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2–9–06 Thursday
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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.

2. The relationship between the Federal Register and Code of Federal Regulations.

3. The important elements of typical Federal Register documents.

4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, March 14, 2006
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Presidential Documents

Title 3—

The President

Proclamation 7980 of February 6, 2006

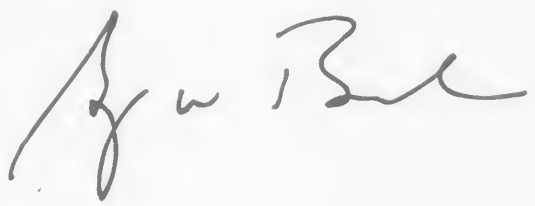
Death of Coretta Scott King

By the President of the United States of America

A Proclamation

As a mark of respect for the memory of Coretta Scott King, I hereby order, by the authority vested in me by the Constitution and laws of the United States of America, that on February 7, 2006, the day of her interment, the flag of the United States shall be flown at half-staff at the White House and upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until sunset on such day. I also direct that the flag shall be flown at half-staff for the same period at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

IN WITNESS WHEREOF, I have hereunto set my hand this sixth day of February, in the year of our Lord two thousand six, and of the Independence of the United States of America the two hundred and thirtieth.



[FR Doc. 06–1256
Filed 2–8–06; 8:45 am]
Billing code 3195–01–P

Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 05–030–2]

Imported Fire Ant; Additions to Quarantined Areas in Arkansas and Tennessee

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the imported fire ant regulations by designating as quarantined areas all of 1 county in Arkansas and all or portions of 18 counties in Tennessee. As a result of the interim rule, the interstate movement of regulated articles from those areas is restricted. The interim rule was necessary to prevent the artificial spread of imported fire ant to noninfested areas of the United States.

DATES: The interim rule became effective on August 8, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Charles L. Brown, Imported Fire Ant Quarantine Program Manager, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–4838.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective and published in the **Federal Register** on August 8, 2005 (70 FR 45523–45525, Docket No. 05–030–1), we amended the imported fire ant regulations in 7 CFR 301.81 through 301.81–10 by adding all of Montgomery County, AR, and all or portions of Bedford, Benton, Bledsoe, Blount, Carroll, Coffee, Cumberland, Giles, Grundy, Haywood, Hickman, Humphreys, Marshall, Maury, Moore, Perry, Roane and Sequatchie Counties, TN, to the list of quarantined areas in § 301.81–3(e).

Comments on the interim rule were required to be received on or before October 7, 2005. We did not receive any comments. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

PART 301—DOMESTIC QUARANTINE NOTICES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 301 and that was published at 70 FR 45523–45525 on August 8, 2005.

Done in Washington, DC, this 3rd day of February 2006.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 06–1203 Filed 2–8–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20354; Directorate Identifier 2004–NM–166–AD; Amendment 39–14476; AD 2006–03–12]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–100, –200, –200C, –300, –400, and –500 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. This AD requires an inspection for chafing of certain wire bundles located above the center fuel tank, corrective actions if necessary, and replacement of wire bundle clamps with new clamps. This AD also requires an inspection for damage to the fuel vapor barrier area located below the wire bundles, and corrective action if necessary. This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent chafed wire bundles near the center fuel tank, which could cause electrical arcing through the tank wall and ignition of fuel vapor in the fuel tank, and result in a fuel tank explosion.

DATES: This AD becomes effective March 16, 2006.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 16, 2006.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Binh Tran, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6485; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a supplemental notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to all Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. That supplemental NPRM was published in the **Federal Register** on December 1, 2005 (70 FR 72083). That supplemental NPRM proposed to require an inspection for chafing of certain wire bundles located above the center fuel tank, corrective actions if necessary, and replacement of wire bundle clamps with new clamps. That supplemental NPRM also proposed to require an inspection for damage to the fuel vapor barrier area located below the wire bundles and, corrective action if necessary.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comment received. The commenter supports the supplemental NPRM.

Conclusion

We have carefully reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD as proposed in the supplemental NPRM.

Costs of Compliance

There are about 2,871 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Inspection	2	$65	None	$130	1,042	$135,460.
Replacement of wire bundle clamps and installation of protective sleeve	5	$65	$688 or $1,245 depending on applicable kit.	$1,013 or $1,570	1,042	Between $1,055,546 and $1,635,940.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866;

(2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2006–03–12 Boeing: Amendment 39–14476. Docket No. FAA–2005–20354; Directorate Identifier 2004–NM–166–AD.

Effective Date

(a) This AD becomes effective March 16, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent chafed wire bundles near the center fuel tank, which could cause electrical arcing through the tank wall and ignition of fuel vapor in the fuel tank, and result in a fuel tank explosion.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspection of Wire Bundles and Fuel Vapor Barrier and Corrective Actions

(f) Within 60 months after the effective date of this AD: Do a detailed inspection for chafing of the wire bundles located below the passenger compartment, above the center fuel tank, aft of station 540 to approximately station 663.75, right buttock line (RBL) and left buttock line (LBL) 24.50; do a detailed inspection for damage to the fuel vapor barrier area located below the wire bundles, as applicable; and do any applicable corrective actions; by accomplishing all of the applicable actions specified in the Accomplishment Instructions of Boeing Service Bulletin 737–28–1208, Revision 1, dated August 25, 2005. Any corrective actions must be done before further flight.

Note 1: For the purposes of this AD, a detailed inspection is: "An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required."

Adjustment/Replacement of Wire Bundle Clamps and Installation of Protective Sleeve

(g) After performing the actions required by paragraph (f) of this AD: Before further flight, adjust and replace, as applicable, the wire bundle clamps located aft of station 540; and install a protective sleeve on the upper bundle of the bundle run at station 616, RBL and LBL 24.50; by accomplishing all of the applicable actions specified in the Accomplishment Instructions of Boeing Service Bulletin 737–28–1208, Revision 1, dated August 25, 2005.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Material Incorporated by Reference

(i) You must use Boeing Service Bulletin 737–28–1208, Revision 1, dated August 25, 2005, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on January 30, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 06–1152 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22528; Directorate Identifier 2005–NM–125–AD; Amendment 39–14474; AD 2006–03–10]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A318–100 and A319–100 Series Airplanes; A320–111 Airplanes; A320–200 Series Airplanes; and A321–100 and A321–200 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Model A318–100 and A319–100 series airplanes; A320–111 airplanes; A320–200 series airplanes; and A321–100 and A321–200 series airplanes. This AD requires a one-time inspection of the horizontal hinge pin of the 103VU electrical panel in the avionics compartment to determine if the hinge pin can move out of the hinge, and related investigative and corrective actions if necessary. This AD results from a report indicating that electrical wire damage was found in the 103VU electrical panel due to contact between the hinge pin and the adjacent electrical wire harness. We are issuing this AD to prevent contact between the horizontal hinge pin and the adjacent electrical wire harness, which could result in damage to electrical wires, and consequent arcing and/or failure of associated systems.

DATES: This AD becomes effective March 16, 2006.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 16, 2006.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the airworthiness directive (AD) docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Airbus Model A318–100 and A319–100 series airplanes; A320–111 airplanes; A320–200 series airplanes; and A321–100 and A321–200 series airplanes. That NPRM was published in the **Federal Register** on September 27, 2005 (70 FR 56381). That NPRM proposed to require a one-time inspection of the horizontal hinge pin of the 103VU electrical panel in the avionics compartment to determine if the hinge pin can move out of the hinge, and related investigative and corrective actions if necessary.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comment received.

Statement of Planned Revision to French Airworthiness Directive

The commenter, the airplane manufacturer, notes that the French airworthiness directive F–2005–052 R1, dated April 13, 2005, which was cited in the NPRM, will be revised to add Airbus Modification 36115 as the final fix for the unsafe condition. The commenter notes that the purpose of Airbus Modification 36115 is to ensure that the hinge is manufactured to prevent hinge pin migration.

We infer that the commenter is requesting that we consider mandating this modification when the Direction Générale de l'Aviation Civile (DGAC) revises French airworthiness directive F–2005–052. We will consider mandating this modification after the DGAC releases its revision. However, we will not delay issuing this AD pending release of the new French airworthiness directive and the applicable Airbus service bulletin. Operators may request an alternative method of compliance under the

provisions of paragraph (h) of this AD. Once the modification is approved and available, we may consider additional rulemaking. We have not changed the AD in this regard.

Conclusion

We have carefully reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Inspection	1	$65	None	$65	696	$45,240

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866;

(2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2006–03–10 Airbus: Amendment 39–14474. Docket No. FAA–2005–22528; Directorate Identifier 2005–NM–125–AD.

Effective Date

(a) This AD becomes effective March 16, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A318–111 and –112; A319–111, –112, –113, –114, –115, –131, –132, and –133; A320–111, –211, –212, –214, –231, –232, and –233; and A321–111, –112, –131, –211 and –231 airplanes; certificated in any category; serial numbers (S/Ns) 1 through 2396 inclusive, except S/Ns 2104, 2143, 2248, 2270, 2347, 2366, 2372, 2376, 2384, 2386, 2388, 2390, 2391, 2393, and 2395.

Unsafe Condition

(d) This AD results from a report indicating that electrical wire damage was found in the 103VU electrical panel due to contact between the hinge pin and the adjacent electrical wire harness. We are issuing this AD to prevent contact between the horizontal hinge pin and the adjacent electrical wire harness, which could result in damage to electrical wires, and consequent arcing and/or failure of associated systems.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspections and Corrective Actions

(f) Within 600 flight hours after the effective date of this AD, do a general visual inspection of the horizontal hinge pin of the 103VU electrical panel in the avionics compartment to determine if the pin can move out of the hinge, and do any applicable related investigative and corrective actions, including repair of any damaged electrical wires, before further flight. Do all the actions in accordance with Airbus All Operators Telex 25A1440, dated February 15, 2005.

Note 1: For the purposes of this AD, a general visual inspection is: "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

No Reporting

(g) Although Airbus All Operators Telex 25A1440, dated February 15, 2005, specifies that operators should send the results of inspections to the manufacturer, that action is not required by this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(i) French airworthiness directive F–2005–052 R1, dated April 13, 2005, also addresses the subject of this AD.

Material Incorporated by Reference

(j) You must use Airbus All Operators Telex 25A1440, dated February 15, 2005, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on January 26, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 06–1151 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23799; Directorate Identifier 2004–NM–141–AD; Amendment 39–14475; AD 2006–03–11]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Model HS 748 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all British Aerospace Model HS 748 airplanes. This AD requires installing a baulking actuator system for the elevator gust lock; doing a functional test and an inspection of any previously installed baulking actuator system for wiring errors; doing repetitive inspections of the gust lock baulk lever for correct operation; and corrective action, if necessary. This AD results from incidents where an elevator gust lock re-engaged without input from the flightcrew, and may have caused a flight control restriction. We are issuing this AD to prevent uncommanded re-engagement of the elevator gust lock, which could result in restriction of the elevator's movement and consequent reduced controllability of the airplane.

DATES: This AD becomes effective February 24, 2006.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of February 24, 2006.

We must receive comments on this AD by April 10, 2006.

ADDRESSES: Use one of the following addresses to submit comments on this AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, notified us that an unsafe condition may exist on British Aerospace Model HS 748 airplanes. The CAA advises that there have been two incidents where re-engagement of the elevator gust lock without input by the flightcrew may have caused a flight control restriction. Uncommanded re-engagement of the elevator gust lock, if not corrected, could result in restriction of the elevator's movement and consequent reduced controllability of the airplane.

Relevant Service Information

British Aerospace has issued BAE Systems (Operations) Limited Service Bulletin HS748–27–135, Revision 2, dated October 2, 2003. The service bulletin describes procedures for installing a baulking actuator system for the elevator gust lock; doing a functional test of the actuator system for correct operation; and inspecting the gust lock baulk lever for correct operation. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The CAA mandated a previous revision of the service bulletin (which specified some wiring procedures incorrectly) and issued British airworthiness directive 003–12–2002 to ensure the continued airworthiness of these airplanes in the United Kingdom. The CAA has also issued British airworthiness directive G–2004–0002, dated February 18, 2004, which supersedes British airworthiness directive 003–12–2002, and requires doing additional actions in accordance with Revision 2 of the service bulletin.

Service Bulletin HS748–27–135 refers to BAE Systems (Operations) Limited Alert Service Bulletin HS748–A27–128, Revision 1, dated December 10, 2002, as an additional source of service information for accomplishing a check of the rigging of the gust lock system.

Service Bulletin HS748–27–135 also refers to BAE Systems (Operations) Limited Service Bulletin HS748–A27–76, Revision 3, dated December 20. 1996, as an additional source of service information for accomplishing an overlap check of the lever gate stop.

FAA's Determination and Requirements of This AD

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. We have examined the CAA's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to prevent uncommanded re-engagement of the elevator gust lock, which could result in restriction of the elevator's movement and consequent reduced controllability of the airplane. This AD requires accomplishing the actions specified in the service information described previously, except as described in "Difference Between This AD and the Service Bulletin."

Difference Between This AD and the Service Bulletin

Where the service bulletin specifies to inspect the baulk lever for correct operation but does not specify corrective action, this AD requires operators to contact the FAA or the CAA (or its delegated agent) for repair instructions.

Clarification on Wiring Inspections

British airworthiness directive G–2004–0002 specifies to inspect the baulk lever installation for correct wiring, and correct the wiring as necessary. The Accomplishment Instructions of Revision 2 of the service bulletin has a note that states that rework in accordance with Revision 2 of the service bulletin is needed for wiring that was done in accordance with Revision 1. This AD requires a general visual inspection for correct wiring and rerouting the wiring as applicable in accordance with Revision 2.

Costs of Compliance

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if any affected airplane is imported and placed on the U.S. Register in the future.

The following table provides the estimated costs to comply with this AD for any affected airplane that might be imported and placed on the U.S. Register in the future.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts cost	Cost per airplane
Installation	49	$65	$18,500	$21,685.
Inspection, per inspection cycle	2	$65	None ...	$130, per inspection cycle.

FAA's Determination of the Effective Date

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any relevant written data, views, or arguments regarding this AD. Send your comments to an address listed in the **ADDRESSES** section. Include "Docket No. FAA–2006–23799; Directorate Identifier 2004–NM–141–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD that might suggest a need to modify it.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2006–03–11 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–14475. Docket No. FAA–2006–23799; Directorate Identifier 2004–NM–141–AD.

Effective Date

(a) This AD becomes effective February 24, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all BAE Systems (Operations) Limited Model HS 748 series 2A and series 2B airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from incidents where an elevator gust lock re-engaged without input from the flightcrew, and may have caused a flight control restriction. We are issuing this AD to prevent uncommanded re-engagement of the elevator gust lock, which could result in restriction of the elevator's movement and consequent reduced controllability of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Installation and Repetitive Inspections

(f) Within 9 months after the effective date of this AD, install a baulking actuator system for the elevator gust lock in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin HS748–27–135, Revision 2, dated October 2, 2003.

Note 1: BAE Systems (Operations) Limited Service Bulletin HS748–27–135, Revision 2, dated October 2, 2003, refers to BAE Systems (Operations) Limited Alert Service Bulletin HS748–A27–128, Revision 1, dated December 10, 2002; and BAE Systems (Operations) Limited Service Bulletin HS748–A27–76, Revision 3, dated December 20, 1996; as additional sources of service information for doing the installation.

(g) At the later of the times specified in paragraphs (g)(1) or (g)(2), test the actuator system for correct operation in accordance with Appendix 2 of BAE Systems (Operations) Limited Service Bulletin HS748–27–135, Revision 2, dated October 2, 2003. Repeat the inspection thereafter at intervals not to exceed 750 flight hours or 240 days, whichever occurs first. Correct any operation errors before further flight in accordance with a method approved by the FAA or the Civil Aviation Authority (CAA) (or its delegated agent).

(1) 750 flight hours or 240 days after installation of the actuator system, whichever occurs first.

(2) 750 flight hours or 240 days after the effective date of this AD, whichever occurs first.

Inspection of Any Installation Done in Accordance With Older Service Bulletin

(h) For airplanes with a baulking actuator system installed in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin HS748–27–135, Revision 1, dated December 10, 2002: Within 750 flight hours or 240 days after the effective date of this AD, whichever occurs first, do the actions specified in paragraphs (h)(1) and (h)(2) of this AD.

(1) Do a general visual inspection of the actuator system for correct wiring in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin HS748–27–135, Revision 2, dated October 2, 2003. Reroute any wiring as applicable before further flight in accordance with the service bulletin.

(2) Do a functional test of the actuator system in accordance with Appendix 1 of BAE Systems (Operations) Limited Service Bulletin HS748–27–135, Revision 2, dated October 2, 2003.

Note 2: For the purposes of this AD, a general visual inspection is: "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

Previous Actions

(i) Actions done before the effective date of this AD in accordance with BAE Systems (Operations) Limited Service Bulletin HS748–27–135, Revision 1, dated December 10, 2002, are considered acceptable for compliance with paragraphs (f) and (g) of this AD.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(k) British airworthiness directives G–2004–0002, dated February 18, 2004, and 003–12–2002, also address the subject of this AD.

Material Incorporated by Reference

(l) You must use BAE Systems (Operations) Limited Service Bulletin HS748–27–135, Revision 2, dated October 2, 2003, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on January 26, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 06–1149 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22503; Directorate Identifier 2005–NM–062–AD; Amendment 39–14477; AD 2006–03–13]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, DC–10–40F, MD–10–10F, MD–10–30F, MD–11, and MD–11F Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain McDonnell Douglas transport category airplanes. This AD requires an initial ultrasonic inspection for cracks of the studbolts of the inboard and outboard hinge fittings of the left and right outboard flaps of the wings. Based on the inspection results, this AD also requires doing repetitive ultrasonic inspections, replacing upper and/or lower studbolts with new or serviceable studbolts, doing a detailed inspection for corrosion of the upper studbolts, doing a magnetic particle inspection for

cracks of studbolts, and changing the protection treatment; as applicable. This AD results from reports of corrosion and failures of the upper and lower studbolts of the outboard flaps inboard and outboard hinge fittings. We are issuing this AD to prevent corrosion and subsequent cracking of studbolts, which could result in failure of the flap hinge fittings and their possible separation from the wing rear spar, and consequent reduced controllability of the airplane.

DATES: This AD becomes effective March 16, 2006.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of March 16, 2006.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, Room PL–401, Washington, DC.

Contact Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024), for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Maureen Moreland, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5238; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the airworthiness directive (AD) docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain McDonnell Douglas Model DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, DC–10–40F, MD–10–10F, MD–10–30F, MD–11, and MD–11F airplanes. That NPRM was published in the **Federal Register** on September 22, 2005 (70 FR 55598). That NPRM proposed to require an initial ultrasonic inspection for cracks of the studbolts of the inboard and outboard hinge fittings of the left and right outboard flaps of the wings. Based on the inspection results, that NPRM also proposed to require doing repetitive ultrasonic inspections, replacing upper and/or lower studbolts with new or serviceable studbolts, doing a detailed inspection for corrosion of the upper studbolts, doing a magnetic particle inspection for cracks of studbolts, and changing the protection treatment; as applicable.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments received.

Request To Consider Parts Availability

One commenter requests that we consider parts availability before setting an effective date for the AD. The commenter states that there are no kits available to do the proposed replacement. The commenter also states that most quantities of studbolts are minimal (less than 50 available) with additional orders coming in from suppliers in the first half of 2006.

We agree to consider parts availability, but do not agree that there is a shortage of parts. The AD specifies several options for continued operation with existing studbolts that are found not to be cracked. Options include installing new bolts with increased corrosion protections; treating existing studbolts with corrosion protection in accordance with a method approved by us; and replacing the studbolts with equivalent studbolts with follow-on repetitive inspections.

In addition, the airplane manufacturer has informed us that they have developed corrosion protection methodologies and will pursue approval from us once the final rule is issued. We will support this effort. The airplane manufacturer also has informed us that they are scheduled to receive studbolts in March of 2006 to support the required replacement of failed studbolts. For operators that initiate a program to replace all the studbolts as terminating action, the airplane manufacturer recommends placing a specific purchase order for the part numbers and quantities of studbolts required, along with a time frame that supports their replacement program.

In light of these findings, we have determined that no change to the final rule is necessary.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Clarification of Replacement

In paragraph (j)(4) of the NPRM, we inadvertently omitted the reference to the service bulletin. We have revised that paragraph to include the phrase "in accordance with the service bulletin."

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the change described previously. We have determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

There are about 594 airplanes of the affected design in the worldwide fleet. This AD will affect about 297 U.S.-registered Model DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, DC–10–40F, MD–10–10F, and MD–10–30F airplanes; and 69 Model MD–11 and –11F airplanes.

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Initial ultrasonic inspection	16	$65	None	$1,040	366	$380,640

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866;

(2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g). 40113, 44701.

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2006–03–13 McDonnell Douglas: Amendment 39–14477. Docket No. FAA–2005–22503; Directorate Identifier 2005–NM–062–AD.

Effective Date

(a) This AD becomes effective March 16, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to McDonnell Douglas airplanes identified in Table 1 of this AD, certificated in any category.

TABLE 1.—APPLICABILITY

Model—	As identified in—
(1) DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, DC–10–40F, MD–10–10F and MD–10–30F airplanes.	Boeing Service Bulletin DC10–57–154, dated February 2, 2005.
(2) MD–11 and MD–11F airplanes	Boeing Service Bulletin MD11–57–076, dated February 2, 2005.

