PRACTICE ADVISORY[1]
November 1, 2012

By The Legal Action Center[2]

Challenging *Matter of E-R-M-F- & A-S-M-*: Warrantless Arrests and the Timing of Right to Counsel Advisals

By regulation, certain noncitizens arrested without a warrant must be provided with advisals regarding their rights following arrest. 8 C.F.R. § 287.3(c).[3] Individuals must be informed of the reasons for their arrest and their right to representation at no expense to the government. In addition, the examining officer must tell individuals that anything they say may be used against them in subsequent proceedings and must provide them with a list of free legal service providers.

In *Matter of E-R-M-F- & A-S-M-*, the Board of Immigration Appeals (BIA or Board) severely undermined the protections provided by § 287.3(c). The BIA held that immigration officers are required to provide § 287.3(c) advisals only after an individual arrested without a warrant is placed in formal proceedings by the filing of a Notice to Appear (Form I-862) (NTA) with the immigration court.[4] Thus, according to the Board, the advisals need not be given prior to a post-arrest examination.

There are compelling arguments that *E-R-M-F-* was wrongly decided. This practice advisory highlights the flaws in the BIA's decision and suggests strategies for challenging the BIA's reading of § 287.3(c) and moving to suppress any evidence obtained after a warrantless arrest but prior to receiving the required advisals. The American Immigration Council's Legal Action Center is participating as *amicus curiae* in the appeal of *E-R-M-F-* currently pending before the Ninth Circuit Court of Appeals. The LAC is interested in hearing about other ongoing cases involving the timing of the 8 C.F.R. § 287.3(c) advisals. Please contact the LAC at clearinghouse@immcouncil.org if you have such a case.

1. What Were the Facts and Holding of *Matter of E-R-M-F- & A-S-M-*?

In *Matter of E-R-M-F- & A-S-M-*, the respondent, a lawful permanent resident, was arrested after applying for admission at the border.[5] He was referred to secondary inspection and questioned by immigration officials. An NTA was issued on the day of his arrest, but was not filed with the

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[3] The full text of 8 C.F.R. § 287.3 is attached as an appendix.

[4] *See* 25 I. & N. Dec. 580, 584–85 (BIA 2011).

[5] *Matter of E-R-M-F- & A-S-M-* originally included another respondent. However, proceedings against her were terminated, and DHS withdrew its appeal of the termination prior to the BIA decision. *See* 25 I. & N. Dec. at 582.

immigration court until more than a month later. The record did not indicate that respondent was provided with 8 C.F.R. § 287.3(c) advisals before or during his post-arrest examination. As a result, the respondent sought to prevent the use of statements obtained during the examination in his removal proceedings.[6]

The BIA held that because immigration officers are not required to provide 8 C.F.R. § 287.3(c) advisals until after an NTA is filed, the statements could be admitted. The Board reasoned that the plain language of § 287.3(c) – namely, the phrase "placed in formal proceedings"[7] – determined not only who would receive advisals but also the timing of the advisals. Further, the Board found that the regulation's history supported its reading.[8] The BIA also relied upon *Samayoa-Martinez v. Holder*, a 2009 decision in which the Ninth Circuit reached the same conclusion regarding the timing of the advisals in § 287.3(c).[9]

2. Why Was *Matter of E-R-M-F- & A-S-M-* Wrongly Decided?

The BIA misinterpreted the plain language, history, and purpose of 8 C.F.R. § 287.3(c).

A. The Board's Decision Relied on One Phrase of § 287.3(c) in Isolation.

Although the BIA stated that it had relied on the plain language of the regulation, its analysis is limited to just one phrase in one sentence of § 287.3(c): "placed in formal proceedings." Yet that phrase does not expressly reference *when* the advisals must occur. A reading of the regulation as a whole makes clear that the phrase "placed in removal proceedings" defines *who* receives advisals and not *when* those warnings take place.

Further, the BIA mischaracterized why the phrase was added to § 287.3(c). While the Board stated that the 1997 amendments to the regulation, which added "placed in formal proceedings," "change[d] the timing of the required advisals,"[10] there is no indication that that is what the Department of Justice (DOJ) intended. Rather, according to the DOJ, the amendments to

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[6] Evidence may be suppressed where it was obtained in violation of a regulation that was intended to benefit noncitizens if the violation prejudiced interests of a noncitizen who should have been protected by the regulation. *See Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 327–29 (BIA 1980).

[7] 25 I. & N. Dec. at 583–84.

