGISTER not later than 30 days after the last day for filing written views or comments. The notice shall include:

- (1) A statement of the time, place and nature of the proceeding;
- (2) A specification of the substantial issues which have been raised and on which an informal hearing has been requested;
- (3) The requirement for the filing of an intention to appear at the hearing, together with a statement of the position to be taken with regard to the issues specified, and of the evidence to be adduced in support of the position;
- (4) The designation of a presiding officer to conduct the hearing; and
- (5) Any other appropriate provisions with regard to the proceeding.

(h) Not later than 10 days following the publication of the notice in the FEDERAL REGISTER, required by paragraph (g) of this section, the affected agency shall publish, or cause to be published, within the State reasonable notice containing the same information.

EFFECTIVE DATE NOTE: At 43 FR 11196, Mar. 17, 1978, §1902.39(a) was suspended indefinitely, effective January 20, 1978.

#### § 1902.40 Informal hearing.

(a) Any hearing conducted under this section shall be legislative in type. However, fairness may require an opportunity for cross-examination on pertinent issues. The presiding officer is empowered to permit cross-examination under such circumstances. The essential intent is to provide an opportunity for participation and comment by interested persons which can be carried out expeditiously and without rigid procedures which might unduly impede or protract the 18(e) determination process.

(b) Although the hearing shall be informal and legislative in type, this section is intended to provide more than the bare essentials of informal proceedings under 5 U.S.C. 553. The additional requirements are the following:

(1) The presiding officer shall be a hearing examiner appointed under 5 U.S.C. 3105.

(2) The presiding officer shall provide an opportunity for cross-examination on pertinent issues.

(3) The hearing shall be reported verbatim, and a transcript shall be available to any interested person on such terms as the presiding officer may provide.

(c) The officer presiding at a hearing shall have all the power necessary or appropriate to conduct a fair and full hearing, including the powers:

(1) To regulate the course of the proceedings;

(2) To dispose of procedural requests, objections, and comparable matters;

(3) To confine the presentation to the issues specified in the notice of hearing, or, where appropriate, to matters pertinent to the issue before the Assistant Secretary;

(4) To regulate the conduct of those present at the hearing by appropriate means;

(5) To take official notice of material facts not appearing in the evidence in the record, as long as the parties are afforded an opportunity to show evidence to the contrary;

(6) In his discretion, to keep the record open for a reasonable and specified time to receive additional written recommendations with supporting reasons and any additional data, views,