Unsafe Condition

(d) This AD was prompted by reports of corrosion and failures of the upper and lower studbolts of the outboard flaps inboard and outboard hinge fittings. We are issuing this AD to prevent corrosion and subsequent cracking of studbolts, which could result in failure of the flap hinge fittings and their possible separation from the wing rear spar, and consequent reduced controllability of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Service Bulletins

(f) The term "service bulletin," as used in this AD, means the Accomplishment Instructions of the applicable service bulletin listed in Table 1 of this AD.

Ultrasonic Inspection

(g) Do an ultrasonic inspection for cracks of the upper and lower studbolts (upper studbolts only for Model MD–11 and –11F airplanes) of the inboard and outboard hinge fittings of the left and right outboard flaps of the wings, in accordance with the service bulletin. Inspect within 72 months from the time the studbolts were last replaced, or within 24 months after the effective date of this AD, whichever occurs later.

Condition 1: No Cracked Studbolts

(h) If no cracked upper or lower studbolt is detected during any ultrasonic inspection required by paragraph (g) of this AD, do the actions specified in paragraph (i), (j), or (k) of this AD.

Condition 1, Option 1: Repetitive Inspections

(i) Repeat the ultrasonic inspection required by paragraph (g) of this AD thereafter at intervals not to exceed 24 months, until the action in paragraph (j)(1), (j)(2), (k)(1), (k)(2)(i), (o)(1), or (o)(2)(i) of this AD is done.

Condition 1, Option 2: Replacement

(j) Within 72 months from the time the studbolts were last replaced, or within 24 months after the effective date of this AD, whichever occurs later, do any one of the replacements in Table 2 of this AD. Thereafter, at the times specified in Table 2, repeat the ultrasonic inspection required by paragraph (g) of this AD (if applicable).

TABLE 2.—REPLACEMENT PARTS

Replace the upper and lower studbolts (as applicable) of the inboard and outboard hinge fittings with—	And repeat the ultrasonic inspection required by paragraph (g) of this AD thereafter—	Accomplishing this replacement terminates—
(1) New studbolts that have increased corrosion protection in accordance with the service bulletin.	None	The repetitive inspection requirements of paragraph (i), (j)(3), and (j)(4) of this AD.
(2) Studbolts changed with protective treatment in accordance with a method approved by the Manager, Los Angeles Aircraft Certification (ACO), FAA.	None	The repetitive inspection requirements of paragraph (i), (j)(3), and (j)(4) of this AD.
(3) Equivalent studbolts in accordance with the service bulletin.	At intervals not to exceed 24 months	None.
(4) Kept serviceable studbolts wet with sealant in accordance with the service bulletin.	At intervals not to exceed 24 months	None.

Condition 1, Option 3: Removal, Inspection(s), and Corrective Actions

(k) Within 72 months from the time the studbolts were last replaced, or within 24 months after the effective date of this AD, whichever occurs later, remove the upper and lower studbolts (as applicable) of the inboard and outboard hinge fittings, and do a detailed inspection for corrosion of the upper and lower studbolts (as applicable), in accordance with the service bulletin.

Note 1: For the purposes of this AD, a detailed inspection is: "An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required."

(1) If no corroded studbolt is found, before further flight, change the protective treatment of all upper and lower studbolts (as applicable) to give increased corrosion protection, in accordance with a method approved by the Manager, Los Angeles ACO, FAA. Accomplishing this change ends the repetitive inspection requirements of paragraph (i) of this AD.

(2) If any corroded studbolt is found, before further flight, install any studbolt identified in and in accordance with Table 2 of this AD, thereafter do the repetitive inspections (if applicable) in accordance with Table 2 of this AD, and do a magnetic particle inspection for cracks in any remaining studbolt in accordance with the service bulletin.

(i) If no cracked studbolt is found, before further flight, change the protective treatment of all remaining studbolts to give increased corrosion protection, in accordance with a method approved by the Manager, Los Angeles ACO, FAA. Accomplishing this change ends the repetitive inspection requirements of paragraph (i) of this AD.

(ii) If any cracked studbolt is found, before further flight, install any studbolt identified in and in accordance with Table 2 of this AD, and thereafter do the repetitive inspections (if applicable) in accordance with Table 2 of this AD.

Condition 2: Cracked Studbolts

(l) If any cracked studbolt is detected during any ultrasonic inspection required by paragraph (g) of this AD, before further flight, do the actions specified in paragraph (m), (n), or (o) of this AD.

Condition 2, Option 1: Removal, Inspection(s), and Corrective Actions

(m) Remove any cracked upper and lower studbolt (as applicable) of the inboard and outboard hinge fittings, install any studbolt identified in and in accordance with Table 2 of this AD, do the repetitive inspections (if applicable) in accordance with Table 2 of this AD, and do a detailed inspection for corrosion of any remaining studbolts in accordance with the service bulletin.

(1) If no corroded studbolt is found, before further flight, do a magnetic particle inspection for cracks in any remaining studbolt in accordance with the service bulletin. If any crack is found, before further flight, install any studbolt identified in and in accordance with Table 2 of this AD and do the repetitive inspections (if applicable) in accordance with Table 2 of this AD.

(2) If any corroded studbolt is found, before further flight, install any studbolt identified in and in accordance with Table 2 of this AD, do the repetitive inspections (if applicable) in accordance with Table 2 of this AD, and do a magnetic particle inspection for cracks in any remaining studbolt in accordance with the service bulletin.

(i) If no cracked studbolt is found, before further flight, install any studbolt identified in and in accordance with Table 2 of this AD, and do the repetitive inspections (if applicable) in accordance with Table 2 of this AD.

(ii) If any cracked studbolt is found, before further flight, install any studbolt identified in and in accordance with Table 2 of this AD, and do the repetitive inspections (if applicable) in accordance with Table 2 of this AD.

Condition 2, Option 2: Replacement

(n) Replace all studbolts in accordance with paragraph (j) of this AD.

Condition 2, Option 3: Removal, Inspections, and Installation

(o) Remove any cracked studbolt, install any studbolt identified in and in accordance with Table 2 of this AD, do the repetitive inspections (if applicable) in accordance with Table 2 of this AD, and do a detailed inspection for corrosion of any remaining studbolt in accordance with the service bulletin.

(1) If no corroded studbolt is found, before further flight, do a magnetic particle inspection for cracks in any remaining studbolt in accordance with the service bulletin, and change the protective treatment of all remaining upper and lower studbolts (as applicable) to give increased corrosion protection in accordance with a method approved by the Manager, Los Angeles ACO, FAA. Accomplishing this change ends the repetitive inspection requirements of paragraph (i) of this AD.

(2) If any corroded studbolt is found, before further flight, install any studbolt identified in and in accordance with Table 2 of this AD, do the repetitive inspections (if applicable) in accordance with Table 2 of this AD, and do a magnetic particle inspection for cracks in any remaining studbolt in accordance with the service bulletin.

(i) If no cracked studbolt is found, before further flight, change the protective treatment of all remaining studbolts to give increased corrosion protection in accordance with a method approved by the Manager, Los Angeles ACO, FAA. Accomplishing this change ends the repetitive inspection requirements of paragraph (i) of this AD.

(ii) If any cracked studbolt is found, before further flight, install any studbolt identified in and in accordance with Table 2 of this AD, and do the repetitive inspections (if applicable) in accordance with Table 2 of this AD.

Alternative Methods of Compliance (AMOCs)

(p)(1) The Manager, Los Angeles ACO, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Material Incorporated by Reference

(q) You must use the applicable service bulletin in table 3 of this AD to perform the actions that are required by this AD, unless

the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024), for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

TABLE 3.—MATERIAL INCORPORATED BY REFERENCE

Service Bulletin	Date
Boeing Service Bulletin DC10–57–154.	February 2, 2005.
Boeing Service Bulletin MD11–57–076.	February 2, 2005.

Dated: Issued in Renton, Washington, on January 30, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 06–1148 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–23279; Directorate Identifier 2005–NE–44–AD; Amendment 39–14478; AD 2006–03–14]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211 Trent 500 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Rolls Royce plc (RR) RB211 Trent 500 series turbofan engines. This AD requires initial and repetitive borescope inspections of the high pressure-and-intermediate pressure (HP–IP) turbine oil vent tubes and bearing chambers for coking and carbon buildup and replacing the vent tubes if necessary. This AD results from a report of an RB211 Trent 700 series engine that experienced a disk shaft separation, overspeed of the IP turbine rotor, and multiple blade release of IP turbine blades. Since the design arrangement in the Trent 500 series engines is similar to that of the Trent 700 series engines, the same failure could occur in the Trent 500 series engines. We are issuing this AD to prevent internal oil fires caused by coking and carbon buildup, that could result in uncontained engine failure and damage to the airplane.

DATES: Effective February 24, 2006. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of February 24, 2006.

We must receive any comments on this AD by April 10, 2006.

ADDRESSES: Use one of the following addresses to comment on this AD:

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Rolls-Royce plc, Technical Publications, P.O. Box 31, Derby, DE24 8BJ, UK; telephone: 011–44–1332–242424; fax: 011–44–1332–249936, for the service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7175; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom (UK) recently notified us that an unsafe condition might exist on RR RB211 Trent 500 Series turbofan engines. The CAA advises that a previous service incident in a Trent 700 engine indicates that carbon restriction in the vent tube can cause over-pressurization of the HP–IP bearing chamber leading to oil ejection from the rear of the chamber. If this oil spray ignites, the fire can cause an IPT shaft failure, leading to overspeed and uncontained failure of the IPT disc. Since the design arrangement in the Trent 500 engines is similar to that of the Trent 700 engines, the same failure could occur in the Trent 500 series engines. We are issuing this AD to prevent internal oil fires caused by coking and carbon buildup, that could result in uncontained engine failure and damage to the airplane.

Relevant Service Information

We have reviewed and approved the technical contents of RR Alert Service Bulletin (ASB) RB.211–72–AE836, Revision 1, dated October 5, 2005. That ASB describes procedures for initial and repetitive borescope inspection and assessment of the HP–IP turbine oil vent tubes and bearing chamber. The CAA classified this service bulletin as mandatory and issued AD No. G–2005–0029, dated October 4, 2005, in order to ensure the airworthiness of these RR Trent 500 series engines in the U.K.

Bilateral Airworthiness Agreement

These RB211 Trent 500 series turbofan engines are manufactured in the U.K. and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Under this bilateral airworthiness agreement, the CAA kept the FAA informed of the situation described above. We have examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

FAA's Determination and Requirements of This AD

Although no airplanes that are registered in the United States use these engines, the possibility exists that the engines could be used on airplanes that are registered in the United States in the future. The unsafe condition described previously is likely to exist or develop on other RR RB211 Trent 500 series turbofan engines of the same type design. This AD requires initial and repetitive borescope inspections of the HP–IP turbine bearing oil vent tubes and bearing chambers for coking and carbon buildup; and replacement of the tubes if necessary.

We are issuing this AD to prevent internal oil fires from coking and carbon buildup that could cause uncontained engine failure and damage to the

airplane. You must use the service information described previously to perform the actions required by this AD.

FAA's Determination of the Effective Date

Since there are currently no domestic operators of this engine model, notice and opportunity for public comment before issuing this AD are unnecessary. A situation exists that allows the immediate adoption of this regulation.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to send us any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include "AD Docket No. FAA–2005–23279; Directorate Identifier 2005–NE–44–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of the DMS Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov*.

Examining the AD Docket

You may examine the docket that contains the AD, any comments received, and any final disposition in person at the Docket Management Facility Docket Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5227) is located on the plaza level of the Department of Transportation Nassif Building at the street address stated in **ADDRESSES**. Comments will be available in the AD docket shortly after the DMS receives them.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include "AD Docket No. FAA–2005–23279; Directorate Identifier 2005–NE–44–AD" in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2006–03–14 Rolls-Royce plc: Amendment 39–14478. Docket No. FAA–2005–23279; Directorate Identifier 2005–NE–44–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective February 24, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Rolls-Royce plc (RR) RB211 Trent 553–61, 553A2–61, 556B–61, 556A2–61, 556–61, 556B2–61, 560–61, and 560A2–61 turbofan engines. These engines are installed on, but not limited to, Airbus A340–500 and A340–600 series airplanes.

Unsafe Condition

(d) This AD results from a report of an RB211 Trent 700 series engine that experienced a disk shaft separation, overspeed of the IP turbine rotor, and multiple blade release of IP turbine blades. We are issuing this AD to prevent internal oil fires caused by coking and carbon buildup, that could result in uncontained engine failure and damage to the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

Initial Inspection

(f) Using section 3, Parts A and B of the Accomplishment Instructions of RR Alert Service Bulletin (ASB) RB.211–72–AE836, Revision 1, dated October 5, 2005, perform an initial inspection of the high pressure-and-intermediate-pressure (HP–IP) turbine bearing oil vent tubes and bearing chambers as follows:

(1) For IP Turbine modules (05 modules) with 9,600 hours time-since-new (TSN) or 1,200 cycles-since-new (CSN) or more on the effective date of this AD, carry out the inspection within 2,400 hours time-in-service (TIS) or 300 cycles-in-service (CIS) from the effective date of this AD, whichever occurs first.

(2) For 05 modules that are below 9,600 hours TSN or 1,200 CSN on the effective date of this AD, carry out the inspection prior to 12,000 hours TSN or 1,500 CSN, whichever occurs first.

Repetitive Inspections

(g) Repeat the inspection at intervals not to exceed 12,000 hours time-since-previous-inspection (TSPI) or 1,500 cycles-since-previous-inspection (CSPI), whichever occurs first, if at the previous inspection, any of the following conditions were observed:

(1) There was no carbon buildup of a visible thickness.

(2) The cleaning tool, HU82105, could pass along the full length of the internal vent tube into the bearing chamber.

(3) The 8 mm diameter borescope could pass along the full length of the internal vent tube into the bearing chamber.

(h) Repeat the inspection at intervals not to exceed 1,600 hours TSPI or 400 CSPI, whichever occurs first, if, at the previous inspection, the carbon restriction prevented the 8 mm diameter flexible borescope from passing through the internal vent tube, but the 6 mm diameter borescope could pass along the full length of the internal vent tube into the bearing chamber.

(i) Remove the engine within 10 CSPI, if the carbon restriction prevented the 6 mm diameter borescope from passing through the full length of the internal vent tubes.

05 Modules in the Shop

(j) For 05 modules in the shop on the effective date of this AD, inspect the vent tube for carbon buildup of a visible thickness and repair the vent tube as necessary prior to further flight. Information regarding the inspection and repair of vent tubes for 05 modules in the shop can be found in section B. of RR ASB RB.211–72–AE836, Revision 1, dated October 5, 2005.

Alternative Methods of Compliance

(k) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(l) United Kingdom Civil Aviation Authority airworthiness directive G–2005–0029, dated October 4, 2005, also addresses the subject of this AD.

Material Incorporated by Reference

(m) You must use Rolls-Royce plc Alert Service Bulletin RB.211–72–AE836, Revision 1, dated October 5, 2005, to perform the inspections required by this AD. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Rolls-Royce plc, Technical Publications, P.O. Box 31, Derby, DE24 8BJ, UK; telephone: 011–44–1332–242424; fax: 011–44–1332–249936, for a copy of this service information. You may review copies at the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001, on the internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibrlocations.html.*

Issued in Burlington, Massachusetts, on February 1, 2006.

Peter A. White,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 06–1145 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30479; Amdt. No. 3153]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment amends Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective February 9, 2006. The compliance date for each SIAP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 9, 2006.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Ave, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which affected airport is located; or

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Division, Flight Standards Service. Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK. 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK. 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to Title 14, Code of Federal Regulations, part 97 (14 CFR part 97) amends Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in the appropriate FAA Form 8260, as modified by the the National Flight Data Center (FDC)/Permanent Notice to Airmen (P-NOTAM), which is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Code of Federal Regulations. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDC P–NOTAM, and contained in this

amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these chart changes to SIAPs, the TERPS criteria were applied to only these specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Further, the SIAPs contained in this amendment are based on the criteria contained in TERPS. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC on January 27, 2006.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.33 and 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows: (Effective upon publication)

FDC Date	State	City	Airport	FDC Number	Subject
12/09/05 ...	PA	Franklin	Venango Regional	5/1370	ILS or LOC RWY 21, AMDT 5.
12/14/05 ...	ME	Portland	Portland INTL Jetport	5/1566	RNAV (GPS) RWY 18, ORIG.
12/14/05 ...	ME	Portland	Portland INTL Jetport	5/1567	RNAV (GPS) RWY 36, ORIG–A.
01/10/06 ...	NV	Elko	Elko Regional	6/0298	RNAV (GPS) RWY 23, ORIG.
01/12/06 ...	OK	Norman	University of Oklahoma Westheimer.	6/0145	NDB RWY 3, ORIG–A.
01/12/06 ...	AR	Jonesboro	Jonesboro Muni	6/0386	ILS or LOC RWY 23, ORIG–B.
01/12/06 ...	AR	Rogers	Rogers Muni Carter Field	6/0387	ILS or LOC RWY 19 AMDT 3.
01/12/06 ...	WA	Moses Lake	Grant County	6/0423	VOR RWY 32R, AMDT INTL 20A.
01/12/06 ...	WA	Moses Lake	Grant County Intl	6/0424	ILS RWY 32R, AMDT 19A.
01/12/06 ...	WA	Moses Lake	Grant County Intl	6/0425	NDB RWY 32R, AMDT 17.
01/12/06 ...	WA	Moses Lake	Grant County Intl	6/0426	MLS RWY 32R, ORIG–A.
01/12/06 ...	WA	Moses Lake	Grant County Intl	6/0427	VOR RWY 4, AMDT 6A.
01/12/06 ...	WA	Moses Lake	Grant County Intl	6/0428	VOR–1 RWY 14L, AMDT 1.
01/12/06 ...	WA	Moses Lake	Grant County Intl	6/0430	GPS RWY 14L, ORIG–A
01/12/06 ...	WA	Moses Lake	Grant County Intl	6/0431	GPS RWY 22, ORIG–A.
01/12/06 ...	WA	Moses Lake	Grant County Intl	6/0432	VOR–3 RWY 14L, AMDT 1A.
01/12/06 ...	WA	Moses Lake	Grant County Intl	6/0433	GPS RWY 4, ORIG–A.
01/18/06 ...	ND	Fargo	Hector Intl	6/0599	ILS OR LOC RWY 36, ORIG–A.
01/18/06 ...	ND	Fargo	Hector Intl	6/0602	VOR/DME or TACAN RWY 18, AMDT1.
01/18/06 ...	MN	Moorhead	Moorhead Muni	6/0603	VOR–A, AMDT 1.
01/18/06 ...	ND	Fargo	Hector Intl	6/0604	VOR or TACAN RWY 36, ORIG.
01/18/06 ...	IL	Chicago	Chicago-O Hare Intl	6/0626	ILS RWY 9L, AMDT 7.
01/18/06 ...	CA	Stockton	Stockton Metropolitan	6/0629	ILS RWY 29R, AMDT 18D.
01/23/06 ...	MO	Chillicothe	Chillicothe Muni	6/0532	RNAV (GPS) RWY 32, ORIG.
01/23/06 ...	IA	Muscatine	Muscatine Muni	6/0533	VOR RWY 6, ORIG–B.
01/23/06 ...	MO	Lee's Summit	Lee's Summit Municipal	6/0537	NDB RWY 18, AMDT 1.
01/23/06 ...	MO	Lee's Summit	Lee's Summit Municipal	6/0540	RNAV (GPS) RWY 18, ORIG.
01/23/06 ...	MO	Lee's Summit	Lee's Summit Municipal	6/0541	RNAV (GPS) RWY 36, ORIG.
01/23/06 ...	TX	Beaumont/Port Arthur	Southeast Texas Regional	6/0561	GPS RWY 34, ORIG–B.
01/23/06 ...	TX	Beaumont/Port Arthur	Southeast Texas Regional	6/0562	VOR/DME RWY 34, AMDT 7B.
01/23/06 ...	TX	Beaumont/Port Arthur	Southeast Texas Regional	6/0563	VOR–A, AMDT 6.
01/23/06 ...	TX	Beaumont/Port Arthur	Southeast Texas Regional	6/0564	VOR–C, AMDT 5.
01/23/06 ...	KS	Olathe	New Century Aircenter	6/0620	ILS OR LOC RWY 35, AMDT 6.
01/23/06 ...	KS	Olathe	New Century Aircenter	6/0621	VOR–A, AMDT 6.
01/23/06 ...	NY	New York	John F. Kennedy Intl	6/0827	ILS RWY 31R, AMDT 14A.
01/23/06 ...	NY	New York	John F. Kennedy Intl	6/0828	ILS RWY 13L, ILS RWY 13L (CAT II), AMDT 16.
01/24/06 ...	CA	Burbank	Bob Hope	6/0846	RNAV (GPS) RWY 8, ORIG–A.

FDC Date	State	City	Airport	FDC Number	Subject
01/24/06 ...	IL	Flora	Flora Muni	6/0825	LOC/DME RWY 21, ORIG–A.
01/24/06 ...	CA	Burbank	Bob Hope	6/0848	VOR RWY 8, AMDT 10D.
01/25/06 ...	IA	Muscatine	Muscatine Muni	6/0803	GPS RWY 24, AMDT 2A.
01/25/06 ...	IA	Muscatine	Muscatine Muni	6/0807	GPS RWY 6, ORIG–A.
01/25/06 ...	OR	Klamath Falls	Klamath Falls	6/0925	ILS RWY 32, AMDT 19C.