[8] The Board found that older versions of § 287.3(c) initially made no mention of formal proceedings and later directed that advisals be given "[a]fter the examining officer has determined that formal proceedings . . . will be instituted." *See Matter of E-R-M-F- & A-S-M-*, 25 I. & N. Dec. at 584 (quoting 8 C.F.R. § 287.3 (1980)); *see also* 32 Fed. Reg. 6,260, 6,260 (Apr. 21, 1967); 44 Fed. Reg. 4,651, 4,564 (Jan. 23, 1979). In 1997, language referring to citizens "placed in formal proceedings" was added. *See Matter of E-R-M-F- & A-S-M-*, 25 I. & N. Dec. at 584 (citing 62 Fed. Reg. 10,312, 10,390 (Mar. 6, 1997)).

[9] 558 F.3d 897, 901–02 (9th Cir. 2009).

[10] *Matter of E-R-M-F- & A-S-M-*, 25 I. & N. Dec. at 584.

§ 287.3(c) were meant to clarify the procedures that apply to individuals "placed in formal proceedings," by contrast with individuals subject to expedited removal.[11]

The BIA's stated reliance on plain language also is belied by federal court decisions which read § 287.3(c) in a contradictory manner. *E-R-M-F-* relied upon the Ninth Circuit's holding in *Samayoa*, but did not mention that two other courts of appeals previously assumed that advisals must take place prior to questioning. In *Singh v. Mukasey*, the Second Circuit reversed the denial of a motion to suppress, relying on factors including an apparent failure to provide § 287.3(c) advisals at the time of a custodial interrogation.[12] Likewise, also in the context of a motion to suppress, the Eighth Circuit assumed that § 287.3(c) advisals must be provided at the time of custodial interviews following warrantless arrests.[13]

B. The Board's Decision Ignored Relevant Language in the Remainder of § 287.3(c).

By focusing solely on the phrase "placed in formal proceedings," the Board disregarded language in § 287.3(c) that is rendered illogical if examining officers are not required to give the advisals until after the filing of an NTA with the immigration court. Specifically, the following provisions in § 287.3(c) make it clear that the advisals must be provided prior to a post-arrest examination:

- The regulation requires notification of "the reason for [a noncitizen's] arrest," thus suggesting some proximity between the time of the arrest and the notification. Yet, weeks or months could pass before the NTA is filed and the person is notified of the reason for the arrest.[14]

- The regulation specifies that the "examining officer" must provide certain advisals. However, under *E-R-M-F-* the advisals need not be provided until long after the examining officer's involvement in the case has ended. In fact, the noncitizen might not receive the advisals until he or she has been transferred to another location or released from custody.

- Section 287.3(c) requires immigration officials to tell noncitizens that their statements may be used against them in "a subsequent proceeding." However, once proceedings have been initiated, they are by definition *not* subsequent.

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[11] *See* 62 Fed. Reg. 444, 452 (Jan. 3, 1997).

[12] The court noted that the administrative record did not clearly establish that the respondent had received § 287.3(c) advisals and that an immigration officer "could not specifically remember anyone informing [the respondent] of his rights, at least not until after a 'few hours had already gone by.'" *Singh v. Mukasey*, 553 F.3d 207, 215–16 (2d Cir. 2009).

[13] *Puc-Ruiz v. Holder*, 629 F.3d 771, 781 (8th Cir. 2010). The *Puc-Ruiz* court ultimately upheld the denial of the noncitizen's motion to suppress for lack of prejudice. *Id.*

[14] 8 C.F.R. § 287.8(c)(2)(iii) also requires that noncitizens be provided with the reason for their arrest, at the time of their arrest, but only if it is "practical and safe to do so." Thus, the § 287.3(c) advisals may be the first time a person learns of the reason for his or her arrest.

C. The Board's Reading of § 287.3(c) Does Not Further the Purpose of the Regulation.

Additionally, the Board in *E-R-M-F-* stakes out a position at odds with the apparent purpose of 8 C.F.R. § 287.3(c). The Department of Justice adopted the advisal requirement less than one year after the Supreme Court decided *Miranda v. Arizona*.[15] While the Department of Justice did not expressly state its purpose in doing so, the timing suggests that it intended to notify arrestees of their rights[16] and to ensure the admissibility of evidence obtained following such notifications. The Board's interpretation of the regulation does not further these goals. If the advisals were given prior to examination, they could assist immigration courts in determining the admissibility of certain confessions alleged by respondents to be coerced or involuntary.[17] Under the timing outlined by *E-R-M-F-*, however, § 287.3(c) would be irrelevant to such assessments. In fact, it is unclear what purpose the regulation serves if the BIA's decision stands.