[FR Doc. 06–1118 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Praziquantel, Pyrantel Pamoate, and Febantel Tablets

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Bayer HealthCare LLC, Animal Health Division. The supplemental NADA provides for the use of flavored, chewable praziquantel/pyrantel pamoate/febantel tablets for the removal of several species of internal parasites in dogs.

DATES: This rule is effective February 9, 2006.

FOR FURTHER INFORMATION CONTACT: Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7543, e-mail: *melanie.berson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Bayer HealthCare LLC, Animal Health Division, P.O. Box 390, Shawnee Mission, KS 66201, filed a supplement to NADA 141–007 that provides for use of DRONTAL PLUS (praziquantel/pyrantel pamoate/febantel) Taste Tabs for Dogs for the removal of several species of internal parasites in dogs. The supplemental NADA is approved as of January 12, 2006, and the regulations are amended in 21 CFR 520.1872 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), this supplemental approval qualifies for 3 years of marketing exclusivity beginning January 12, 2006.

FDA has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 520

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 520.1872 [Amended]

■ 2. Revise paragraph (a) introductory text in § 520.1872 by adding "or chewable tablet" after "tablet".

Dated: February 1, 2006.

Steven D. Vaughn,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 06–1205 Filed 2–8–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. 2003P–0564]

Microbiology Devices; Reclassification of Hepatitis A Virus Serological Assays

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final rule to reclassify hepatitis A virus (HAV) serological assays from class III (premarket approval) into class II (special controls). FDA is taking this action after reviewing a reclassification petition submitted by Beckman Coulter, Inc. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document entitled "Guidance for Industry and FDA Staff: Class II Special Controls Guidance Document: Hepatitis A Virus Serological Assays" that will serve as the class II special control for these devices.

DATES: This rule is effective March 13, 2006.

FOR FURTHER INFORMATION CONTACT: Sally Hojvat, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–0496.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Food, Drug, and Cosmetic Act (the act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Public Law 94–295), the Safe Medical Devices Act (SMDA) (Public Law 101–629). and the Food and Drug Administration Modernization Act (FDAMA) (Public Law 105–115), established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and

effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the act, devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), generally referred to as preamendments devices, are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976, generally referred to as postamendments devices, are classified automatically by statute (section 513(f) of the act) into class III without any FDA rulemaking process. Those devices generally remain in class III until the device is reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, under section 513(i) of the act, to a legally marketed device. The agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807.

A preamendments device that has been classified into class III may be marketed, by means of premarket notification procedures, without submission of a premarket approval application (PMA) until FDA issues a final regulation under section 515(b) of the act (21 U.S.C. 360e(b)) requiring premarket approval.

Section 513(f)(3) allows FDA to initiate reclassification of a postamendments device classified into class III under section 513(f)(1) of the act, or the manufacturer or importer of a device to petition the Secretary of the Department of Health and Human Services for the issuance of an order classifying the device into class I or class II. FDA's regulations in section 21 CFR 860.134 set forth the procedures for the filing and review of a petition for reclassification of such class III devices. To change the classification of the device, it is necessary that the proposed new classification have sufficient regulatory controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use.

II. Regulatory History of the Device

In the **Federal Register** of September 30, 2004 (69 FR 58371), FDA published a proposed rule to reclassify HAV serological assays into class II, after reviewing information contained in a reclassification petition submitted by Beckman Coulter, Inc. HAV serological assays are in vitro diagnostic devices used to support the clinical laboratory diagnosis of HAV. Specimens from individuals who have symptoms consistent with acute HAV or who may have previously been infected with HAV are tested for HAV-specific antibodies. The presence of these HAV-specific antibodies in human serum or plasma is laboratory evidence of HAV infection. Interested persons were invited to comment on the proposed rule by December 29, 2004. FDA also identified the draft guidance document entitled "Class II Special Controls Guidance Document: Hepatitis A Serological Assays for the Clinical Laboratory Diagnosis of Hepatitis A Virus" as the proposed special control capable of providing reasonable assurance of safety and effectiveness for these devices.

III. Analysis of Comments and FDA's Response

FDA received several comments on the proposed rule and guidance document. One comment supported the reclassification of HAV serological assays stating that these devices afford a long history of safe and effective use and that class II status would be appropriate. Another comment supported the proposed reclassification of HAV serological assays, but suggested modified wording to clarify the definition of "human tissue" as used in the codification language and in the guidance document. FDA believes the use of "solid or soft tissue donors" adequately describes the individuals who are currently required to be tested.

Other comments suggested specific modifications to the documents. One suggestion was to broaden the scope to include the intended use of determining whether individuals are susceptible to HAV infection. FDA agreed with the suggestion and revised language in the guidance document and classification regulation. These comments also suggested revising the general study recommendations in the following ways:

(Comment 1) One comment recommended that the study include a representative sample of vaccines currently licensed in the United States, rather than every vaccine that is currently licensed in the United States. FDA disagrees with this comment. FDA believes it is essential to have data to show that the submitted assay will detect antibodies produced from any U.S.-licensed vaccine.

(Comment 2) A comment recommended removing or revising the recommendation that manufacturers collect samples beginning at 2 to 4 weeks. FDA has clarified this section to recommend collecting specimens no earlier than 4 weeks post-vaccination.

(Comment 3) Another comment recommended FDA remove or revise the recommendation that a manufacturer establish reproducibility for devices indicated for use in matrices other than serum. FDA concurs and has revised this recommendation and added information within the guidance document to address this issue.

(Comment 4) Another comment asked FDA to remove the notation of anti-nuclear antibodies, rheumatoid factor, and heterophilic antibodies under the "interference" section because it is duplicative of the analysis recommended under the "cross-reactivity" section. FDA concurs and has revised the guidance document accordingly.

(Comment 5) Another comment asked FDA to clarify the recommended study population. FDA has revised the appropriate section of the guidance document to clarify the recommended study population, taking into account the sporadic incidence of HAV infection within the United States.

IV. Conclusion

Based on the information discussed in the preamble to the proposed rule (69 FR 58371), FDA concludes that special controls, in conjunction with general controls, will provide reasonable assurance of the safety and effectiveness for HAV serological assays. The agency is, therefore, reclassifying HAV serological assays from class III (premarket approval) into class II (special controls). Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document entitled "Guidance for Industry and FDA Staff: Class II Special Controls Guidance Document: Hepatitis A Virus Serological Assays" as the special control capable of providing reasonable assurance of safety and effectiveness for these devices. Following the effective date of this final classification rule, any firm submitting a 510(k) premarket notification for a HAV serological assay will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance or in

some other way provides equivalent assurances of safety and effectiveness.

FDA is now codifying the classification for HAV serological assays by adding new § 866.3310. For the convenience of the reader, 21 CFR 866.1 informs the reader where to find guidance documents referenced in 21 CFR part 866.

Section 510(m) of the act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device and, therefore, this type of device is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the HAV serological assay they intend to market.

V. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this reclassification action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Reclassification of HAV serological assays from class III into class II will relieve manufacturers of the cost of complying with the premarket approval requirements in section 515 of the act. Because reclassification will reduce regulatory costs with respect to these devices, it will impose no significant economic impact on any small entities, and it may permit small potential competitors to enter the marketplace by lowering their costs.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $115 million, using the most current (2003) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

VII. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required

VIII. Paperwork Reduction Act of 1995

FDA concludes that this rule contains no new collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

List of Subjects in 21 CFR Part 866

Biologics, Laboratories, Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

■ 1. The authority citation for 21 CFR part 866 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Section 866.3310 is added to subpart D to read as follows:

§ 866.3310 Hepatitis A virus (HAV) serological assays.

(a) *Identification.* HAV serological assays are devices that consist of antigens and antisera for the detection of hepatitis A virus-specific IgM, IgG, or total antibodies (IgM and IgG), in human serum or plasma. These devices are used for testing specimens from individuals who have signs and symptoms consistent with acute hepatitis to determine if an individual has been previously infected with HAV, or as an aid to identify HAV-susceptible individuals. The detection of these antibodies aids in the clinical laboratory diagnosis of an acute or past infection by HAV in conjunction with other clinical laboratory findings. These devices are not intended for screening blood or solid or soft tissue donors.

(b) *Classification.* Class II (special controls). The special control is "Guidance for Industry and FDA Staff: Class II Special Controls Guidance Document: Hepatitis A Virus Serological Assays." See § 866.1(e) for the availability of this guidance document.

Dated: February 1, 2006.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 06–1206 Filed 2–8–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AM03

Eligibility for Health Care Benefits for Certain Filipino Veterans in the United States

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: Department of Veterans Affairs (VA) medical regulations describe veterans who are eligible to receive health care from VA in the United States. This document amends VA medical regulations to provide eligibility for VA hospital care, nursing home care, and outpatient services for any Filipino Commonwealth Army veteran, including those recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces, and for any veteran of the new Philippine Scouts, provided that any such veteran resides in the U.S. and is either a citizen of the U.S. or is lawfully

admitted to the United States for permanent residence. Under this regulatory provision, these certain veterans are eligible for VA hospital care, nursing home care, and outpatient medical services in the United States in the same manner and subject to the same terms and conditions as apply to U,S. veterans.

DATES: *Effective Date*: March 13, 2006.

FOR FURTHER INFORMATION CONTACT: Roscoe Butler, Chief Business Office (163), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 254–0329. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on January 11, 2005, (70 FR 1841), VA proposed to amend VA medical regulation 38 CFR 17.39 to include Filipino Commonwealth Army veterans, including those who were recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces, and new Philippine Scouts who reside in the U.S. and who are citizens, or lawfully admitted to the United States for permanent residence as persons who are eligible for VA health care benefits within the United States on the same basis as U.S. veterans. This proposed rule also established requirements for proof of citizenship or lawful permanent residency status that veterans must provide in order to be eligible for VA health care benefits.

The public comment period ended on March 14, 2005, and VA received comments from three individuals. Two commenters applauded the Secretary for taking this action and one commenter opposed this action. The one opposing commenter alleged non-payment of taxes by Filipino veterans and raised concerns regarding cost and the number of non-Filipino American citizens who do not have health insurance. The proposed rule reflects statutory requirements set forth at 38 U.S.C. 1734 and VA has no authority to deny health care to Filipino veterans who reside in the United States and who are eligible for these benefits by statute. Moreover, the commenter's assertion that these veterans do not pay taxes appears incorrect because they must be either citizens or legal residents of the United States to qualify for benefits.

Based on the rationale set forth in the proposed rule and those contained in this document, we are adopting the provisions of the proposed rule as a final rule with the addition of an authority citation and information collection approval number added at the end of § 17.39.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in expenditure by state, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, or tribal governments, or the private sector.

Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the collection of information requirement related to this rulemaking proceeding under OMB control number 2900–0091.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule would not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.006, Grants to States for the Construction of State Homes; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care: 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; and 64.022, Veterans Home Based Primary Care.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: February 3, 2006.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, 38 CFR part 17 is amended as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, 1721, unless otherwise noted.

■ 2. Revise § 17.39 to read as follows:

§ 17.39 Certain Filipino veterans.

(a) Any Filipiño Commonwealth Army veteran, including one who was recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces, or any new Philippine Scout is eligible for hospital care, nursing home care, and outpatient medical services within the United States in the same manner and subject to the same terms and conditions as apply to U.S. veterans, if such veteran or scout resides in the United States and is a citizen or lawfully admitted to the United States for permanent residence. For purposes of these VA health care benefits, the standards described in 38 CFR 3.42(c) will be accepted as proof of U.S. citizenship or lawful permanent residence.

(b) Commonwealth Army Veterans, including those who were recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces, and new Philippine Scouts are not eligible for VA health care benefits if they do not meet the residency and citizenship requirements described in § 3.42(c).

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0091.)

(Authority: 38 U.S.C. 501, 1734)

[FR Doc. 06–1221 Filed 2–8–06; 8:45 am]

BILLING CODE 8320–01–P

Proposed Rules

Federal Register
Vol. 71, No. 27
Thursday, February 9, 2006

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23840; Directorate Identifier 2005–NM–232–AD]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146 and Model Avro 146–RJ Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain BAE Systems (Operations) Limited Model BAe 146 and Model Avro 146–RJ airplanes. This proposed AD would require modifying the control cable duct on the left bulkhead structure at frame 12, and for certain airplanes, the forward toilet bulkhead structure. This proposed AD results from a structural analysis by the manufacturer which revealed that rapid decompression of the flight compartment with the door closed could cause structural deformation of the left bulkhead structure at frame 12, and of the attached cable duct structure. The duct structure protects the cables for the primary flight controls. We are proposing this AD to prevent deformation of the cable duct structure in the event of a rapid decompression, which could result in restriction of the primary flight controls and consequent reduced controllability of the airplane.

DATES: We must receive comments on this proposed AD by March 13, 2006.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171, for service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149..

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number "FAA–2006–23840; Directorate Identifier 2005–NM–232–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, notified us that an unsafe condition may exist on certain BAE Systems (Operations) Limited Model BAe 146 and Model Avro 146–RJ airplanes. The CAA advises that a structural analysis by the manufacturer revealed that rapid decompression of the flight compartment with the door closed would cause structural deformation of the left bulkhead structure at frame 12, and the attached cable duct structure. The duct structure protects the cables for the primary flight controls. Deformation of the cable duct structure in the event of a rapid decompression could result in restriction of the primary flight controls and consequent reduced controllability of the airplane.

Relevant Service Information

BAE Systems (Operations) Limited has issued Modification Service Bulletin SB.25–459–36241A, Revision 1, dated March 30, 2005. The service bulletin describes procedures for modifying the control cable duct on the left bulkhead structure at frame 12, and for modifying the forward toilet bulkhead structure. The modification of the control cable duct includes, among other things, installing new, stronger duct structure. The modification of the forward toilet bulkhead includes, among other things, installing new inserts and a new support plate. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The CAA mandated the service information and issued British airworthiness directive G–2005–0026, dated September 21,

2005. to ensure the continued airworthiness of these airplanes in the United Kingdom.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in the United Kingdom and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. We have examined the CAA's findings, evaluated all pertinent information, and determined that we need to issue an AD for airplanes of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

This proposed AD would affect about 19 airplanes of U.S. registry.

The modification specified in Part 1 of the service bulletin would take about 21 work hours per airplane, at an average labor rate of $65 per work hour. Required parts would be free of charge. Based on these figures, the estimated cost of the proposed AD is $1,365 per airplane.

The modification specified in Part 2 of the service bulletin would take about 5 work hours per airplane, at an average labor rate of $65 per work hour. Required parts would be free of charge. Based on these figures, the estimated cost of the proposed AD is $325 per airplane.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Docket No. FAA–2006–23840; Directorate Identifier 2005–NM–232–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by March 13, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to BAE Systems (Operations) Limited Model BAe 146–100A, –200A, and –300A series airplanes, and Model Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes; certificated in any category; as identified in BAE Systems (Operations) Limited Modification Service Bulletin SB.25–459–36241A, Revision 1, dated March 30, 2005.

Unsafe Condition

(d) This AD results from a structural analysis by the manufacturer which revealed that rapid decompression of the flight compartment with the door closed could cause structural deformation of the left bulkhead structure at frame 12, and of the attached cable duct structure. The duct structure protects the cables for the primary flight controls. We are issuing this AD to prevent deformation of the cable duct structure in the event of a rapid decompression, which could result in restriction of the primary flight controls and consequent reduced controllability of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Modification

(f) Within 9 months after the effective date of this AD: Do the actions specified in either paragraph (f)(1) or (f)(2) of this AD by doing all the applicable actions specified in the Accomplishment Instructions of BAE Systems (Operations) Limited Modification Service Bulletin SB.25–459–36241A, Revision 1, dated March 30, 2005.

(1) For airplanes on which BAE Modification HCM50303C has been installed, but on which BAE Modification HCM30033E, HCM30033F, HCM30033G, or HCM30033N has not been installed: Modify the control cable duct on the left bulkhead structure at frame 12 in accordance with Part 1 of the Accomplishment Instructions of the service bulletin.

(2) For airplanes on which BAE Modification HCM50303C has been installed, and on which BAE Modification HCM30033E, HCM30033F, HCM30033G, or HCM30033N has also been installed: Modify the control cable duct on the left bulkhead structure at frame 12 and the forward toilet bulkhead structure in accordance with Parts 1 and 2 of the Accomplishment Instructions of the service bulletin.

Modifications Accomplished According to Previous Issue of Service Bulletin

(g) Modifications accomplished before the effective date of this AD in accordance with BAE Systems (Operations) Limited Modification Service Bulletin SB.25–459–36241A, dated July 22, 2004, are considered acceptable for compliance with the corresponding action specified in this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(i) British airworthiness directive G–2005–0026, dated September 21, 2005, also addresses the subject of this AD.

Issued in Renton, Washington, on January 31, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–1762 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23841; Directorate Identifier 2005–NM–214–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This proposed AD would require revising the Airworthiness Limitations section of the Instructions for Continuing Airworthiness of the Maintenance Requirements Manual to include revised threshold and repeat inspection intervals for the cargo door skin cut-out. This proposed AD results from a report that a crack was discovered at the lower forward corner of a cargo door skin cut-out during fatigue testing. We are proposing this AD to detect and correct cracking in the lower forward corner of the cargo door skin cut-out, which could result in reduced structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by March 13, 2006.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: *Go to http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada, for service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Richard Beckwith, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, suite 410, Westbury, New York 11590; telephone (516) 228–7302; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number "FAA–2006–23841; Directorate Identifier 2005–NM–214–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, notified us that an unsafe condition may exist on Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7003 and subsequent, on which Modsum TC601R16421 has not been incorporated. TCCA advises that during a complete-airplane fatigue test on a Model CL–600–2B19 (Regional Jet Series 100) airplane, a crack was discovered at the lower forward corner of the cargo door skin cut-out. This condition, if not corrected, could result in reduced structural integrity of the airplane.

Relevant Service Information

Bombardier has issued Canadair Regional Jet Temporary Revision (TR) 2B–2109, dated October 13, 2005, to Appendix B, "Airworthiness Limitations," of the Canadair Regional Jet Maintenance Requirements Manual (MRM). The TR includes Airworthiness Limitations (AWL) Task 53–61–141, which revises thresholds and revises repeat inspection intervals for the cargo door skin cut-out. The cargo door skin cut-out is identified as a principal structural element. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. TCCA mandated AWL Task 53–61–141 of the TR and issued Canadian airworthiness directive CF–2005–05, dated February 18, 2005, to ensure the continued airworthiness of these airplanes in Canada.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in Canada and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, TCCA has kept the FAA informed of the situation described above. We have examined

TCCA's findings, evaluated all pertinent information, and determined that we need to issue an AD for airplanes of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between the Proposed AD and the Canadian Airworthiness Directive."

Differences Between the Proposed AD and the Canadian Airworthiness Directive

Although the Canadian airworthiness directive references TR 2B–2048 (which was later replaced by TR 2B–2084), this proposed AD would reference TR 2B–2109. TR 2B–2109 was issued after the Canadian airworthiness directive, and replaces both TR 2B–2048 and TR 2B–2084.

Although the Canadian airworthiness directive contains initial inspection threshold information in paragraph B. "Phase-In Schedule," this proposed AD does not state that information because it is included in TR 2B–2109.

These differences have been coordinated with TCCA.

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
AWL Revision	1	$65	$65	738	$47,970

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

Bombardier, Inc. (Formerly Canadair): Docket No. FAA–2006–23841; Directorate Identifier 2005–NM–214–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by March 13, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7003 and subsequent, certificated in any category; on which Bombardier Modsum TC601R16421 or TC601R16422 has not been accomplished.

Unsafe Condition

(d) This AD results from a report that a crack was discovered at the lower forward corner of a cargo door skin cut-out during fatigue testing. We are issuing this AD to detect and correct cracking in the lower forward corner of the cargo door skin cut-out, which could result in reduced structural integrity of the airplane

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to the procedures specified in paragraph (g) of this AD. The request should include a description of changes to the required inspections that will ensure the continued damage tolerance of the affected structure. The FAA has provided guidance for this determination in Advisory Circular (AC) 25–1529.

Maintenance Requirements Manual Revision

(f) Within 30 days after the effective date of this AD, revise the Airworthiness Limitations (AWL) section (Appendix B) of the Instructions for Continuing Airworthiness of the Canadair Regional Jet Maintenance Requirements Manual (MRM), to include the information specified in AWL Task 53–61–141 in Canadair Regional Jet Temporary Revision (TR) 2B–2109, dated October 13, 2005. Thereafter, except as provided by paragraph (g) of this AD, no alternative structural inspection intervals may be approved for the cargo door skin cut-out.

Note 2: The actions required by paragraph (f) of this AD may be done by inserting a copy of TR 2B–2109 into the AWL section of the Canadair Regional Jet MRM. When the contents of TR have been included in general revisions of the MRM, the general revisions may be inserted in the MRM, provided the relevant information in the general revision is identical to that in TR 2B–2109.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, New York Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(h) Canadian airworthiness directive CF–2005–05, dated February 18, 2005, also addresses the subject of this AD.

Issued in Renton, Washington, on January 31, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–1766 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23644; Directorate Identifier 2006–CE–03–AD]

RIN 2120–AA64

Airworthiness Directives; Mitsubishi Heavy Industries MU–2B Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for some Mitsubishi Heavy Industries (MHI) MU–2B series airplanes. This proposed AD would require you to change the flight idle blade angle. This proposed AD results from a recent safety evaluation that used a data-driven approach to analyze the design, operation, and maintenance of the MU–2B series airplanes in order to determine their safety and define what steps, if any, are necessary for their safe operation. Part of that evaluation was the identification of unsafe conditions that exist or could develop on the affected type design airplanes. We are issuing this proposed AD to prevent confusion in blade angle settings. This unsafe condition, if not corrected, could lead to an asymmetric thrust situation in certain flight conditions, which could result in airplane controllability problems.

DATES: We must receive comments on this proposed AD by March 17, 2006.

ADDRESSES: Use one of the following addresses to comment on this proposed AD:

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Fax: 1–202–493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Mitsubishi Heavy Industries, Ltd., 4951 Airport Parkway, Suite 800, Addison, Texas 75001; telephone: 972–934–5480; facsimile: 972–934–5488, for the service information identified in this proposed AD.

You may examine the comments on this proposed AD in the AD docket on the Internet at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Rao Edupuganti, Aerospace Engineer, Fort Worth ACO, ASW–150, Rotorcraft Directorate, FAA, 2601 Meacham Boulevard, Fort Worth, Texas 76137–4298; telephone: 817–222–5284; facsimile: 817–222–5960.

SUPPLEMENTARY INFORMATION:

Comments Invited

How do I comment on this proposed AD? We invite you to send any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include the docket number, "FAA–2006–23644; Directorate Identifier 2006–CE–03–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed rulemaking. Using the search function of the DOT docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov*.

Examining the Dockets

Where can I go to view the docket information? You may examine the docket that contains the proposal, any comments received and any final disposition on the Internet at *http://dms.dot.gov*, or in person at the DOT Docket Offices between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5227) is located on the plaza level of the Department of Transportation NASSIF Building at the street address stated in **ADDRESSES**. Comments will be available in the AD docket shortly after the Docket Management Facility receives them.

Discussion

What events have caused this proposed AD? Recent accidents and the service history of the Mitsubishi MU–2B series airplanes prompted FAA to conduct an MU–2B Safety Evaluation. This evaluation used a data-driven approach to analyze the design, operation, and maintenance of the MU–2B series airplanes in order to determine their safety and define what steps, if any, are necessary for their safe operation.

The safety evaluation provided an in-depth review and analysis of MU–2B accidents, incidents, safety data, pilot training requirements, engine reliability, and commercial operations. In conducting this evaluation, the team employed new analysis tools that provided a much more detailed root cause analysis of the MU–2B problems than was previously possible.

Part of that evaluation was the identification of unsafe conditions that exist or could develop on the affected type design airplanes. One of these conditions is the potential for incorrect blade angle settings for the propellers. A survey of the operators, pilots, owners, and service center owners voiced a

concern that 16-degree and 12-degree flight idle blade angles called out in Type Certificate Data Sheet A10SW, Note #3, could have caused confusion in blade angle settings for both propellers.

What is the potential impact if FAA took no action? This condition, if not corrected, could lead to an asymmetric thrust situation in certain flight conditions, which could result in airplane controllability problems.

Relevant Service Information

Is there service information that applies to this subject? We have reviewed Mitsubishi Aircraft International, Inc., Service Bulletin No. SB016/61–001, dated March 18, 1980.

What are the provisions of this service information? The service information describes procedures for the change of the flight idle blade angle.

Since Japan is the State of Design for the affected airplanes on one of the two type certificates, did the Japan Civil Airworthiness Board (JCAB) take any action? The MU–2B series airplane was initially certificated in 1965 and again in 1976 under two separate type certificates that consist of basically the same type design. Japan is the State of Design for TC No. A2PC, and the United States is the State of Design for TC No. A10SW. The models on the respective type certificates are as follows (where models are duplicated, specific serial numbers are specified in the individual TCs):

Type certificate	Models
A10SW	MU–2B–25, MU–2B–26, MU–2B–26A, MU–2B–35, MU–2B–36, MU–2B–36A, MU–2B–40, and MU–2B–60.
A2PC	MU–2B, MU–2B–10, MU–2B–15, MU–2B–20, MU–2B–25, MU–2B–26, MU–2B–30, MU–2B–35, and MU–2B–36.

Only certain models from Type certificate A10SW are affected by this proposed AD. Therefore, the JCAB did not issue any AD action because, as State of Design, they had no affected airplanes.

FAA's Determination and Requirements of the Proposed AD

Why have we determined AD action is necessary and what would this proposed AD require? We are proposing this AD to address an unsafe condition that we determined is likely to exist or develop on other products of this same type design. The proposed AD would require you to change the flight idle blade angle. The proposed AD would require you to use the service information described previously to perform these actions.

Costs of Compliance

How many airplanes would this proposed AD impact? We estimate that this proposed AD affects 148 airplanes in the U.S. registry.

What would be the cost impact of this proposed AD on owners/operators of the affected airplanes? We estimate the following costs to do this proposed modification to change the flight idle blade angle:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
6 work hours × $65 = $390	Not Applicable	$390	$57,720

Are there other actions that FAA is issuing that would present a cost impact on the MU–2B series airplane fleet? This is one of several actions that FAA is evaluating for unsafe conditions on the MU–2B airplanes. To date, we have proposed the following action:

Docket	Unsafe condition	Date NPRM published	Cost impact
FAA–2006–23578	Wing attach barrel nuts, bolts, and retainers for cracks, corrosion, and fractures.	January 25, 2006 (71 FR 4072).	$65 per airplane for the inspection and $1,195 per airplane if all 8 barrel nuts needed replacement. Total airplane cost is $1,260 per airplane. If all 397 airplanes needed all 8 barrel nuts replaced, the total cost on U.S. operators for this proposed action would be $500,220.

Total proposed cost impact to date (including this NPRM) for the affected airplanes is $1,650 per airplane. This does not account for the following:

- The cost of any repairs or replacements based upon the results of inspections by the proposed actions; and
- The loss of revenue due to the airplane being down for work associated with any proposed AD action.

The total cost to date on all U.S. operators to date (including this NPRM) would be $557,940. This is based on the presumption that all 357 airplanes would need all 8 barrel nuts replaced per Docket No. FAA–2006–23578.

Authority for This Rulemaking

What authority does FAA have for issuing this rulemaking action? Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

Would this proposed AD impact various entities? We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on

the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive:

Mitsubishi Heavy Industries: Docket No. FAA–2006–23644; Directorate Identifier 2006–CE–03–AD.

When Is the Last Date I Can Submit Comments on This Proposed AD?

(a) The Federal Aviation Administration (FAA) must receive comments on this proposed airworthiness directive (AD) action by March 17, 2006.

What Other ADs Are Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects the following airplane models and serial numbers that are certificated in any category:

Model	Serial Nos.
(1) MU–2B–26A and MU–2B–40	321SA, 348SA, 350SA through 419SA, 421SA, 422SA, and 423SA.
(2) MU–2B–36A and MU–2B–60	661SA, 697SA through 747SA, 749SA through 757SA, and 759SA through 773SA.

What Is the Unsafe Condition Presented in This AD?

(d) This AD results from a recent safety evaluation that used a data-driven approach to analyze the design, operation, and maintenance of the MU–2B series airplanes in order to determine their safety and define what steps, if any, are necessary for their safe operation. Part of that evaluation was the identification of unsafe conditions that exist or could develop on the affected type design airplanes. The actions specified in this AD are intended to prevent confusion in blade angle settings. This unsafe condition, if not corrected, could lead to an asymmetric thrust situation in certain flight conditions, which could result in airplane controllability problems.

What Must I Do To Address This Problem?

(e) To address this problem, you must do the following:

Actions	Compliance	Procedures
Change the flight idle blade angle	Within the next 100 hours time-in-service (TIS).	Follow Mitsubishi Aircraft International, Inc. Service Bulletin No. SB016/61–001, dated March 18, 1980.

May I Request an Alternative Method of Compliance?

(f) The Manager, Fort Worth Airplane Certification Office (ACO), FAA, has the authority to approve alternative methods of compliance for this AD, if requested using the procedures found in 14 CFR 39.19.

(g) For information on any already approved alternative methods of compliance or for information pertaining to this AD, contact Rao Edupuganti, Aerospace Engineer, Fort Worth ACO, ASW–150, Rotorcraft Directorate, FAA, 2601 Meacham Boulevard, Fort Worth, Texas 76137–4298; telephone: 817–222–5284; facsimile: 817–222–5960.

May I Get Copies of the Documents Referenced in This AD?

(h) To get copies of the documents referenced in this AD, contact Mitsubishi Heavy Industries, Ltd., 4951 Airport Parkway, Suite 800, Addison, Texas 75001 telephone: 972–934–5480; facsimile: 972–934–5488. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC, or on the Internet at *http://dms.dot.gov*. The docket number is Docket No. FAA–2006–23644; Directorate Identifier 2006–CE–03–AD.

Issued in Kansas City, Missouri, on February 3, 2006.

John R. Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–1769 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23842; Directorate Identifier 2005–NM–145–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 777–200 and 777–300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 777–200 and 777–300 series airplanes. This proposed AD would require repetitive inspections for discrepancies of the splined

components that support the inboard end of the inboard trailing edge flap, and related investigative, corrective, and other specified actions if necessary. This proposed AD would also require a one-time modification of the inboard support of the inboard trailing edge flap by installing a new isolation strap and attachment hardware. This proposed AD would also require repetitive replacement of the torque tube assembly. This proposed AD results from reports of corrosion on the torque tube and closeout rib fittings that support the inboard end of the inboard trailing edge flap, as well as a structural reassessment of the torque tube joint that revealed the potential for premature fatigue cracking of the torque tube that would not be detected using reasonable inspection methods. We are proposing this AD to detect and correct corrosion or cracking of the torque tube and closeout rib fittings that support the inboard end of the inboard trailing edge flap. Cracking in these components could lead to a fracture, which could result in loss of the inboard trailing edge flap and consequent reduced controllability of the airplane.

DATES: We must receive comments on this proposed AD by March 27, 2006.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for the service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Gary Oltman, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6443; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number "FAA–2006–23842; Directorate Identifier 2005–NM–145–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

We have received reports that corrosion has been found on the torque tube and closeout rib fitting assembly that support the inboard end of the inboard trailing edge flap on certain Boeing Model 777–200 and –300 series airplanes. Investigation has revealed contact between the splined areas of the torque tube and closeout rib fitting, causing wear to the titanium-cadmium plating of the components. When the grease on these components dries out, moisture may enter the area, and corrosion may form in areas where the plating has worn away. This corrosion may subsequently lead to corrosion pitting and cracking that can propagate by stress corrosion. Also, a structural reassessment of Boeing Model 777–200 and 777–300 series airplanes revealed the potential for premature fatigue cracking of the torque tube of the inboard trailing edge flap, whether or not the torque tube is corroded. This premature fatigue cracking would not be detected by traditional inspection methods such as visual or non-destructive inspection techniques. Cracking of the torque tube or closeout rib fitting, if not corrected, could lead to a fracture of the torque tube or a closeout rib fitting, which could result in loss of the inboard trailing edge flap and consequent reduced controllability of the airplane.

Relevant Service Information

We have reviewed Boeing Service Bulletin 777–57A0048, Revision 1, dated June 9, 2005. The service bulletin describes procedures for performing repetitive detailed inspections for any discrepancy of the splined components (torque tube, closeout rib fitting, carrier beam pillow block fitting assembly (i.e., the matched set of two carrier beam pillow block fittings) and the drive crank support) that support the inboard end of the inboard trailing edge flap. Discrepancies of the torque tube and closeout rib fitting include light contact wear, corrosion pits, corrosion, cracking, and fracture. Discrepancies of the other splined components consist of damage to the cadmium plating. (The carrier beam pillow block fitting assembly and drive crank support are made from corrosion-resistant steel. The condition of the plating on these components must be inspected because the plating helps to protect these components from the steel torque tube, which is made of less corrosion-resistant 4330M steel.)

If no discrepancy is found, the service bulletin describes procedures for other specified actions that include:

- Assembling the splined components with corrosion-inhibiting compound.
- Modifying certain splined components by installing a new isolation strap and attachment hardware. (Installing the isolation strap is intended to prevent a washer installed between the drive crank support and the carrier beam pillow block fittings from coming into contact with the torque tube splines, which could damage the finish on the torque tube splines.)
- Refinishing the components as necessary.

If a discrepancy is found, the service bulletin describes procedures for corrective actions that include:

- Determining the condition of the spline interface by doing an evaluation of the level of spline rework using the guidelines in Appendix A of the service bulletin.
- Blending out light contact wear (defined in the service bulletin as shallow surface irregularities or discrete pits, which can be blended out using unpowered hand tools).
- Reworking corroded or corrosion-pitted components according to the Spline Rework procedures in Part 3 of the service bulletin if the damage is within specified limits.
- Replacing corroded or corrosion-pitted components having damage that is outside the specified limits with new or serviceable components.
- Replacing cracked or fractured components with new or serviceable components. (The service bulletin notes that, if one of the two fittings that make up the closeout rib fitting assembly or the carrier beam pillow block fitting assembly is replaced, both fittings that make up the assembly must be replaced at the same time.)
- Refinishing components as necessary.

If spline rework is accomplished, the service bulletin also describes procedures for performing additional investigative actions that include:

- Evaluating the interfaces between the splined components using the Spline Rework Evaluation or the Preliminary Spline Rework Evaluation procedure, as applicable.
- Doing a magnetic particle inspection of the splined area for cracking.
- Doing a detailed inspection for corrosion or corrosion pitting to ensure complete removal of corrosion or corrosion pitting.
- Doing a detailed inspection for discoloration due to overheating, or a local surface temper etch inspection for other damage, that may have resulted from performing the rework procedures.

The service bulletin specifies a compliance time for the initial inspection of 48 months after the date of issuance of the original Airworthiness Certificate or the date of issuance of the original Export Certificate of Airworthiness, or within 24 months after the date of Revision 1 of the service bulletin, whichever is later. The service bulletin specifies repeating the detailed inspections for any discrepancy of the splined components that support the inboard end of the inboard trailing edge flap within 5 years or 10 years, depending on the condition of the splined components. (Subsequent inspections are required at intervals not to exceed 5 years or 10 years, depending on the condition found during the repeat inspection.) If the criteria for Condition D are met during the initial inspection (as determined by the spline evaluation), a repeat inspection is required within 24 months. If the criteria for Condition C or D are met in a subsequent repeat inspection, the affected splined component must be replaced before further flight.

Note (c) of Table 7, under paragraph 1.E., "Compliance," of the service bulletin also specifies repetitively replacing the torque tube assembly with a new torque tube assembly, regardless of condition. The service bulletin specifies an initial compliance time for this replacement of either 18,000 or 20,000 total flight cycles on the airplane (depending on airplane group), or 24 months after the date of Revision 1 of the service bulletin, whichever is later. The repetitive interval for the replacement is either 18,000 or 20,000 flight cycles, depending on airplane group.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. For this reason, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed below under "Difference Between Proposed AD and Service Information."

Difference Between Proposed AD and Service Information

The service bulletin specifies compliance times relative to the date of issuance of the service bulletin; however, this proposed AD would require compliance before the specified compliance time after the effective date of this AD.

Clarification of Requirement To Replace Torque Tube Assembly

As explained previously, Note (c) of Table 7, under paragraph 1.E., "Compliance," of the service bulletin specifies repetitively replacing the torque tube assembly with a new torque tube assembly, regardless of condition. However, this replacement of a torque tube assembly with no discrepancy is not specified in the Accomplishment Instructions of the service bulletin. Paragraph (k) of this proposed AD would require the repetitive replacement of the torque tube assembly at the schedule indicated in the Compliance section of the service bulletin.

Interim Action

We consider this proposed AD interim action. The manufacturer is currently developing a new, improved torque tube that will be made from corrosion-resistant steel and have thicker walls. Installing this new, improved torque tube is expected to address the unsafe condition identified in this proposed AD and eliminate the need for the repetitive inspections and torque tube assembly replacements that would be required by this proposed AD. Once the improved torque tube is developed, approved, and available, we may consider additional rulemaking to require installing it.

Costs of Compliance

There are about 353 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this proposed AD, at an average labor rate of $65 per work hour.

ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Detailed inspection for discrepancies of the splined components.	20	None	$1,300, per inspection cycle.	132	$171,600, per inspection cycle.
Modification (Installing isolation strap and hardware).	Negligible	$17,156	$17,156	132	$2,264,592.

ESTIMATED COSTS—Continued

Action	Work hours	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Replacement of torque tube assembly	Negligible [1]	$24,230	$24,230	132	$3,198,360, per replacement cycle.

[1] Provided that the replacement is performed at the same time as a scheduled inspection.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2006–23842; Directorate Identifier 2005–NM–145–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by March 27, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 777–200 and –300 series airplanes, certificated in any category, as identified in Boeing Service Bulletin 777–57A0048, Revision 1, dated June 9, 2005.

Unsafe Condition

(d) This AD results from reports of corrosion on the torque tube and closeout rib fittings that support the inboard end of the inboard trailing edge flap, as well as a structural reassessment of the torque tube joint that revealed the potential for premature fatigue cracking of the torque tube that would not be detected using reasonable inspection methods. We are issuing this AD to detect and correct corrosion or cracking of the torque tube and closeout rib fittings that support the inboard end of the inboard trailing edge flap. Cracking in these components could lead to a fracture, which could result in loss of the inboard trailing edge flap and consequent reduced controllability of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Service Bulletin Reference

(f) The term "service bulletin," as used in this AD, means Boeing Service Bulletin 777–57A0048, Revision 1, dated June 9, 2005.

(g) Where the service bulletin specifies a compliance time after the issuance of the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD.

Initial Inspection

(h) Do a detailed inspection for any discrepancy of the splined components of the inboard trailing edge flap, in accordance with the Accomplishment Instructions of the service bulletin. The splined components of the inboard trailing edge flap include the torque tube, closeout rib fitting assembly, carrier beam pillow block fitting assembly, and drive crank support. Discrepancies of the torque tube and closeout rib fitting include light contact wear, corrosion pits, corrosion, cracking, or fracture. Discrepancies of the carrier beam pillow block fitting assembly and drive crank support consist of light contact wear and damage to the cadmium plating. Do the initial inspection at the applicable time specified in Table 7 under paragraph 1.E., "Compliance," of the service bulletin, except as provided by paragraph (g) of this AD.

No Discrepancy/Other Specified Actions

(i) If no discrepancy is found, perform all applicable specified actions, including the modification to install a new isolation strap and attachment hardware, in accordance with the Accomplishment Instructions of the service bulletin. Then, repeat the inspection at the applicable time specified in Table 7 under paragraph 1.E., "Compliance," of the service bulletin.

Related Investigative/Corrective/Other Specified Actions and Repetitive Inspections

(j) For any discrepancy found during any inspection required by this AD: Before further flight, accomplish all applicable investigative, corrective, and other specified actions, including the modification to install a new isolation strap and attachment hardware, in accordance with the Accomplishment Instructions of the service bulletin. Then, evaluate the spline rework to determine the appropriate repetitive interval, in accordance with the Accomplishment Instructions of the service bulletin. Thereafter, repeat the inspection at the applicable interval specified in Table 7 under paragraph 1.E., "Compliance," of the service bulletin.

Replacement of Torque Tube Assembly

(k) Replace the torque tube assembly with a new torque tube assembly, in accordance

with the Accomplishment Instructions of the service bulletin. Do the initial replacement at the applicable compliance time specified in Notes (c) and (d), as applicable, of Table 7 in paragraph 1.E., "Compliance," of the service bulletin, except as provided by paragraph (g) of this AD. Repeat the replacement thereafter at the applicable interval specified in Notes (c) and (d), as applicable, of Table 7 under paragraph 1.E., "Compliance," of the service bulletin.

Alternative Methods of Compliance (AMOCs)

(l)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane.

Issued in Renton, Washington, on January 31, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–1767 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NE–12–AD]

RIN 2120–AA64

Airworthiness Directives; Turbomeca Turmo IV A and IV C Series Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) for Turbomeca Turmo IV A and IV C series turboshaft engines. That AD currently requires borescope and eddy current inspections or ultrasonic inspections of centrifugal compressor intake wheel blades for cracks and evidence of corrosion pitting, and replacement with serviceable parts. This proposed AD would require the same actions, but would require borescope inspections at more frequent intervals for certain engines. This proposed AD results from Turbomeca's review of the engines' service experience that determined more frequent borescope inspections are required on engines not modified to the TU 191, TU 197, or TU 224 standard. We are proposing this AD to prevent centrifugal compressor intake wheel blade cracks, which can result in engine in-flight power loss, engine shutdown, or forced landing.

DATES: We must receive any comments on this proposed AD by April 10, 2006.

ADDRESSES: Use one of the following addresses to comment on this proposed AD:

- By mail: Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 99–NE–12–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- By fax: (781) 238–7055.
- By e-mail: *9-ane-adcomment@faa.gov.*

You can get the service information identified in this proposed AD from Turbomeca, 40220 Tarnos, France; telephone 33 05 59 74 40 00, fax 33 05 59 74 45 15.

You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7175; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "AD Docket No. 99–NE–12–AD" in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. If a person contacts us verbally, and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

Examining the AD Docket

You may examine the AD Docket (including any comments and serviceinformation), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. See **ADDRESSES** for the location.

Discussion

On May 20, 2003, the FAA issued AD 2003–11–09, Amendment 39–13168 (68 FR 31970, May 29, 2003). That AD requires initial and repetitive borescope and eddy current inspections or ultrasonic inspections of centrifugal compressor intake wheel blades for cracks and evidence of corrosion pitting, and, if found cracked or if there is evidence of corrosion pitting, replacement with serviceable parts. The Direction Generale de L'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that an unsafe condition may exist on Turbomeca Turmo IV A and IV C series turboshaft engines. The DGAC advises that they have received reports of cracked centrifugal compressor intake wheel blades.