3. How Can Attorneys Challenge the Failure to Provide 8 C.F.R. § 287.3(c) Advisals Prior to Examination?

Although the BIA stated in *Matter of E-R-M-F- & A-S-M-* that § 287.3(c) advisals are not required before the initiation of formal removal proceedings, it is important to preserve the claim that the immigration officer failed to provide advisals prior to examination. Should a respondent fail to raise a claim or object to the admissibility of evidence in immigration court, the BIA may find that the claim has been waived.[18] Further, failure to exhaust administrative remedies will bar federal court review,[19] including review of claims related to improper use of evidence that were not properly raised before the BIA.[20]

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[15] *Compare Miranda v. Arizona*, 384 U.S. 436 (1966) (decided June 13, 1966), *with* 32 Fed. Reg. 6,260, 6,260 (Apr. 21, 1967).

[16] *See, e.g.*, 8 C.F.R. § 292.5(b) (right to counsel); *see also Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006) ("By regulation, [noncitizens do] have a right to be represented by counsel at examinations by immigration officers . . . . "); *Matter of Sandoval*, 17 I. & N. Dec. 70, 83 n.23 (BIA 1979) (recognizing "the inadmissibility of evidence obtained in violation of a respondent's privilege against self-incrimination") (citation omitted); *infra*, Question 6.

[17] *See, e.g.*, *Navia-Duran v. INS*, 568 F.2d 803, 810 (1st Cir. 1977) ("If the INS had complied with [§ 287.3(c)] . . . [then] the atmosphere of coercion would have vanished . . . ."); *Matter of Garcia-Flores*, 17 I. & N. Dec. at 327 ("[T]he failure to comply with [§ 287.3(c)] . . . would be relevant in assessing any question of voluntariness.").

[18] *See, e.g., Torres de la Cruz v. Maurer*, 483 F.3d 1013, 1022 (10th Cir. 2007) ("The BIA has held that matters not raised before an IJ are not preserved on appeal." (citations omitted)); *Matter of J-Y-C-*, 24 I. & N. Dec. 260, 261 n.1 (BIA 2007) (finding that, because a claim was not raised before the immigration court, "it is not appropriate for [the BIA] to consider it for the first time on appeal"); *Matter of Edwards*, 20 I. & N. Dec. 191, 196 n.4 (BIA 1990) (noting that it is not proper to object to the admissibility of evidence before the BIA where the respondent did not do so before the immigration court).

[19] INA § 242(d)(1) ("A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right . . . .").

[20] *See, e.g.*, *Castro v. Att'y Gen. of the U.S.*, 671 F.3d 356, 365 (3d Cir. 2012) (noting that the court lacks jurisdiction to consider claim that evidence was improperly admitted where the issue

In order to object to the admission of evidence or statements obtained in the absence of § 287.3(c) advisals, attorneys may wish to file a motion to suppress based on the violation of 8 C.F.R. § 287.3(c), and, within 30 days of a denial of an order of removal, a Notice of Appeal to the BIA. For a more information on motions to suppress, see AIC's Motions to Suppress in Removal Proceedings: A General Overview Practice Advisory.[21] The BIA's decision may be challenged in the court of appeals through a Petition for Review (PFR). For a detailed discussion of how to file a PFR, see the LAC's How to File a Petition for Review Practice Advisory.

4. How Should You Frame Your Arguments in a Petition for Review?

Although courts give substantial deference to the BIA's interpretations of the agency's immigration regulations,[22] deference is not warranted when the language of a regulation is unambiguous.[23] Deference also is not merited for interpretations of even ambiguously worded regulations where the agency's interpretation is not reasonable.[24] Noncitizens may argue that

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was not raised before the IJ or the BIA); *Melnitsenko v. Mukasey*, 517 F.3d 42, 47 (2d Cir. 2007) (declining to review argument that evidence should be suppressed due to widespread Fourth Amendment violations where respondent had only argued egregious violations before the BIA); *Ramani v. Ashcroft*, 378 F.3d 554, 558–59 (6th Cir. 2004) (holding that the court lacks jurisdiction to consider claim that an IJ improperly relied on evidence not admitted into the record because petitioner failed to raise the claim before the BIA); *see also Matul-Hernandez v. Holder*, 685 F.3d 707, 713 (8th Cir. 2012) ("We have consistently held that we may not consider an issue that a petitioner has failed to raise before the BIA."); *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) ("To satisfy § 1252(d)(1), an alien must present the *same specific legal theory* to the BIA before he or she may advance it in court."); *Zeqiri v. Mukasey*, 529 F.3d 364, 369 (7th Cir. 2008) ("Courts have almost universally interpreted § 1252(d)(1) to require that specific legal issues be presented to the Board for its consideration."). Several courts of appeals have held that the exhaustion requirement does not have equitable exceptions, especially in light of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), but a discussion of these issues is beyond the scope of this practice advisory.