The phenomena of blade cracking occurs in two phases: initiation after a single event, such as foreign object damage or surge, and crack propagation due to operating at a gas generator speed, between 80 percent and 83 percent, which sets up a vibration. Although the exact cause of the initiation of cracks has not yet been identified, cracks could initiate at corrosion pits. The investigation is continuing. This condition, if not corrected, could result in centrifugal compressor intake wheel blade cracks, which can result in engine in-flight power loss, engine shutdown, or forced landing.

Since AD 2003–11–09 required the removal of the TU 197 standard within 6 months after the AD's effective date of July 3, 2003, the TU 197 standard is no longer allowed. The compliance time in this proposed AD requires removing the TU 197 standard before further flight.

Actions Since AD 2003–11–09 Was Issued

Since AD 2003–11–09 was issued, Turbomeca reevaluated the engines' service experience and reduced the borescope inspection interval for engines not modified to the TU 191, TU 197, or TU 224 standard, from 250 flight hours-since-last inspection to 200 flight hours-since-last inspection. Also,

Turbomeca eliminated the TU 197 standard as a valid modification.

Relevant Service Information

We have reviewed and approved the technical contents of Turbomeca Mandatory Service Bulletin (MSB) A249 72 0100, Update No. 5, dated February 25, 2005, that describes procedures for the centrifugal compressor intake wheel blade borescope inspections. The DGAC classified this MSB as mandatory and issued AD F–2005–037, dated March 2, 2005, in order to ensure the airworthiness of these engines in France.

Bilateral Agreement Information

This engine model is manufactured in France and is type certificated for operation in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. In keeping with this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. Therefore, we are proposing this AD, which would require:

- For engines modified to the TU 197 standard but not to the TU 191 standard or TU 224 standard, before further flight, removing the TU 197 standard and installing the TU 224 standard.
- Initial and repetitive borescope and eddy current or ultrasonic inspections of centrifugal compressor intake wheel blades for cracks and evidence of corrosion pitting.
- Removing centrifugal compressor intake wheel blades confirmed cracked or pitted.

The proposed AD would require that you do these actions using the service information described previously.

Costs of Compliance

We estimate that this proposed AD would affect 36 Turbomeca Turmo IV A and IV C series turboshaft engines installed on helicopters of U.S. registry. We also estimate that it would take about 41 work hours per engine to perform the proposed inspections, including disassembling and assembling engines, and that the average labor rate is $65 per work hour. A replacement centrifugal compressor assembly costs about $21,651. Based on these figures, the cost per inspection and replacement is estimated to be $24,316. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $875,390.

Special Flight Permits Paragraph Removed

Paragraph (e) of the current AD, AD 2003–11–09, contains a paragraph pertaining to special flight permits. Even though this proposed AD does not contain a similar paragraph, we have made no changes with regard to the use of special flight permits to operate the helicopter to a repair facility to do the work required by this AD. In July 2002, we published a new Part 39 that contains a general authority regarding special flight permits and airworthiness directives; see Docket No. FAA–2004–8460, Amendment 39–9474 (69 FR 47998, July 22, 2002). Thus, when we now supersede ADs we will not include a specific paragraph on special flight permits unless we want to limit the use of that general authority granted in section 39.23.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this proposal and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include "AD Docket No. 99–NE–12–AD" in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–13168 (68 FR 31970, May 29, 2003) and by adding a new airworthiness directive, to read as follows:

Turbomeca: Docket No. 99–NE–12–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by April 10, 2006.

Affected ADs

(b) This AD supersedes AD 2003–11–09, Amendment 39–39–13168.

Applicability

(c) This AD applies to Turbomeca Turmo IV A and IV C series turboshaft engines. These engines are installed on but not limited to Aerospatiale SA 330—PUMA helicopters.

Unsafe Condition

(d) This AD results from Turbomeca's review of the engines' service experience that determined more frequent borescope inspections are required on engines not modified to the TU 191, TU 197, or TU 224 standard. The actions specified in this AD are

intended to prevent centrifugal compressor intake wheel blade cracks, which can result in engine in-flight power loss, engine shutdown, or forced landing.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

Engine Modification Before Further Flight

(f) For engines modified to the TU 197 standard but not to the TU 191 or TU 224 standard, before further flight, remove the TU 197 standard and install the TU 224 standard.

Initial Inspections

(g) For all engines, borescope-inspect, and either eddy current-inspect (ECI) or ultrasonic-inspect (UI) the centrifugal compressor intake wheel blades using paragraphs 2.B.(1)(a) through 2.B.(1)(g) of Turbomeca Mandatory Service Bulletin A249 72 0100, Update No. 5, dated February 25, 2005, and the criteria in the following Table 1:

TABLE 1.—INSPECTION CRITERIA

If engine modification level is:	Then borescope-inspect centrifugal compressor intake wheel blades:	Were traces of corrosion found at borescope-inspection?	Then confirm corrosion by performing ECI or UI within:
(1) Pre TU 191 and Pre TU 224	Within 200 flight hours-since-last inspection.	(i) Yes	Six months-or 50 flight hours-since-borescope inspection, whichever occurs first.
		(ii) No	Two hundred flight hours-since-borescope inspection.
(2) Post TU 191 or Post TU 224 ...	Within 1,000 flight hours-since-last inspection.	(i) Yes	Six months-or 50 flight hours-since-borescope inspection, whichever occurs first.
		(ii) No	One thousand flight hours-since-borescope inspection.

(h) Thereafter, perform repetitive inspections using the criteria in Table 1 of this AD.

(i) Remove centrifugal compressor intake wheel blades confirmed cracked or pitted.

Alternative Methods of Compliance

(j) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(k) Direction Generale de L'Aviation Civile airworthiness directive F–2005–037, dated March 2, 2005, also addresses the subject of this AD.

Issued in Burlington, Massachusetts, on February 3, 2006.

Peter A. White,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E6–1768 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket Nos. RM06–8–000 and AD05–7–000]

Long-Term Firm Transmission Rights in Organized Electricity Markets; Long-Term Transmission Rights in Markets Operated by Regional Transmission Organizations and Independent System Operators

February 2, 2006.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission is proposing to amend its regulations to require transmission organizations that are public utilities with organized electricity markets to make available long-term firm transmission rights that satisfy certain guidelines established in this proceeding. The Commission is taking this action pursuant to section 1233(b) of the Energy Policy Act of 2005, Public Law No. 109–58, section 1233(b), 119 Stat. 594, 960 (2005).

DATES: Comments are due March 13, 2006. Reply comments are due March 27, 2006.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Introduction

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005) [1] became law. Pursuant to the requirement in section 1233 of EPAct 2005,[2] which added a new section 217 to the Federal Power Act (FPA), the Commission is proposing to amend its regulations to require each transmission organization that is a public utility with one or more organized electricity markets to make available long-term

[1] Pub. L. 109–58, 119 Stat. 594 (2005).

[2] Pub. L. 109–58, § 1233(b), 119 Stat. 594, 960.

firm transmission rights that satisfy guidelines established by the Commission in this rulemaking. The Commission proposes to require each such transmission organization to file, no later than [INSERT DATE 180 DAYS AFTER PUBLICATION OF FINAL RULE IN THE **Federal Register**], either: (1) Tariff sheets and rate schedules that make available long-term firm transmission rights that are consistent with the guidelines set forth in the Final Rule; or (2) an explanation of how its current tariff and rate schedules already provide long-term firm transmission rights that are consistent with the guidelines set forth in the Final Rule. Transmission organizations that are approved by the Commission after [INSERT DATE 180 DAYS AFTER PUBLICATION OF FINAL RULE IN THE **Federal Register**], must meet the requirements of the proposed rule before commencing operation.

2. New section 217(b)(4) of the FPA provides:

> The Commission shall exercise the authority of the Commission under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.[3]

Section 1233(b) of EPAct 2005 requires:

> Within 1 year after the date of enactment of this section and after notice and an opportunity for comment, the Commission shall by rule or order, implement section 217(b)(4) of the Federal Power Act in Transmission Organizations, as defined by that Act with organized electricity markets.[4]

3. In this Notice of Proposed Rulemaking (NOPR), we propose guidelines for the design and administration of long-term firm transmission rights that transmission organizations with organized electricity markets [5] would make available to all transmission customers. As described in more detail below, the Commission will allow regional flexibility in setting the terms of the rights, but long-term firm transmission rights must be made available with terms (and/or rights to renewal) that are sufficient to meet the needs of load-serving entities to hedge long-term power supply arrangements made or planned to satisfy a service obligation. While we propose that long-term firm transmission rights be made available to all transmission customers, in the event that a transmission organization cannot accommodate all requests for long-term firm transmission rights over existing transmission capacity, we propose to require that a preference be given to load-serving entities with long-term power supply arrangements used to meet service obligations. The other properties we believe long-term firm transmission rights must have are discussed in the proposed guidelines below. These guidelines will give transmission organizations, in consultation with market participants, the flexibility to propose alternative designs that reflect regional preferences and accommodate the regional market design, while also ensuring that the objectives of Congress expressed in new section 217(b)(4) of the FPA are met.

4. In proposing this rule, the Commission seeks to provide increased certainty regarding the congestion cost risks of long-term transmission service in organized electricity markets that will help load-serving entities and other market participants make new investments and other long-term power supply arrangements. We understand that specifying and allocating long-term firm transmission rights supported by existing transfer capability will raise difficult issues that must be addressed in this rulemaking and in its implementation over time. We note, however, that long-term rights are available to market participants in a direct manner, namely by supporting an expansion or upgrade of grid transfer capability. As described in more detail below, the Commission's policy is that market participants that request and support an expansion or upgrade in accordance with their transmission organization's prevailing rules for cost responsibility and allocation must be awarded a long-term firm transmission right for the incremental transfer capability created by the expansion or upgrade. Such a long-term transmission right must be for a term equal to the life of the new facilities, or for a lesser term if requested by the funding entity. The transmission organization tariffs must clearly and specifically provide for this arrangement, if they do not already.

II. Definitions

5. The Commission proposes several definitions in this NOPR. We set forth those proposed definitions in this section, since these defined terms are used extensively in the background discussion and proposed guidelines that follow. The Commission seeks comment on whether these definitions are appropriate.

A. Transmission Organization

6. The Commission proposes a definition for "transmission organization" that is similar to the definition provided in EPAct 2005.[6] Specifically, we propose to include the word "independent" in the last clause of the EPAct 2005 definition, such that transmission organization would mean "a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other *independent* transmission organization finally approved by the Commission for the operation of transmission facilities." [7] We make this clarification to the definition in EPAct 2005 because we interpret section 1233(b) of the legislation to require that long-term firm transmission rights be made available in the currently existing independent entities approved to operate transmission facilities that have organized electricity markets (as defined below), and any such independent entities that are created in the future.[8] We seek comments on whether this definition appropriately captures the intent of section 1233(b) of EPAct 2005.

B. Load-Serving Entity and Service Obligation

7. The Commission proposes to define the terms "load-serving entity" and "service obligation," for purposes of the proposed rule, exactly as they are defined in section 217 of the FPA. Specifically, we propose to define load-serving entity to mean "a distribution utility or electric utility that has a service obligation." [9] We propose to define service obligation to mean "a requirement applicable to, or the exercise of authority granted to, an electric utility under Federal, State or local law or under long-term contracts to provide electric service to end-users or to a distribution utility." [10] We seek comment on whether it is necessary to

[3] Pub. L. 109–58, section 1233, 119 Stat. 594, 958.

[4] *Id.* at 960.

[5] *See* "Definitions" below.

[6] Pub. L. No. 109–58, section 1233, 119 Stat. 594, 985.

[7] *See id.* at 942, 985.

[8] The transmission organizations that currently have an organized electricity market are ISO New England, Inc. (ISO–NE), New York Independent System Operator, Inc. (New York ISO), PJM Interconnection, Inc. (PJM), California Independent System Operator, Inc. (CAISO), and Midwest Independent Transmission System Operator, Inc. (Midwest ISO). Southwest Power Pool is currently developing its market.

[9] *See id.* at 957. In section 1291 of EPAct 2005, "electric utility" is defined as "a person or Federal or State agency (including an entity described in section 201(f) [of the FPA]) that sells electric energy." *Id.* at 984.

[10] *See id.* at 958.

expand or clarify these definitions in the Final Rule.

C. Organized Electricity Market

8. EPAct 2005 and section 217 of the FPA do not define "organized electricity market." The Commission proposes to define organized electricity market as "an auction-based market where a single entity receives offers to sell and bids to buy electric energy and/or ancillary services from multiple sellers and buyers and determines which sales and purchases are completed and at what prices, based on formal rules contained in Commission-approved tariffs, and where the prices are used by a transmission organization for establishing transmission usage charges." We intend for the Final Rule we develop in this proceeding to apply to any transmission organization with a day-ahead and/or real-time (or "spot") bid-based energy market that is the transmission provider in its region.[11] These markets could either be administered by the transmission organization itself or by another entity. The definition we propose here is intended to ensure that the Final Rule covers all such transmission organizations, either existing or developed in the future. We seek comment on whether the scope of this definition is appropriate or whether it should be revised.

D. Long-Term Power Supply Arrangement

9. Section 217(b)(4) of the FPA requires the Commission to exercise its authority to enable load-serving entities to obtain firm transmission rights on a long-term basis "for *long-term power supply arrangements* made * * * or planned" to meet service obligations.[12] While "long-term power supply arrangements" is not defined in the legislation, section 217(b)(1)(A) of the FPA suggests that a load-serving entity has a long-term power supply arrangement if it "owns generation facilities, markets the output of Federal generation facilities, or holds rights under one or more wholesale contracts to purchase electric energy, for the purpose of meeting a service obligation." For purposes of this proposed rule, we propose to use similar language to define "long-term power supply arrangements." Specifically, we propose to define "long-term power supply arrangements" to mean "the ownership of generation facilities, rights to market the output of Federal generation facilities with a term of longer than one year, or rights under one or more wholesale contracts to purchase electric energy with a term of longer than one year, for the purpose of meeting a service obligation."[13]

[11] As noted above, the transmission organizations that currently have an organized electricity market are ISO–NE, New York ISO, PJM, CAISO, and Midwest ISO. Southwest Power Pool is currently developing its market.

[12] Pub. L. No. 109–58, section 1233, 119 Stat. 594, 958 (emphasis added).

[13] While we consider long-term as "more than one year" in the context of defining a long-term power supply arrangement, later in this NOPR we note that we consider "long-term" in the context of the appropriate terms for long-term firm transmission rights to be terms and/or renewal rights that cover the multiple years necessary to support a long-term power supply arrangement. *See infra* at P 55.

III. Background

A. The Development of ISOs and RTOs

10. In Order No. 888, the Commission found that undue discrimination and anticompetitive practices existed in the provision of electric transmission service in interstate commerce, and determined that non-discriminatory open access transmission service was one of the most critical components of a successful transition to competitive wholesale electricity markets.[14] Accordingly, the Commission required all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to file open access transmission tariffs (OATTs) containing certain non-price terms and conditions and to "functionally unbundle" wholesale power services from transmission services.[15]

11. In addition, the Commission found in Order No. 888 that Independent System Operators (ISOs) had the potential to aid in remedying undue discrimination and accomplishing comparable access.[16] To guide the voluntary development of ISOs, Order No. 888 set forth 11 principles for assessing ISO proposals submitted to the Commission.[17] Following Order No. 888, several voluntary ISOs were established and approved by the Commission.

12. In light of the creation of these ISOs and other changes in the electric industry, the Commission issued Order No. 2000.[18] In that order, the Commission concluded that traditional management of the transmission grid by vertically integrated electric utilities was inadequate to support the efficient and reliable operation of transmission facilities that is necessary for continued development of competitive electricity markets.[19] The Commission also found that even after functional unbundling of electric utilities under Order No. 888, opportunities for undue discrimination continued to exist.[20] As a result, the Commission adopted rules intended to facilitate the voluntary development of Regional Transmission Organizations (RTOs). The Commission concluded that RTOs would provide several benefits, including regional transmission pricing, improved congestion management, and more effective management of parallel path flows.[21]

13. In Order No. 2000, the Commission established the minimum characteristics and functions that an RTO must satisfy to gain Commission approval. Minimum characteristics of an RTO include independence from market participants and operational authority over transmission facilities under its control.[22] Minimum functions of an RTO include ensuring the development and operation of market mechanisms to manage transmission congestion, development and implementation of procedures to address parallel path flow issues, and market monitoring.[23] Under Order No. 2000, the Commission has approved the voluntary formation of a number of RTOs.

14. Most of the RTOs and ISOs operate organized markets for energy and/or ancillary services in addition to providing transmission service under a single transmission tariff. As described in more detail below, most of these markets utilize a congestion management system based on

[14] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 at 31,682 (1996), *order on reh'g*, Order No. 888–A, 62 FR 12274 (March 14, 1997), FERC Stats & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

[15] Under functional unbundling, the public utility is required to: (1) Take wholesale transmission services under the same tariff of general applicability as it offers its customers; (2) state separate rates for wholesale generation, transmission and ancillary services; and (3) rely on the same electronic information network that its transmission customers rely on to obtain information about the utility's transmission system. *Id.* at 31,654.

[16] Order No. 888 at 31,655; Order No. 888–A at 30,184.

[17] Order No. 888 at 31,730.

[18] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000–A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington* v. *FERC*, 272 F.3d 607 (D.C. Cir. 2001).

[19] Order No. 2000 at 30,992–93 and 31,014–15.

[20] *Id.* at 31,015–17.

[21] *Id.* at 31,024.

[22] *Id.* at 31,046 *et seq.*

[23] *Id.* at 31,106 *et seq.*

Locational Marginal Pricing (LMP). Congestion is defined as the inability to inject and withdraw additional energy at particular locations in the network due to the fact that the injections and withdrawals would cause power flows over a specific transmission facility to violate the reliability limits for that facility. The market operator manages congestion by scheduling and dispatching generators that can meet load in the presence of congestion. Financially, in LMP markets the price of congestion is measured as the difference in the cost of energy in the spot market at two different locations in the network.[24] When such price differences occur, a congestion charge is assessed to transmission users based on their nodal injections and withdrawals. These price differences can be variable and difficult to predict. In order to manage the risk associated with the variability in prices due to transmission congestion, these markets use various forms of Financial Transmission Rights (FTRs) (described in more detail below) to allow market participants who hold the rights to protect against such price risks. In most cases, these FTRs have terms of one year or less. The use of FTRs and their terms is also discussed in more detail below.[25]

B. Currently Available Transmission Rights

15. In recent years, interest in long-term transmission rights in organized electricity markets has increased, stemming in large part from a desire of some market participants to obtain rights that replicate the transmission service that was available to them prior to the formation of the organized electricity markets and remains available today in regions without organized electricity markets. The principal concern of these market participants is the inability to obtain a fixed, long-term level of service under pricing arrangements that hedge the congestion cost risk that they face in the organized electricity markets. This section describes the transmission rights that are available in regions with and without organized electricity markets, and concludes with a comparison of the two types of rights.

1. Transmission Rights in Regions Without Organized Electricity Markets

16. In general, in regions without organized electricity markets, transmission service is provided to customers under the terms of the Order No. 888 OATT, or under terms of contracts that predate the OATT. The OATT offers two types of transmission service: Network integration transmission service (network service), which is a long-term firm transmission service, and point-to-point transmission service, which is available on a firm or non-firm basis and on a long-term (one year or longer) or short-term basis. Long-term firm transmission customers taking service under the OATT have the right to continue to take transmission service from the transmission provider when their contract expires (rollover right). Transmission providers are required to expand facilities to satisfy network and point-to-point customer needs.[26]

17. Firm point-to-point transmission service provides for the transmission of energy between designated points of receipt and designated points of delivery. A customer taking firm point-to-point transmission service generally pays a monthly demand charge based on its reserved capacity, and it may resell the service to another customer.[27]

18. Network service provides the customer with flexibility to utilize its current and planned generation resources to serve its network load in a manner comparable to that in which the transmission provider utilizes its generation resources to serve its native load customers. A network customer must designate network resources, including all generation owned, purchased or leased by the network customer to serve its designated load. A network customer also must designate the individual network loads on whose behalf the transmission provider will provide network service. The network customer pays a monthly charge for basic service based on its load ratio share of the transmission provider's transmission revenue requirement.

19. As a condition of receiving network service, a network customer agrees to redispatch its network resources as requested by the transmission provider.[28] The transmission provider must plan, construct, operate and maintain its transmission system in order to provide the network customer with network service over the transmission provider's system, and must designate its own resources and loads in the same manner as a network customer. If the transmission provider needs to redispatch the system due to congestion to accommodate a network customer's schedule, the costs of redispatch are passed through to the transmission provider's network customers, including its own native load, on a load-ratio basis. If a curtailment on the transmission provider's system is required to maintain reliable operation of the system, curtailments are made on a non-discriminatory basis to the extent practicable and consistent with good utility practice, with firm service having the highest priority and non-firm generally having the lowest priority.

20. The price that a transmission customer pays for OATT transmission service is usually predictable and relatively stable over the long-term. For example, a load-serving entity that has a generating facility at one location that it wishes to use to serve load at a second location can contract for long-term point-to-point transmission service from the generator to the load. For this service, the load-serving entity pays only a demand charge that is known in advance. Although the load-serving entity must pay the demand charge whether or not it uses its full reservation, it does not have to pay additional costs associated with transmission congestion for point-to-point transmission service even when the transmission provider must redispatch its generators to honor the firm service commitment. If the load-serving entity has generators and loads at multiple locations, it can request network service and dispatch of its generators to serve its loads in a least cost manner. The load-serving entity must pay a load ratio share of the transmission provider's Commission-approved transmission revenue requirement but, again, is not directly assigned any congestion costs. If either the transmission provider's or the load-serving entity's generators have to be redispatched to relieve congestion, then the cost of redispatch is shared by the transmission provider and all network customers on a load ratio basis. Thus, whether it takes firm point-to-point transmission service or network service, the load-serving entity faces transmission costs that are relatively stable and predictable over the term of its service agreement.

[24] *See infra* at P 21–22.

[25] *See infra* at P 23–28.

[26] *See* Order No. 888 *pro forma* OATT at sections 13.5, 15.4 and 28.2.

[27] Under the Commission's transmission pricing policy, the demand charge may reflect the higher of the transmission provider's embedded costs or incremental expansion costs. Also, if the transmission system is constrained, the demand charge may reflect the higher of embedded costs or "opportunity" costs, with the latter capped at incremental expansion costs. *See Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*, Policy Statement, 69 FERC ¶ 61,086 (1994). In practice, the demand charge is almost always determined on basis of the transmission provider's embedded costs.

[28] Redispatch means that, due to congestion, the utility changes the output of generators to maintain the energy balance. The output of some generators may be increased while the output of others may decrease.

2. Transmission Rights in Organized Electricity Markets

21. Each of the transmission organizations that exist today has implemented or is planning to implement an organized electricity market that uses locational pricing for electric energy. In most cases, the locational pricing system that is used is LMP. Under LMP, the price at each location in the grid at any given time reflects the cost of making available an additional unit of energy for purchase at that location and time. In the absence of transmission congestion, all locational prices at a given time are the same.[29] However, when congestion is present, locational prices typically will not be the same, and the difference between any two locational prices represents the cost of congestion between those locations.

22. Because locational spot prices can vary significantly over time, a market participant potentially faces some degree of price uncertainty. Consider a load-serving entity that has a generator at one location and load at another. If there is no congestion, the generator and the load will see the same locational prices just as if they were at the same location. However, when congestion arises, locational prices will differ, and the price that the load-serving entity's generator receives typically will not be the same as the price that its load must pay.[30] This difference in prices is the congestion cost, and the load-serving entity must pay this cost to the transmission organization whenever power is injected and withdrawn at different locations in the transmission system under constrained conditions.

23. To reduce the uncertainty due to congestion, transmission organizations that use locational marginal pricing make FTRs available to their market participants.[31] An FTR is a right to receive the congestion costs paid by grid users and collected by the transmission organization for one megawatt of electricity delivered from a specified point of receipt to a specified point of delivery. The holder of an FTR receives in each hour a payment that is calculated by subtracting the price at the point of receipt from the price at the point of delivery, and multiplying the difference by the megawatt quantity.

24. In an LMP system, all spot power is purchased and sold at locational prices and all scheduled injections and withdrawals are subject to congestion charges. When there is no congestion, the prices are the same and the payments to FTR holders are zero. However, when congestion is present, prices will differ; prices for withdrawals are generally higher than prices for injections, creating a source of funds to pay the FTR holders. To ensure that the excess revenue is sufficient to meet its FTR payment obligations under normal operating conditions, the transmission organization generally subjects any award of FTRs to a simultaneous feasibility test. The simultaneous feasibility test requires that, before specific FTRs can be awarded, the transmission organization must demonstrate that the transmission system is capable of physically delivering the power flows represented by the FTRs simultaneously with the power flows represented by all concurrently or previously awarded FTRs. Although FTRs do not convey a physical right (or obligation) to use the transmission system, the transmission organization will be at risk of not receiving sufficient revenues to meet all of its FTR payment obligations under normal operating conditions if any awarded FTRs do not meet the simultaneous feasibility test. Any time that revenues are not sufficient, the transmission organization is said to be "revenue inadequate."[32]

25. The most common type of FTR, which is known as an FTR "obligation," provides for a payment to the holder when congestion cost is positive, but also requires the holder to make a payment to the transmission organization whenever the cost is negative. Because of this feature, some transmission organizations also offer FTR "options," which do not place a payment obligation on the rights holder. However, because FTR options require more transmission capacity than FTR obligations to meet the simultaneous feasibility test, their availability is limited.[33] Therefore, for purposes of the discussion in this section, we will assume that FTRs are limited to FTR obligations.[34]

26. If a load-serving entity holds an FTR that matches its injections and withdrawals exactly, it pays no net congestion cost.[35] A load-serving entity may also reduce its congestion cost risk by holding an FTR that provides a partial hedge. Typically, the FTRs that load-serving entities hold do not exactly match their use of the transmission system in each hour, but the "over" and "under" financial coverage provided by the FTRs evens out over time to provide a sufficient hedge.

27. In general, transmission organizations provide FTRs on an annual basis to load-serving entities and others that pay access charges or fixed transmission rates. Load-serving entities receive FTRs either through direct allocation or through a two-step process in which the load-serving entity first is allocated auction revenue rights (ARRs) and then purchases FTRs in an auction.[36] The revenues from the auction flow back to the load-serving entity and other ARR holders and thus defray the cost of purchasing the FTRs in the auction. Transmission organizations currently offer ARRs and FTRs with terms of one year or less. Although details vary by transmission organization, the allocation is based largely on historical uses of the system as measured by peak loads, but also allows market participants some flexibility to choose among transmission paths. Most transmission organizations also allocate long-term ARRs and FTRs to any party that invests in transmission upgrades that increase transmission capability. FTRs can be traded in annual and monthly transmission organization auctions or bilaterally outside the auction.

28. Since the state of the transmission system and market prices change from year to year, the annual allocation allows market participants to re-

[29] The inclusion of marginal losses can cause locational prices to differ across locations even in the absence of congestion. For purposes of this discussion, we will consider only the congestion component of locational price differences.

[30] It is important to note that, depending on the relative magnitude of the prices at the generator's location and the load's location, congestion costs can be positive or negative.

[31] We use the term FTR in this NOPR to refer generally to the financial transmission instruments used in the various organized electricity markets that currently exist. In some markets, these financial instruments are called transmission congestion contracts or congestion revenue rights.

[32] It should be noted that, even when all awarded FTRs meet the simultaneous feasibility test, the Transmission Organization may at times be revenue inadequate as a result of unexpected events, such as a line outage or transmission system disruption that reduces transfer capability.

[33] The need for more capacity is due to the fact that the Transmission Organization cannot assume that the FTR options will provide any "counterflows" when it conducts the simultaneous feasibility test.

[34] *See infra* at P 72–79 for a more complete discussion of the properties of FTR obligations and FTR options.

[35] This net result is reached because congestion charges billed to the load-serving entity (or any other party that holds FTRs) are exactly offset by FTR payments.

[36] ARRs confer the right to collect revenues from the subsequent FTR auction. For example, the holder of an ARR between location A and location B knows that it will collect revenues equal to the market clearing price of an FTR between location A and location B. An ARR can, but does not need to, exactly match an FTR. In some Organized Electricity Markets, a market participant must submit a bid for FTRs in the auction to convert its ARRs to FTRs, while in other Organized Electricity Markets a market participant can convert its ARRs to FTRs directly and is not required to bid in the auction.

configure their transmission rights requests each year to reflect such changes. The annual reconfiguration also helps the transmission organization to manage exposure to situations where payments to FTR holders can exceed congestion revenues. Revenue shortfalls can occur due to changes in the transmission grid or in the availability of generators that have a major impact on power flows. If such changes are expected to be long-lasting, the transmission organization is able to adjust the quantity and configuration of rights made available in the next annual cycle. However, a load-serving entity may receive fewer FTRs or ARRs than it requests due to factors outside of its control, such as changes in the network, the network flow assumptions or the FTR nominations of other participants. As a result, load-serving entities are uncertain from year to year whether they will obtain the FTRs needed to support long-term power supply arrangements, including investment in generation resources.

3. Comparison of Transmission Rights in Regions With and Without Organized Electricity Markets

29. There are several important differences between transmission service under the OATT and transmission rights in organized electricity markets that use LMP and FTRs. However, the differences that are most relevant for purposes of this NOPR concern the management of congestion, the recovery of congestion costs and the availability of long-term service arrangements.

30. Under the OATT, the transmission provider manages congestion by redispatching its own or its customers' network resources as needed to accommodate a transmission constraint; the OATT provides no mechanism by which firm point-to-point transmission customers can participate directly in congestion management. However, in organized electricity markets, the transmission organization manages congestion through the use of locational prices. This means that all available resources under an LMP system can participate in redispatch for congestion management because they all receive the congestion price signal. As a result, a transmission organization in a region with an organized electricity market is less likely to have to invoke transmission loading relief (TLR) procedures and service curtailments than a transmission provider under the OATT.

31. The recovery of congestion costs also differs greatly between regions with and without organized electricity markets. In regions where transmission service is provided under the OATT, a transmission customer that takes network service or firm point-to-point transmission service is not charged directly for the costs of the redispatch that may be required to accommodate its use of the transmission system. For example, a firm point-to-point transmission customer is allowed to take service up to its contractual entitlement while paying only a fixed demand charge. Also, although a network customer must pay a share of any redispatch costs that the transmission provider and other network customers incur, its cost responsibility is determined after the fact as a load ratio share of the total redispatch costs that are incurred on behalf of all users of the system over a given time period. While this type of pricing may not present the customer with a price signal that accurately reflects all of the costs occasioned by the customer's use of the system, it lowers the transmission customer's price uncertainty. In addition, both network service and firm point-to-point transmission service can be obtained under long-term contracts. These attributes of OATT transmission service result in a less volatile price for transmission service over a long-term, which in turn can help facilitate the planning and financing of large generation facilities and other long-term power supply arrangements.

32. In contrast, a transmission organization in a region with an organized electricity market recovers congestion costs through the locational pricing of energy. Because locational prices include a congestion cost component (which can be positive, negative or zero), a participant in an organized electricity market faces the prospect of paying a congestion charge for many of its transactions. For example, as explained above, a load-serving entity that has generation at one location and load at another, but does not hold FTRs, is at risk of incurring congestion costs, which may not be predictable. Also, although that load-serving entity can avoid congestion costs by holding FTRs, it still faces a congestion price risk if its spot sales and purchases or scheduled injections and withdrawals do not correspond exactly to its allocated (or purchased) FTRs. Clearly, locational pricing and price-based congestion management provide the market participant with much of the information it needs to make cost effective decisions regarding energy consumption and use of the transmission system (as well as investment in new generation and transmission upgrades). However, the FTRs that transmission organizations currently provide to hedge congestion charges for using existing transmission capacity (as opposed to incremental transmission expansions) are generally available for terms of only one year or less. This can create uncertainty for the market participant because, in any given year, its award of FTRs may not be sufficient to meet its needs. Some market participants have expressed concern that this uncertainty makes it more difficult to finance long-term power supply arrangements.

33. The Commission believes that some of the problems of uncertainty in organized electricity markets can be overcome and the objectives of section 217(b)(4) of the FPA can be met through the introduction of long-term firm transmission rights. However, for a variety of reasons that are discussed below, transmission rights in organized electricity markets cannot always be designed in a way that captures all of the features of the transmission rights that have long been available under the OATT. Consequently, the Commission's objective in issuing this NOPR is to present a framework within which transmission organizations and their market participants can design and implement long-term firm transmission rights in the organized electricity markets that are compatible with the design of those markets, in particular retaining the advantages of price-based congestion management, and meet the reasonable needs of market participants.

C. Staff Paper on Long-Term Transmission Rights

34. Prior to the enactment of EPAct 2005, the Commission released a Staff Paper that provided background and solicited comments on whether long-term transmission rights were needed in the ISO and RTO markets, and if so, how to implement them.[37] This section provides an overview of the comments to the notice.

35. With respect to the need for and design of long-term transmission rights, the views of the respondents tended to fall into three general groups. The first group consisted of advocates of long-term transmission rights with terms in

[37] Notice Inviting Comments on Establishing Long-Term Transmission Rights in Markets With Locational Pricing and Staff Paper, Long-Term Transmission Rights Assessment, Docket No. AD05–7–000 (May 11, 2005) (Staff Paper). While we are issuing this NOPR in both Docket No. RM06–8–000 and Docket No. AD05–7–000, we expect to issue our Final Rule in only Docket No. RM06–8–000. Comments in response to this NOPR should be filed in Docket No. RM06–8–000.

the range of 5–30 years.[38] These parties argue that the failure of transmission organizations to offer transmission rights with terms greater than one year is a key deficiency in the markets that produces increased financial risk due to congestion price uncertainty, the failure of forward energy markets to form, and barriers to investment in new generation capacity. The core problem expressed by these parties is that annual allocations of rights may not provide sufficient rights year-to-year to adequately cover potentially volatile congestion cost exposure. In turn, the inability to secure a known quantity of transmission rights for multiple years introduces an unacceptable degree of uncertainty into resource planning, investment and contracting.

36. Most of the parties in this first group stressed that not all transmission capacity should be given over to long-term rights, but that there should be an amount sufficient to cover at least base-load generation resources and perhaps renewable energy generators.[39] These commenters argue that long-term rights should be FTR obligations only under certain conditions that limit financial exposure of the rights holder. Several proposed that the long-term rights should be FTR options. Otherwise, the rights could be physical rights[40] or modified FTRs (*e.g.* financial rights with physical characteristics, such as "use-or-lose" rights) designed to alter the financial settlement properties of traditional FTRs so as to reduce congestion risk.[41]

37. A second group of commenters largely agreed with the first that long-term rights should be introduced, but argued that this should take place within the framework of existing FTR market designs and follow a cautious, incremental approach. These parties, which included most of the ISOs and RTOs that submitted comments as well as many stakeholders, argued that rights of greater than one year duration would indeed find a role in the markets, but that care was needed in the design of the rights.[42] Most of these parties were supportive of straightforward extensions of the current FTR market design to include FTR obligations of longer terms, although perhaps with modified creditworthiness requirements and other rule changes to reflect the different risks embodied in such rights. In general, they proposed terms for such FTRs of between 2 to 5 years. They also supported limiting the quantity of system capability given over to long-term FTRs for at least an initial period.

38. Finally, some respondents felt that long-term rights should not be introduced at this time.[43] These parties argued that the current procedures for annual allocations of FTRs with terms of one year or less were well-established and that transmission rights markets were efficient and maturing around this design. They were concerned that the introduction of multi-year rights could introduce inequity and inefficiency into the organized electricity markets, because they believe such rights will reduce the availability of FTRs with terms of one year or less that can be used to hedge shorter-term transactions. They also assert that introducing long-term rights could cause cost shifts if holders of long-term rights are given congestion risk coverage greater than that accorded to other parties. Some respondents that supported this position were from retail choice states, reflecting concerns that long-term rights could adversely affect their ability to acquire and trade transmission rights used to hedge shorter-term contracts.

39. In general, those responding to the Staff Paper did not favor a uniform, "one size fits all" approach to long-term rights. Instead, they stressed that the development of long-term transmission rights should take place in a regional context, which would allow stakeholders to balance the different needs of transmission users and reflect the characteristics of the regional grid and generation resources. Also, those responding provided suggestions on many other aspects of long-term transmission right design and implementation. We will refer to those suggestions where relevant in some of the discussion that follows.

IV. Proposed Guidelines for Design and Administration of Long-Term Firm Transmission Rights in Organized Electricity Markets

A. The Commission's Proposed Approach

40. To satisfy the requirements of section 1233(b) of EPAct 2005, and to address the concerns expressed by market participants, the Commission proposes to establish a set of guidelines for the design and administration of long-term firm transmission rights in organized electricity markets. The Commission proposes to require each transmission organization that is a public utility with one or more organized electricity markets[44] to file with the Commission, within 180 days, either proposed tariff sheets that make available long-term firm transmission rights that are consistent with the guidelines, or an explanation of how the transmission organization already makes such rights available. The proposed compliance procedures are discussed in more detail below.

41. The Commission recognizes that there may be many possible approaches to fulfilling this requirement of EPAct 2005. Parties commenting on the Staff Paper suggested a number of possible approaches to designing and implementing long-term transmission rights. The Commission believes that

[38] *See, e.g.*, Comments on Staff Paper of the American Public Power Association (APPA) at 1, 8, 19; Comments on Staff Paper of the Transmission Access Policy Study Group (TAPS) at 19–21; Comments on Staff Paper of the National Rural Electric Cooperative Association (NRECA) at 17–19; Comments on Staff Paper of the Electricity Consumers Resource Council (ELCON) at 9–10.

[39] *See* Comments on Staff Paper of APPA at 31; Comments on Staff Paper of TAPS at 17–19. However, other parties supportive of long-term transmission rights argued that their allocation should not be tied to particular classes of generator. *See, e.g.*, Comments on Staff Paper of ELCON at 8–9.

[40] *See* Comments on Staff Paper of Sacramento Municipal Utility District (SMUD) at 12–16; Comments on Staff Paper of City of Santa Clara, California, Silicon Valley Power (SVP) at 14–18.

[41] For example, a right that only provides a financial hedge when the holder submits a physical schedule (a type of "use or lose" right). *See, e.g.*, Comments on Staff Paper of the Transmission Access Policy Study Group (TAPS) at 21–25; Comments on Staff Paper of the Electricity Consumers Resource Council (ELCON) at 12–13. Note also that several commenters argued that ISOs with LMP and financial rights should not revert to physical rights to provide long-term transmission service, nor should they allow such ISOs to offer combinations of physical and financial rights (with the exception of already awarded grandfathered rights). *See, e.g.*, Comments on Staff Paper of ABATE at 10–11; Comments on Staff Paper of American Electric Power (AEP) at 3; Comments on Staff Paper of Cinergy at 13–14; Comments on Staff Paper of Edison Electric Institute (EEI) at 3; Comments on Staff Paper of Electric Power Supply Association (EPSA) at 6–8; Comments on Staff Paper of FirstEnergy Solutions at 8; Comments on Staff Paper of ISO/RTO Council at 2–3,

[42] *See generally* Comments on Staff Paper of California ISO; Comments on Staff Paper of ISO New England; Comments on Staff Paper of New York ISO; Comments on Staff Paper of PJM; Comments on Staff Paper of ISO/RTO Council. *See also generally* Comments on Staff Paper of New York Public Service Commission (NY PSC) and the Organization of Midwest States (OMS). On appropriate term lengths, *see* Comments on Staff Paper of Cinergy at 10; Comments on Staff Paper of Coral Power at 3, 6; Comments on Staff Paper of DC Energy at 4–5; Comments on Staff Paper of Edison Electric Institute (EEI) at 10; Comments on Staff Paper of Electric Power Supply Association (EPSA) at 11; Comments on Staff Paper of Midwest Transmission Owners at 11; Comments on Staff Paper of Morgan Stanley at 7; Comments on Staff Paper of National Grid at 15; Comments on Staff Paper of Pacific Gas & Electric (PG&E) at 5.

[43] *See, e.g.*, Comments on Staff Paper of Cinergy at 3; Comments on Staff Paper of Coral Power at 7. However, many of these respondents did articulate views on how long-term rights should be specified in the event that the Commission required them.

[44] As noted elsewhere, this proposed rule would apply whether the Organized Electricity Markets are administered by the Transmission Organization itself, or whether the Organized Electricity Markets are administered by another entity.

establishing guidelines for the design and administration of long-term firm transmission rights in this rulemaking, followed by development of specific long-term firm transmission right designs within the stakeholder process of each Transmission Organization with an organized electricity market, is the most appropriate course for complying with the directive of section 1233(b) of EPAct 2005. We agree with many of those commenting on the Staff Paper that a "one size fits all" long-term firm transmission right design is not appropriate, and that long-term transmission rights should be developed through regional stakeholder discussion.[45]

42. This flexible regional development of long-term firm transmission rights must, however, occur within certain guidelines. Accordingly, the Commission proposes guidelines for the design and administration of long-term firm transmission rights that ensure that those rights have certain properties that we believe are fundamental to meeting the objectives of section 217(b)(4) of the FPA. For example, we propose below that long-term firm transmission rights be made available with terms (and/or rights to renewal) that are sufficient to meet the needs of load-serving entities to hedge long-term power supply arrangements made or planned to satisfy a service obligation. Additionally, as described in more detail in the guidelines that follow, we propose that transmission organizations be required to award long-term firm transmission rights to market participants that request and support an expansion or upgrade to the transmission system in accordance with the transmission organization's prevailing rules for cost allocation. Such long-term firm transmission rights must be for a term equal to the life of the new facilities, or for a lesser term if requested by the funding entity. Also, as described in more detail below, while long-term firm transmission rights should be made available to all transmission customers, in the event that a transmission organization cannot accommodate all requests for long-term firm transmission rights over existing transmission capacity, we propose that the approach most consistent with section 217(b)(4) of the FPA is to require that a preference be given to load-serving entities with long-term power supply arrangements used to meet service obligations.

43. While we believe these and the other properties outlined in the guidelines below are critical to the successful implementation of long-term rights, we intend for the guidelines to form only a framework for further, more specific development of long-term firm transmission rights by each transmission organization. Accordingly, the guidelines should provide enough flexibility to allow each region to develop, through its usual stakeholder process, a specific long-term firm transmission right design that fits the prevailing market design and best meets the needs of market participants in that region.