[21] The majority of the practice advisory discusses issues related to motions to suppress evidence based on violations of the Fourth Amendment or the Due Process Clause of the Fifth Amendment, but see pages 9 – 10 for information regarding motions to suppress based on regulatory violations and pages 25 – 28 for general information about how to file motions to suppress.

[22] *See, e.g.*, *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1011 (9th Cir. 2006); *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 178 (2d Cir. 2006); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (finding that an agency interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotations and citations omitted).

[23] *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Restrepo v. McElroy*, 369 F.3d 627, 638–39 n.19 (2d Cir. 2004).

[24] *See Auer*, 519 U.S. at 461 (agency is not owed deference where interpretation is "plainly erroneous or inconsistent with the regulation") (internal citations and quotation omitted); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150–51 (1991) (agency

courts should not defer to the BIA's interpretation of 8 C.F.R. § 287.3(c) in *E-R-M-F-* because it is contrary to the plain language, purpose, and context of the regulation and in the alternative, is unreasonable. The discussion above ("Why Was *Matter of E-R-M-F- & A-S-M-* Wrongly Decided?") can be used to support these arguments.

5. Will These Arguments Apply to Interrogations at Ports of Entry?

The arguments set forth above apply where there has been a warrantless *arrest*. However, these arguments are complicated by other immigration regulations and by recent case law, especially in the Ninth Circuit, when a warrantless arrest takes place at a port of entry.

8 C.F.R. 292.5(b) affords noncitizens the right to counsel in immigration examinations but states that the regulation will not "be construed to provide any applicant for admission in either primary or secondary inspection the right to representation…." In a recent decision, *Gonzaga-Ortega v. Holder*, the Ninth Circuit relied on this language to conclude that a petitioner did not have a right to counsel at secondary inspection and thus that the inspecting officer did not violate § 292.5 by obtaining a statement without providing the petitioner access to an attorney.[25]

However, neither § 292.5 nor the *Gonzaga-Ortega* court addresses § 287.3(c) – providing for *notice of* the right to counsel, as opposed to the right to counsel itself.[26] Furthermore, for port of entry cases, it is important to note the potential distinction between secondary inspection and warrantless arrest. The Ninth Circuit has found that individuals may be placed under warrantless arrest after referral to secondary inspection but prior to making statements to immigration officials.[27] Thus, in challenging the failure to provide § 287.3(c) advisals, it is important to assert that the noncitizen was under warrantless arrest, and not merely in secondary inspection, at the time of making any inculpatory statements.[28] Attorneys with cases involving failure to provide

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interpretation is owed deference "so long as it is reasonable") (internal quotations and citations omitted).

[25] 2012 U.S. App. LEXIS 19329, at *8, *17 (9th Cir. Sept. 14, 2012). Note that not all courts of appeals have addressed these issues and that petitioners may wish to argue for a different interpretation of § 292.5(b) outside of the Ninth Circuit.

[26] Confusingly, a recent Third Circuit decision, *Oliva-Ramos v. Att'y Gen. of the U.S.*, appears to have conflated these two regulations. The court echoes the Board's reasoning in *E-R-M-F-* regarding the timing of § 287.3(c) advisals, but applies the argument in the context of analyzing whether ICE officers violated § 292.5(b). 2012 U.S. App. LEXIS 19219, *75–*77 (3d Cir. Oct. 13, 2012). Further, the court expressly notes that the petitioner had failed to appeal his § 287.3(c) claims. *Id*. at *77 n.28.

[27] *De Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047, 1051 (9th Cir. 2008). Although the Board indicated in *E-R-M-F-* that referral to secondary does not *always* constitute an arrest, *see* 25 I. & N. Dec. 580, 585 n.5, the Board did not suggest that immigration officers *never* make warrantless arrests of individuals referred to secondary inspection. The *Gonzaga-Ortega* court did not address the issue of warrantless arrest.

[28] Respondents may support this assertion with evidence regarding whether a "reasonable person would have believed he was . . . free to leave" at the time of interrogation. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The Mendenhall standard is reflected in agency

§ 287.3(c) advisals at ports of entry may contact the LAC at clearinghouse@immcouncil.org with questions about how to address secondary inspection issues.