44. Although we propose to allow regional flexibility in the development of long-term firm transmission rights, we recognize that allowing transmission organizations with organized electricity markets to implement different rules for these rights could lead to regional seams issues. We seek comments on our proposal to provide regional flexibility. In particular, we ask commenters to identify features of long-term firm transmission rights that, if not consistent across transmission organizations, may interfere with the effective operation of regional markets.

B. Proposed Guidelines

Guideline (1): The long-term firm transmission right should be a point-to-point right that specifies a source (injection node or nodes) and sink (withdrawal node or nodes), and a quantity (MW).

45. Section 217(b)(4) of the FPA requires that long-term firm transmission rights be available to support long-term power supply arrangements. Hence, we propose that the transmission rights must be specified such that they can hedge the congestion costs that may be incurred in delivering the output of particular generation resources to particular loads.[46] The source nodes can correspond to a single generator or a set of generators (*e.g.*, a zone). Similarly, the sink nodes can specify a single node or set of nodes.[47] This guideline is not intended to preclude flowgate rights so long as they are designed with the same hedging properties as an equivalent long-term point-to-point right.

46. Section 217(b)(4) recognizes that there may be alternative designs for long-term firm transmission rights.[48] For many transmission organizations and their market participants, the most straightforward method to develop long-term firm transmission rights would be to extend the term of the auction revenue rights or FTRs that they currently allocate. These may require additional market rules, such as modified creditworthiness standards. However, we do not preclude alternative designs for long-term rights. Some possible designs are compared in Section IV.C of this NOPR.

Guideline (2): The long-term firm transmission right must provide a hedge against locational marginal pricing congestion charges (or other direct assignment of congestion costs) for the period covered and quantity specified. Once allocated, the financial coverage provided by the right should not be modified during its term except in the case of extraordinary circumstances or through voluntary agreement of both the holder of the right and the transmission organization.

47. In most existing organized electricity markets, LMP is used to manage congestion. The FTRs currently offered in the organized electricity markets provide a hedge against these charges, but are only offered in terms of one year or less. Because of this short term, market participants with long-term power supply arrangements are at risk of having the ARRs or FTRs that they are eligible for to hedge congestion charges associated with delivery of that power prorated during the course of the power supply arrangement. As noted above, one criticism of the current FTR market rules is that the annual FTR allocation may produce different results from year to year in the quantity of FTRs allocated to eligible load-serving entities. APPA, for example, argues that there is a need for a mechanism to keep long-term firm transmission rights feasible in the "out" years.[49]

48. To address this concern, we propose that the transmission organization ensure that the long-term firm transmission rights it offers provide a hedge against congestion costs for the entire term of the right, and for the

[45] *See, e.g.*, Comments on Staff Paper of APPA at 23–24; Comments on Staff Paper of Association of Businesses Advocating Tariff Equity (ABATE) and Coalition of Midwest Transmission Customers at 11–12; Comments on Staff Paper of New York ISO at 3–4; Comments on Staff Paper of New York Transmission Organizations at 3–4.

[46] APPA states that, because ISO–NE offers only general system-wide ARRs, there is no direct relationship between the ARRs that a market participant receives and the FTRs that the market participant may desire, given the location of its resources. *See* Comments on Staff Paper of APPA, attached Concept Paper—Long-Term Transmission Rights, at 16, n. 22.

[47] It is thus possible to define a form of network service that consists of a set of point-to-point rights, each of which specifies a source, a sink and a megawatt quantity. This, however, would differ from network service under the OATT, which does not require the customer to reserve a specific amount of capacity between its network resources and network loads.

[48] In particular, that provision states that the Commission shall exercise its authority "to enable load-serving entities to secure firm transmission *(or equivalent tradable or financial rights)* on a long-term basis" (emphasis added).

[49] Comments on Staff Paper of APPA at 21.

entire quantity of the right. In proposing that the financial coverage offered by the long-term rights, once awarded, not be modified, we seek to establish rights that provide a high degree of stability in terms of payments from year to year, rather than subject to uncertainty over the possibility of significant pro-rationing in the event of revenue inadequacy. We interpret the intent of section 217(b)(4) of the FPA to be that the Commission ensure the availability in organized electricity markets of long-term firm transmission rights that provide price stability to load-serving entities with long-term power supply arrangements used to satisfy their service obligations.

49. When conditions arise that cause the transmission organization to receive congestion revenues that are not sufficient to meet payment obligations to FTR holders, the transmission organization must have in place a mechanism to fully fund the rights by collecting the needed revenues from a set of market participants. We will not specify here how that funding should be allocated among market participants, which is a subject for stakeholder discussion, but note that ideally the rules for funding of the rights should be designed to create and improve incentives for the maintenance and expansion of the transmission system that is needed to ensure the feasibility of the long-term rights that are allocated. This might be accomplished, for example, by placing the entities that are ultimately responsible for system maintenance and expansion at risk (wholly or partially) for funding revenue shortfalls that are due to inadequate maintenance or expansion practices. The transmission organization might also define rules for transmission upgrades and expansion to support the feasibility of long-term rights.[50] The Commission seeks comments on funding revenue shortfalls related to the provision of long-term firm transmission rights, particularly with regard to how any necessary charges should be allocated. Should such charges be allocated to a transmission owner that is responsible for maintaining and expanding the capacity supporting the long-term firm transmission rights where the revenue shortfalls are due to inadequate maintenance or expansion? Are there appropriate methods for allocating such charges that also provide appropriate short-term and long-term incentives for transmission usage, maintenance and expansion?

50. Also, there may be extraordinary circumstances under which the requirement for full funding should be relaxed. For example, one such extraordinary circumstance may be a sustained, unplanned outage of a large transmission line. Such circumstances may require alternative rules for sharing of congestion cost risk than would otherwise apply.

Guideline (3): Long-term firm transmission rights made feasible by transmission upgrades or expansions must be available upon request to any party that pays for such upgrades or expansions in accordance with the tronsmission organization's prevoiling cost allocation methods for upgrades or expansions. The term of the rights should be equol to the life of the focility (or facilities) or o lesser term requested by the porty poying for the upgrade or expansion.

51. Most transmission organizations today allow entities that pay for network upgrades or expansions to receive the long-term firm transmission rights that would not be feasible but for those expansions. The Commission believes that this policy is fair to both new and existing users of the transmission system, promotes efficient capacity expansions by allowing users that fund the expansions to compare directly any congestion cost savings with the cost of the necessary upgrades, and provides the long-term hedge against congestion costs desired by transmission customers wishing to enter into long-term power supply arrangements. We note that the *pro forma* OATT adopted by the Commission in Order No. 888 requires public utility transmission providers to expand capacity, if necessary, to satisfy the needs of transmission customers.[51] Accordingly, the tariffs of transmission organizations must clearly and specifically provide for the award of long-term firm transmission rights (as described in this proposed rule) to entities that support an expansion or upgrade in accordance with the transmission organization's prevailing cost responsibility or allocation rules. The long-term firm transmission rights would be equal to the amount of transfer capability created by the expansion or upgrade. We propose that such rights be for a term equal to the life of the facility (or facilities), or for a lesser term if requested by the funding party.

52. An issue that arises in this context concerns the possibility that granting a long-term firm transmission right that uses expanded capacity may encumber some existing transmission capacity as well. Given the integrated nature of the grid, any point-to-point transmission right made possible by a capacity expansion is likely to require use of at least some existing transfer capability in order for the right to be feasible. If the entity that has funded a capacity expansion does not have a priority to obtain long-term rights to existing capacity as proposed in guideline (5) in this NOPR,[52] the transmission organization must propose a procedure by which such an entity can obtain rights to existing capacity when such rights are needed to make the incremental expansion rights feasible. We ask for comment on the appropriate rules in such cases.

Guideline (4): Long-term firm transmission rights must be mode ovailable with term lengths (ond/or rights to renewal) that ore sufficient to meet the needs of load-serving entities to hedge long-term power supply orrongements mode or planned to sotisfy o service obligation. The length of term of renewals may be different from the original term.

53. The Commission proposes to require each transmission organization to make long-term firm transmission rights available to market participants. Doing so is consistent with section 217(b)(4) of the FPA, which requires that load-serving entities be able to secure firm transmission rights on a long-term basis to support long-term power supply arrangements made or planned to meet a service obligation. This requirement raises a number of issues. First, we note that the FPA (and EPAct 2005) do not define "long-term." Commenters on the Staff Paper expressed a wide range of views on the appropriate term for long-term transmission rights. Some commenters prefer to proceed cautiously, suggesting that a two year FTR obligation would be a reasonable, conservative starting point for implementation of long-term rights.[53] A number of commenters also support initial experimentation with shorter term FTRs, but are willing to consider longer terms, typically up to three to five years.[54]

54. Other commenters argued that the initial assignment of long-term rights should consider much longer time-frames, on the order of decades. For example, NRECA argues that the term of the rights should be matched to the RTO planning process, which is typically 5 or 10 years.[55] TAPS argues that long-term rights consistent with its specifications should be made available for 10 year terms with the unconditional

[50] We discuss this issue in Section V, *infra*.

[51] *See pro forma* OATT at sections 13.5, 15.4 and 28.2.

[52] *See infra* at P 58–61.

[53] *See, e.g.*, Comments on Staff Paper of California ISO at 5; Comments on Staff Paper of New York Public Service Commission at 3.

[54] *See, e.g.*, Comments on Staff Paper of Cinergy at 10; Comments on Staff Paper of Edison Electric Institute at 10.

[55] *See* Comments on Staff Paper of NRECA at 18.

right to renew.[56] APPA states that a party making an investment in a generation asset should be able to obtain a long-term right for the duration of the financing terms, which could be 20 to 30 years, or even for the duration of the asset's operating life. APPA notes that there should be flexibility in the term of the long-term right, but that perhaps there should be a minimum term that matches the transmission organization's planning and construction horizon.[57]

55. The Commission believes that it is reasonable to allow transmission organizations to individually develop and propose the terms of the long-term firm transmission rights they offer.[58] However, we consider long-term, for purposes of this rulemaking, to mean terms on the order of multiple years, sufficient to meet the needs of load-serving entities with service obligations.[59] The Commission's primary concern here is to be responsive to the needs of load-serving entities, other market participants, and the requirements of section 217(b)(4) of the FPA. In particular, our goal is to ensure that long-term firm transmission rights are available for those who wish to obtain a more stable, long-term firm transmission right to meet their service obligations, and for those who need longer-term transmission rights to finance investments in new generation or long-term power purchase contracts. To achieve this goal, we propose this guideline, which would require that the specific rights proposed by each transmission organization in compliance with this rulemaking have term lengths (and/or rights to renewal) that are sufficient to meet the needs of transmission customers to hedge long-term power supply arrangements made or planned to satisfy a service obligation. Because market participants in different transmission organizations may have different needs, we decline to propose a specific term length or set of term lengths. New section 217(b)(4) of the FPA makes clear, however, that transmission organizations with organized electricity markets must meet the needs for long-term firm transmission service of load-serving entities with long-term power supply arrangements made, or planned, to meet their service obligations. Hence, this guideline would require that transmission organizations with organized electricity markets offer long-term firm transmission rights with terms that meet such needs. The Commission expects that multiple-year terms will be necessary to ensure that the rights will support the financing of new generation investments or power purchase contracts.[60] Our view of long-term as terms of multiple years is intended to provide a range to allow transmission organizations the flexibility to individually develop and propose term lengths, subject to review by the Commission to ensure that the terms each transmission organization proposes meet the goals described above and expressed by Congress in section 217(b)(4) of the FPA.

56. We seek comments regarding the length of terms of long-term firm transmission rights. For example, we seek comments on whether regional flexibility is needed on the length of term, or whether a more specific set of terms should be included in the Final Rule. Further, we note that the issue of term length is linked to the length of the transmission organization's transmission planning and expansion cycle. As a result, we seek comments on how longer-term long-term firm transmission rights (*i.e.* 20 to 30 years) relate to the transmission organization's planning cycle, how such longer-term rights can be guaranteed beyond the length of the planning cycle, and whether the planning cycles of transmission organization's must be modified or extended to accommodate terms that are sufficient to meet the needs of load-serving entities to hedge long-term power supply arrangements made or planned to satisfy a service obligation.[61]

57. With regard to rights to renew long-term firm transmission rights, the transmission organization may propose reasonable criteria regarding the availability of renewal rights, and the price at which rights may be renewed. For example, the right to renew long-term firm transmission rights may be limited to a load-serving entity that can demonstrate that the renewal right is needed to allow the load-serving entity to match the term of its transmission rights to the term of a particular long-term power supply arrangement. In addition, the transmission organization may require minimum notice periods for initiation, renewal, cancellation or conversion that accommodate the transmission organization's planning cycle or other administrative considerations. We seek comments on the relationship between the right to renew a long-term firm transmission right and transmission system planning.

Guideline (5): Load-serving entities with long-term power supply arrangements to meet a service obligation must have priority to existing transmission capacity that supports long-term firm transmission rights requested to hedge such arrangements.

58. When finalized, this rulemaking will require that transmission organizations with organized electricity markets make long-term firm transmission rights available to transmission customers. As noted above, section 217(b)(4) of the FPA requires the Commission to exercise its authority to enable "load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs." As we discuss elsewhere in this NOPR, in regions where existing transmission capacity is limited, transmission organizations may not be able to accommodate all requests for long-term firm transmission rights. While section 217 does not require that long-term firm transmission rights be made available only to load-serving entities with service obligations, we interpret that section to require the Commission to give load-serving entities with long-term power supply arrangements to satisfy a service obligation a preference in securing long-term firm transmission rights. In accordance with this interpretation, if there is a conflict (infeasibility) in awarding long-term rights from existing capacity (or capacity created by incremental reliability upgrades) to all parties eligible to receive them, we propose to require the transmission organizations to address this infeasibility by first giving load-serving entities with long-term power supply arrangements used to meet service obligations priority in the allocation of the rights.

59. When rights requested by eligible parties with priority (or parties without priority that are being accommodated) are not simultaneously feasible given existing transmission capacity, the transmission organization may adopt methods to allocate the requested rights to the parties prior to granting such rights. We seek comments on such methods and whether and to what extent it may be appropriate to allow

[56] *See* Comments on Staff Paper of TAPS at 19–21.

[57] *See* Comments on Staff Paper of APPA at 33.

[58] We expect that transmission organizations will develop their proposals in consultation with stakeholders.

[59] Defining long-term in this manner, for purposes of this proposed rule, differs from our previous practice of defining long-term as "one year or more." We propose defining long-term differently in this context because the transmission organizations subject to this rulemaking already provide transmission rights with a term of one year.

[60] The ability to renew the long-term firm transmission rights will also help ensure that term lengths will be appropriate.

[61] This NOPR also explores transmission planning and expansion in Section V, *infra*.

transmission organizations to adopt limits on the amount of capacity they will allocate to long-term rights before such rights are allocated. In particular, we seek comments on whether section 1233 of EPAct 2005 and new section 217(b)(4) of the FPA, read in their entirety, support such reasonable limits. Section 217(b)(4) states that the Commission must exercise its authority to meet the "reasonable needs" of load-serving entities to satisfy their service obligations. Additionally, that section requires that the Commission enable load-serving entities to secure long-term firm transmission rights for "power supply arrangements made, or planned," to meet their service obligations.

60. In making available long term firm transmission rights for power supply arrangements "made or planned" to meet service obligations, transmission organizations may have to incorporate estimates of load growth into the award of such rights. This raises the concern that to the extent that the load growth assumptions made by load-serving entities as a basis for nominating transmission rights are overstated, some load serving entities could be awarded more long-term firm transmission rights than needed to meet service obligations, and the associated transmission capacity would not be available for allocation of transmission rights to others. The Commission seeks comment on this issue and any rules or other safeguards that address it.

61. We also seek comments on the other issues raised by this guideline. Particularly, we seek comment on how the transmission organization should allocate long-term firm transmission rights from existing capacity in light of the priority we propose in this guideline.

Guideline (6): A long-term transmission right held by a load-serving entity to support a service obligation should be re-assignable to another entity that acquires that service obligation.

62. The Commission believes that in general, it is appropriate to require that long-term firm transmission rights, once allocated to or obtained by a load-serving entity, be reassignable to a successor load-serving entity which, in turn, would assume any cost responsibility that holding the rights entails. This proposal is consistent with section 217(b)(3)(A) of the FPA, which requires that transmission rights held by a load-serving entity as of the date of enactment of EPAct 2005 for the purpose of delivering energy it has purchased or generated to meet a service obligation be transferred to a successor load-serving entity.[62] Specifically, section 217(b)(3)(A) provides:

> To the extent that all or a portion of the service obligation covered by the firm transmission rights or equivalent tradable or financial transmission rights is transferred to another load-serving entity, the successor load-serving entity shall be entitled to use the firm transmission rights or equivalent tradable or financial transmission rights associated with the transferred service obligation.

This guideline would apply when a service obligation is transferred to a new load-serving entity. Such a transfer of a service obligation might occur pursuant to a state commission order, or might occur in a state with retail competition if load chooses a new supplier. The Commission seeks comments regarding whether the reassignability we propose to require in this guideline, consistent with section 217, should apply to all long-term firm transmission rights, regardless of how those rights were obtained. For example, what, if any, compensation should a holder of long-term rights receive when its rights are reassigned to a successor load-serving entity?

63. Section 217(b)(4) of the FPA does not discuss whether long-term firm transmission rights should be fully tradable among market participants. Allowing such rights to be fully tradable could raise issues of equity, since a load-serving entity who acquired the rights through the preference we propose in this rulemaking could then possibly sell or trade the rights at a profit. This might give load-serving entities the incentive to acquire excess long-term firm transmission rights in order to take advantage of profit opportunities through arbitrage. However, full tradability may bring benefits to the market, and allow those who could not obtain long-term rights in the initial allocation to obtain such rights later. We seek comment on these issues. Particularly, we seek comment on whether the equity issues we note above could be addressed by only permitting holders of long-term firm transmission rights to return their rights to the transmission organization at the price paid, or whether these issues could be addressed in some other manner.

Guideline (7): The initial allocation of the long-term firm transmission rights shall not require recipients to participate in an auction.

64. As is currently done in most transmission organization markets, the first stage in awarding transmission rights is to allocate the rights directly to eligible parties or to allocate auction revenue rights directly and subsequently conduct an auction for transmission rights (in which parties with and without allocated rights can participate). If an auction model is adopted or continued by the transmission organization, we will require that any long-term rights allocated as auction revenue rights can be directly converted to transmission rights without participation in the auction.[63] This allows any party that feels uncertain about valuing its rights commercially to de facto have them allocated directly. This guideline does not preclude interested parties with long-term rights from participating in the auction if they choose.

Guideline (8): Allocation of long-term firm transmission rights should balance any adverse economic impact between participants receiving and not receiving the right.

65. The provision of long-term firm transmission rights may have adverse impacts on markets participants not receiving such rights. For example, to the extent that the capacity of the transmission system is encumbered by entities holding long-term firm transmission rights, entities that prefer to hold short-term transmission rights, such as load-serving entities operating in retail states,[64] will have fewer rights available to them than they have under annual allocation schemes that are now used. In addition, to the extent awarded long-term rights become infeasible due to major unforeseen changes in the physical properties of the transmission system, the payment obligations to holders of long-term firm transmission rights would have to be funded by others.

66. Although some of these impacts may be unavoidable, the Commission believes, in general, that it is possible for a transmission organization to introduce long-term firm transmission rights in a way that balances their economic impact between those receiving and not receiving the rights. For example, the transmission

[62] We note that the short-term transmission rights currently offered by transmission organizations are generally reassignable to successor load-serving entities, consistent with this statutory language. *See, e.g.*, PJM Manual 06, Financial Transmission Rights (Revision 7, effective April 15, 2005), *at http://www.pjm.com/contributions/pjm-manuals/pdf/m06v071.pdf.*

[63] For example, under the rules for allocation of transmission rights on file for PJM, awarded ARRs can be directly converted to FTRs in the subsequent annual auction without submission of price offers.

[64] Because load-serving entities in retail access states may prefer a business model that is based upon having only short-term supply arrangements, they may prefer to hold only short-term transmission rights.

organization could place a limit on the amount of system capacity that is available to support long-term rights. This would reduce the likelihood that the rights may become infeasible due to major unforeseen changes in physical properties of the transmission system, which in turn would reduce the possibility that the burden of funding the allocated rights would eventually fall onto other market participants. The Commission seeks comment on this issue.

67. Second, to the extent that the long-term right relieves the holder of the obligation to pay congestion costs, the value of that congestion hedge should be reflected in the price of the long-term right, insofar as possible. For example, where FTR options are offered to provide a better congestion hedge, and the FTR option encumbers more system capacity than an FTR obligation, the load-serving entity that requests such a right could be required to assume greater cost responsibility than it would if it received an FTR obligation. The additional payment may, for example, be in the form of a requirement to pay a larger share of the transmission revenue requirement.

68. Third, the transmission organization might provide for a secondary market or auction by which long-term rights holders can offer their rights for sale or reconfigure their rights, subject to any restrictions on trading that may be deemed necessary. This would provide an opportunity for transmission customers to obtain long-term rights on either a long-term or short term basis from those holding long-term rights. However, as we noted above in our discussion of guideline (6), allowing this kind of tradability could raise equity issues and could give load-serving entities with a preference the incentive to acquire excess long-term rights and later sell them at a profit.[65] We seek comment on these issues.