6. Regardless of the BIA's Holding, Do Noncitizens Have a Right to Be Accompanied by a Legal Representative During Examinations and Interviews by Federal Immigration Officials?

Matter of E-R-M-F- & A-S-M- addressed the right to receive *notice* of certain rights, but did not address the underlying rights themselves. Other legal authorities, however, do address the right to counsel. Specifically, the Administrative Procedure Act (APA) provides the right to counsel when individuals are "compelled to appear" before an agency or its representative,[29] which should include post-arrest examination by immigration officials.[30] DHS regulations also provide the right to counsel in immigration examinations.[31] Violation of agency regulations can serve as the basis for a motion to suppress evidence or termination of removal proceedings.[32]

Finally, the right to counsel is protected by the Due Process Clause of the Fifth Amendment. Involuntary or coerced statements may be suppressed in immigration proceedings if violations of due process occurred in the course of obtaining them.[33] If an immigration officer interferes with an individual's attempt to confer with counsel after arrest, it may provide evidence of coercion and thus render subsequent statements inadmissible.[34] Thus, regardless of the holding in

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regulations stating that an arrest has *not* occurred "as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away." 8 C.F.R. § 287.8(b)(1). *See also De Rodriguez-Echeverria*, 534 F.3d at 1051 (finding that an individual detained by immigration officials "in a locked room overnight and made to remove her shoes and belt" was under arrest).

[29] 5 U.S.C. § 555(b).

[30] Although the hearing provisions of the APA – Sections 5, 7 and 8 – do not apply to removal proceedings, *see Marcello v. Bonds*, 349 U.S. 302, 306-07, 310 (1955) (holding that the INA superseded hearing provisions of the APA), 5 U.S.C. § 555(b) is in Section 6 of the APA.

[31] *See* 8 C.F.R. § 292.5(b). Significantly, however, the regulation indicates that there is no right to counsel at primary or secondary inspection. *See supra*, Question 5. Further, Legacy INS had internal guidance providing for access to counsel in post-arrest examinations. *See* INS Examinations Handbook (1988) at I-75, I-76. It is unclear whether ICE still deems this guidance binding.

[32] *See Matter of Garcia-Flores*, 17 I. & N. Dec. at 327–29 (holding suppression of evidence or termination of proceedings to be appropriate remedies for regulatory violations). *See also* AIC's Motions to Suppress in Removal Proceedings: A General Overview Practice Advisory, at 9–10.

[33] *See, e.g., Navia-Duran v. INS*, 568 F.2d 803, 810–11 (1st Cir.1977); *Bong Youn Choy v. Barber*, 279 F.2d 642, 647 (9th Cir.1960) (excluding a statement "not voluntarily given" as a violation of due process). *See also* AIC's Motions to Suppress in Removal Proceedings: A General Overview Practice Advisory, at 21–24.

[34] *See, e.g., Lopez-Gabriel v. Holder*, 653 F.3d 683, 687 (8th Cir. 2011) (stating "interference with [the] right to counsel" is an "indicia of coercion" that may suggest statements were made involuntarily); *Matter of Garcia*, 17 I. & N. Dec. 319, 320–21 (BIA 1980) (terminating

E-R-M-F-, if a noncitizen affirmatively requests access to counsel in a post-arrest examination and such request is denied, he or she may be able to challenge the admissibility of statements made during the examination.[35]

proceedings where evidence was obtained after respondent's requests to contact counsel were ignored).

[35] *See, e.g.*, *Matter of Garcia*, 17 I. & N. Dec. at 320; *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (BIA 1980) (noting that "interference with any attempt by the respondent to exercise his rights" could be evidence of coercion in a motion to suppress evidence).

APPENDIX

8 C.F.R. § 287.3 Disposition of cases of aliens arrested without warrant.

(a) *Examination.* An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Act will be examined by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him or her, may examine the alien.

(b) *Determination of proceedings.* If the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry in accordance with 8 CFR parts 235, 239, or 240, order the alien removed as provided for in section 235(b)(1) of the Act and §235.3(b) of this chapter, or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case.

(c) *Notifications and information.* Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized under §292.2 of this chapter or 8 CFR 1292.2 that are located in the district where the hearing will be held. The examining officer shall note on Form I–862 that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

(d) *Custody procedures.* Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.

[62 FR 10390, Mar. 6, 1997, as amended at 66 FR 48335, Sept. 20, 2001; 68 FR 35276, June 13, 2003]