69. Finally, with regard to the pricing of long-term rights in general, the Commission proposes not to prescribe a specific methodology, whether the rights are available from existing capacity or require capacity expansion. In particular, the Commission does not propose to require a rolled-in pricing policy for long-term firm transmission rights. Rather, consistent with current policy, the Commission proposes to allow the transmission organization flexibility to propose methods for pricing transmission rights and related services that are appropriate for its region and are the product of a stakeholder process.

[65] *See supra* at P 63.

70. We seek comment on ways that transmission organizations may balance any adverse economic impacts of allocating long-term firm transmission rights between participants receiving and not receiving such rights. We also seek comment on any measures that should be adopted to protect against actions by long-term firm transmission rights holders. For example, a holder of a long-term firm transmission obligation type of right may leave the transmission organization. The allocation of other transmission rights may have depended on that holder's counterflows on the grid or its payments to fulfill its obligation to the transmission organization. Are measures needed to address this situation?

C. Alternative Designs

71. The guidelines above are sufficiently general to allow for a range of proposals for the design of long-term firm transmission rights. To assist parties in formulating those proposals, we discuss three alternative designs that are possible under the guidelines: long-term ARR or FTR obligations, FTR options, and rights with modifications of FTR settlement or physical scheduling requirements, such as "use or lose" rights. Consistent with proposed Guideline (7), we expect that the first step under any proposed design will be a direct allocation, rather than an auction (followed possibly by voluntary participation in an auction). The prevailing design for initial allocation of ARRs or FTRs has been to assign obligation rights. At the Commission's urging and in response to market interest, in at least one current market (PJM), ARRs can subsequently be used to purchase FTR options as well as obligations through an FTR auction.

1. Long-Term ARR or FTR Obligations

72. We begin with the advantages and disadvantages of the prevailing designs for transmission rights in current organized electricity markets. As noted above, allocated transmission rights, whether as ARRs or FTRs, are modeled as obligation rights. The major advantage of obligations is that they allow the transmission organization to maximize the coverage of the allocated point-to-point transmission rights made available to eligible parties. As explained above, in the modeling of the transmission system power flows that supports the initial allocation, obligation rights are represented under the assumption that the counterflows associated with injections and withdrawals will be present. This limits the need to "pro-ration" eligible transmission rights, although most transmission organizations have rules for how such pro-rationing will occur if necessary (*e.g.*, by having stages of the allocation with higher priority given to rights nominated in early stages).

73. In existing systems that directly allocate FTR obligations, allocating multi-year FTRs could be a fairly straightforward extension of the existing market design, with the need for additional rules to cover the additional risks of a multi-year financial instrument that could entail payment obligations, such as creditworthiness requirements.

74. In systems that directly allocate ARRs, the rules would be slightly different. A long-term ARR obligation would mean that for the term defined in the right, the load-serving entity would receive the right to auction revenues associated with a fixed quantity of injections and withdrawals in the FTR auction. The load-serving entity could then either directly convert the ARRs to FTR obligations on an annual basis or it can use the expected revenues to purchase FTRs of greater than one year based on the assumption that its ARR revenue eligibility will be fixed for multiple years (or it could choose not to purchase long-term FTRs but simply collect auction revenues each year). In contrast, under a direct allocation of long-term FTR obligations, the party with the rights will hold the rights for the term specified. Hence, a design that provides ARR obligations on a long-term basis will be somewhat more flexible than the allocation directly of FTRs, because it gives the parties the choice of purchasing a fixed quantity of FTRs annually or holding a longer-term FTR obligation. Thus, the directly allocated long-term ARR obligation gives a similar degree of financial certainty as the directly allocated long-term FTR obligation, but more flexibility to change actual holdings of FTRs from year to year.

75. On the other hand, under some conditions, obligations of either type—ARR or FTR—may not provide the price certainty desired in a long-term firm transmission right. Transmission system conditions change over time—including resource ownership and perhaps load—such that the long-term FTR obligation may be difficult to manage financially through physical scheduling. At times, FTR obligations may become a financial liability, as noted above. ARR obligations can also become negative sources of income—a negative ARR would require the holder to pay the auction rather than collect revenues from it. It is these properties that have stimulated interest in other types of

rights without the likelihood of negative payment obligations.

76. Before turning to alternative rights, we note that there could be market rules that, while not turning obligations into options, reduce the extent of the exposure to potential long-term payment obligations. As an example, long-term FTR obligations are currently awarded for incremental transmission expansions, and such rights also have potential negative payment obligations. Because parties that build transmission may not own generation with which to manage such FTR payment risk (*e.g.*, merchant transmission operators), some organized electricity market rules (*e.g.*, PJM) currently allow for such long-term incremental rights to be "turned back" to the transmission organization without penalty at the end of each annual allocation cycle, thus creating an option-like feature. To the extent that long-term incremental transmission rights support only a limited reliance on counterflow used by other parties in subsequent allocations of rights, such a rule may have no or limited financial impact on other parties, but if the transmission organization applied such a rule to long-term obligation rights to existing capacity, such a "turn back" rule could have more substantial financial implications—that is, require uplift charges—in some circumstances. This is a "socialization" of risk decision that is best made by stakeholders in tandem with other such decisions, such as how many long-term rights to allocate. Such socialization may assist in developing rules for long-term ARR or FTR obligations that have more desirable properties for market participants.

2. Long-Term FTR Options

77. For many parties seeking long-term rights (including long-term rights obtained for transmission upgrades and expansions), FTR option rights have attractive financial properties. As noted above, in contrast to the obligation right, the FTR option payment is made only when the congestion charge between the points is positive. When the congestion charge is negative, the FTR option neither pays revenues nor requires payment equal to the negative charge. As such, the holder will never face negative payment obligations.

78. The primary difficulty in allocating long-term (or short-term) FTR options is that because the counterflows are not included when modeling for revenue adequacy, the transmission organization will be able to directly allocate fewer FTR options to eligible parties than it would be able to allocate FTR obligations that assume counterflows (see discussion next). This increases the likelihood that the transmission organization would not be able to fulfill all requests for FTRs. The potential shortfall in available FTRs could be significant in some locations and rules for equitable pro-rationing could be difficult to develop.[66] As a result some parties would be exposed to congestion charges for transmission usage in excess of their FTR allocation.

79. The allocation issues posed by long-term FTR options may be mitigated in a number of ways. If parties sufficiently desire the financial risk characteristics and revenues associated with FTR options, they may be willing to accept pro-rationing with the attendant possibility of congestion charge exposure. Depending on grid capability, it is possible that the resulting exposure may be minimal. Another possibility is that, if eligibility requirements are restrictive, sufficiently few long-term FTR options will be allocated such that there is enough transmission system capability to satisfy the remaining needs for congestion hedges through FTR obligations. Another approach, similar to that currently followed in PJM for annual rights, is to assign long-term auction revenue rights modeled as obligations, and then let holders of such rights decide whether to purchase long-term FTR options or obligations in a subsequent auction. This method requires the party eligible for the long-term right to make financial decisions up-front that it may prefer not to make, however. Yet another policy option is to make sufficient investments in transmission expansion to make the desired long-term FTR options feasible. This course could be taken if the market participants determine that such investments are less expensive than any congestion cost exposure or insurance through uplift charges associated with other transmission rights schemes, some of which are discussed below.

3. Other Approaches to Long-Term Firm Transmission Rights

80. The features of long-term FTR options and FTR obligations have driven some parties to propose alternative types of long-term transmission rights, some having financial settlement properties that are different from current FTRs and others combining physical and financial features.[67] We review these alternative approaches simply for illustrative purposes.

81. Some transmission organizations have implemented types of multi-year transmission rights with combined financial and physical properties to solve certain transmission rights allocation problems. For example, in the Midwest ISO, parties with pre-Order 888 OATT rights were eligible for Grandfathered Agreements (GFAs) that exempted the holders from congestion charges based on locational marginal prices. Typically, such rights would be accommodated in transmission rights markets through physical set-asides or "carve-outs" that basically reserved enough transmission capacity on an "option" basis (*i.e.*, not considering counterflows) to accommodate them. However, in the Midwest ISO footprint, there were enough of these eligible GFAs so that treating them all in this fashion would have greatly reduced the allocation of FTRs to other parties and possibly threatened the integrity of the LMP energy markets and the FTR allocation to other parties. One of the interim solutions devised by the Midwest ISO was to create the GFA "Option B" right.[68] The Midwest ISO models this right as an FTR obligation in the FTR allocation process, thus allowing it to capture the counterflows associated with the rights. However, instead of assigning the FTR obligation to the eligible party, the Midwest ISO holds the right for settlement purposes. The GFA Option B holder is required to schedule transmission in the day-ahead market, upon which the congestion revenues accumulated by the right are used to "pay" its congestion charges; the holder is not assessed negative congestion charges (in most cases, the holder of such a right would not schedule power if LMPs were to create negative congestion charges, but this might not be foreseeable at all times).[69] If there is a revenue inadequacy, the Midwest ISO charges uplift to all market participants on a *pro-rata* basis, based on their load ratio share in the Midwest ISO market. This is thus a type of use-or-lose right that does not allow the holder to accumulate revenues in excess of congestion charges from transmission rights but does not expose the holder to negative congestion charges. However, the allocation of such rights is based on system-wide insurance, in the form of

[66] The pro-rationing of FTR obligations has also created conflict over the appropriate rules in some organized markets, but the scale of the equity problem in the case of FTR options could be much greater.

[67] *See generally* Comments on Staff Paper of APPA; Comments on Staff Paper of TAPS.

[68] *See* section 38.8.3(b), Midwest ISO Open Access Transmission and Energy Markets Tariff (TEMT), Second Revised Sheet No. 447.

[69] Holders of GFA Option B rights are also exempted from marginal loss charges.

uplift, to cover any resulting revenue inadequacies.

82. Also in the Midwest ISO, the Commission created a related type of interim long-term congestion cost hedge for parties in persistent load pockets (called "Narrow Constrained Areas" or NCAs) that previously had firm transmission service that covered generation resources or contracts outside the load pocket.[70] This is called the "Expanded Congestion Cost Hedge." The concern was that the FTR allocation would not be sufficient to always cover the quantities of transmission imports covered by these parties' prior transmission rights, thus leaving them potentially exposed to high congestion charges (reflecting the expectation that LMPs in a load pocket could be substantially higher than LMPs outside the load pocket). In this case, the purpose of the right was to provide such parties with a fixed quantity of transmission service covered by a congestion hedge, even if such rights were not awarded through the FTR allocation process (that is, were not simultaneously feasible with all other nominated FTRs).[71] This right also requires that the holder schedule through the day-ahead market. Unlike the Midwest ISO's "Option B" GFA, this arrangement does not protect the holder from negative congestion charges associated with its allocated FTRs, but it does guarantee that the holder will receive revenues from the Midwest ISO sufficient to cover any positive congestion charges not covered through its allocated FTRs. If the Midwest ISO experiences revenue inadequacy due to these payments, it again charges uplift to all market participants on a *pro-rata* basis, based on their load ratio share in the Midwest ISO market.

4. Combining Different Types of Long-Term Firm Transmission Rights

83. Most existing transmission organizations do retain some quantity of non-FTR transmission rights on their transmission systems, typically grandfathered pre-Order 888 OATT rights that are treated as physical scheduling rights. In most of these markets, these physical transmission rights do not require that a large amount of transmission capability is reserved, hence they do not greatly affect the allocation and trading of FTRs. However, as noted above, the Midwest ISO has had to accommodate a greater number of such rights than other transmission organizations and has done so on an interim basis through creation of alternative types of financial rights or other arrangements. It has sought to minimize the impact of such rights on the FTR allocation and on the exposure of market participants to uplift.

84. In the event that stakeholders' interests in different types of transmission rights are difficult to reconcile, transmission organizations may need to consider the development of different types of long-term rights simultaneously. We believe that regional stakeholder discussions are the appropriate forum for such decision-making.

85. If the transmission organization and stakeholders are considering more than one type of transmission right, we further encourage them to establish mechanisms by which holders of one kind of long-term firm transmission right can convert their rights into other rights with other characteristics offered by the transmission organization that rely on the same amount of transmission capacity. For example, a long-term right initially awarded as an obligation could be subsequently converted to an option. However, since more transmission capacity may be necessary to support an option than to support an obligation, the holder may receive fewer options than obligations.

V. Planning and Expansion of Transmission Facilities

86. As noted above, section 217(b)(4) of the FPA requires the Commission to exercise its authority "in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities."[72]

87. Additionally, many of those commenting on the Staff Paper argued that implementation of long-term firm transmission rights will not be possible unless the transmission organization has adequate transmission planning and expansion procedures in place.[73] According to some commenters, the inadequacy of the physical transmission system and the lack of a reliable mechanism for transmission organizations to plan and require the construction of transmission facilities are the prime impediments to both introducing long-term firm transmission rights in the organized electricity markets and ensuring that they remain simultaneously feasible over their entire term.[74] Several of those providing comments on the Staff Paper recommended specific attributes that should be included in transmission organization planning and expansion procedures.[75] For example, TAPS argues that transmission organizations should have clear authority to mandate the construction of transmission facilities by transmission owners or others.[76] Also, commenters asserted that transmission planning and expansion procedures adopted by transmission organizations should plan for "economic" upgrades as well as upgrades needed for reliability.[77]

88. We propose in this NOPR to require that transmission organizations ensure that the long-term firm transmission rights they offer remain viable and are not modified or curtailed over their entire term. In particular, the proposed guidelines would require that transmission organizations guarantee the financial coverage of the long-term firm transmission rights over their entire term.[78] Accordingly, transmission organizations will need to have effective planning and expansion regimes in place, and may need to expand the system where necessary to ensure that the long-term firm transmission rights can be accommodated over their entire term without modification or curtailment. Without appropriate planning and expansion of the system where necessary, it may be difficult to ensure that long-term firm transmission rights remain financially viable without significant charges to some set of participants.

89. While we agree in general with those comments on the Staff Paper that stress the necessity of tying the availability of long-term firm transmission rights to adequate planning and expansion procedures, we will not propose specific procedures in this NOPR. The Commission believes that each transmission organization and its stakeholders should develop appropriate methods for ensuring that

[70] *See* section 43.2.6, Midwest ISO TEMT, Substitute Second Revised Sheet No. 630.

[71] This expanded hedge was made available as a market start safeguard for five years from the start of the market. Since only one region of the Midwest ISO was designated as an NCA at the start of the market, the hedge was also made available during the safeguard period for parties in any area subsequently designated as an NCA.

[72] Pub. L. 109–58, § 1233, 119 Stat. 594, 956.

[73] *See, e.g.*, Comments on Staff Paper of NRECA at 9–10; Comments on Staff Paper of Midwest TDUs at 5; Comments on Staff Paper of ELCON at 3; Comments on Staff Paper of National Grid at 1–2 and 9.

[74] *See, e.g.*, Comments on Staff Paper of NRECA at 9; Comments on Staff Paper of APPA at 21–22.

[75] *See, e.g.*, Comments on Staff Paper of NRECA at 11–13; Comments on Staff Paper of City of Santa Clara, California at 18–19; Comments on Staff Paper of APPA, attached Concept Paper; Comments on Staff Paper of National Grid at 8–10.

[76] Comments on Staff Paper of TAPS at 32.

[77] *See, e.g.*, Comments on Staff Paper of TAPS at 32; Comments on Staff Paper of NRECA at 12; Comments on Staff Paper of National Grid at 10.

[78] *See* discussion of guideline (2), *supra*.

long-term firm transmission rights are supported by adequate planning and expansion procedures. While we do not propose specific requirements in this regard, we expect that such planning and expansion procedures will be a necessary complement to long-term firm transmission rights. The Commission encourages transmission organizations to propose such procedures as part of their filings in compliance with the Final Rule in this docket, and the Commission will consider them in light of the charge in section 217(b)(4) of the FPA that we "facilitate * * * the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities." We seek additional comments regarding the relationship between long-term firm transmission rights and planning and expansion procedures in the organized electricity markets operated by transmission organizations. In particular, we seek comment on whether the Commission should require that transmission organizations file their transmission planning and expansion procedures and specific plans. We also seek comment on whether, alternatively, the Commission should require that transmission organizations file such procedures for informational purposes, as a means for the Commission to monitor the adequacy of such plans and procedures for ensuring the adequacy of long-term firm transmission rights.

90. Additionally, we note that the *pro forma* OATT adopted by the Commission in Order No. 888 requires public utility transmission providers to expand capacity, if necessary, to satisfy the needs of network transmission customers and point-to-point transmission service customers.[79] In comments submitted in response to the Staff Paper, several entities suggested that this obligation does not exist, or is not carried out, in the organized electricity markets operated by ISOs and RTOs.[80] The Commission's recent Notice of Inquiry concerning the *pro forma* OATT sought responses from interested parties on several specific questions relating to this requirement in the *pro forma* OATT, including: (1) Whether this provision has met transmission customers' needs, and (2) whether public utility transmission providers have fulfilled these obligations.[81] In this proceeding, the Commission seeks comments addressing these questions in the specific context of transmission organizations with organized electricity markets that are the subject of this rulemaking. Where appropriate, responses should address the arguments made in response to the Staff Paper, and noted above, concerning the obligation of transmission providers to expand capacity to meet the needs of network and point-to-point transmission service customers.

91. The Commission also emphasized in the NOI that it is not proposing to change the native load preference established in Order No. 888.[82] The Commission sought comments, however, on whether the definition of native load service obligation in section 1233 of EPAct 2005 is the same as the approach the Commission took in Order No. 888.[83] In this docket, the Commission seeks comments on this question with particular emphasis on how the native load preference has been applied in the organized electricity markets that are the subject of this rulemaking.

92. Finally, many of the comments received on the Staff Paper stressed a need for appropriate incentives for transmission organizations, transmission owners and market participants to construct needed upgrades and expansions to the transmission system. As we discuss above, the potential for additional charges in ensuring that the financial coverage of the long-term firm transmission rights remains intact for their entire term should provide an incentive for planning and expanding the transmission system. Additionally, we note that in Docket No. RM06–4–000, the Commission issued a NOPR proposing amendments to the Commission's existing regulations to promote reliable and economically efficient transmission and generation of electricity by providing incentives for increased capital investment in transmission facilities.[84] The Commission will consider the issues surrounding appropriate incentives for expansion of transmission facilities in that rulemaking.

VI. Proposed Compliance Procedures

93. The Commission proposes to direct each public utility that is a transmission organization with an organized electricity market, within 180 days of the publication of a Final Rule in the **Federal Register**, to either: (1) File with the Commission tariff sheets and rate schedules that make available long-term firm transmission rights that are consistent with the guidelines set forth in section (d) of the Final Rule; or (2) file with the Commission an explanation of how its current tariff and rate schedules already provide for long-term firm transmission rights that are consistent with the guidelines set forth in paragraph (d) of the Final Rule. The Commission intends that during this 180-day time period, such transmission organizations will work with their stakeholders to develop a long-term firm transmission right that will harmonize the prevailing market design with the guidelines set forth in this Final Rule. We do not propose any specific stakeholder process, and intend that the transmission organization will use its usual process for receiving stakeholder input and filing tariff changes with the Commission. For any transmission organization that is approved by the Commission after the 180-day time period, the Commission proposes that the transmission organization satisfy the requirements set forth in this rule before commencing operation.

VII. Information Collection Statement

94. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.[85] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. This NOPR amends the Commission's regulations to implement some of the statutory provisions of section 1233 of EPAct 2005. Particularly, section 1233 of EPAct 2005 enacts a new section 217 of the FPA. New section 217(b)(4) requires the Commission to exercise its authority in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy their service obligations, and enables load-serving entities to secure long-term firm transmission rights to meet their service

[79] *See pro forma* OATT at sections 13.5, 15.4 and 28.2.

[80] *See, e.g.*, Comments on Staff Paper of APPA at 10; Comments on Staff Paper of ABATE and Midwest Transmission Customers at 4–6; Comments on Staff Paper of Peabody Energy Corporation at 6.

[81] *Preventing Undue Discrimination and Preference in Transmission Services*, Notice of Inquiry, 112 FERC ¶ 61,299 at P 21 (2005) (NOI).

[82] *Id.* at P 9.

[83] *Id.*

[84] *See* Promoting Transmission Investment Through Pricing Reform, Notice of Proposed Rulemaking, 113 FERC ¶ 61,182 (2005).

[85] 5 CFR 1320.13 (2005).

obligations. Section 1233(b) of EPAct 2005 directs that Commission to, by rule or order, implement this new provision in the FPA. This proposed rule would require transmission organizations with organized electricity markets to either file tariff sheets making long-term firm transmission rights available that are consistent with guidelines established by the Commission, or to make a filing explaining how their existing tariffs already provide long-term firm transmission rights that are consistent with the guidelines. Such filings would be made under Part 35 of the Commission's regulations. The information provided for under Part 35 is identified as FERC–516.

95. The Commission is submitting these reporting requirements to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act.[86] Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques.

Burden Estimate: The Public Reporting burden for the requirements contained in the NOPR is as follows:

Data collection	Number of respondents	Number of responses	Hours per response	Total annual hours
FERC–516—Transmission Organizations with Organized Electricity Markets	6	1	1180	7,080

Total Annual Hours for Collection: (Reporting + recordkeeping, (if appropriate) = 7,080 hours.

Information Collection Costs: The Commission seeks comments on the costs to comply with these requirements. It has projected the average annualized cost to be the total annual hours of 7,080 times $150 = $1,062,000.

Title: FERC–516 "Electric Rate Schedule Filings."

Action: Proposed Collections.

OMB Control No.: 1902–0096.

Respondents: Business or other for profit, and/or not for profit institutions.

Frequency of Responses: One time to initially comply with the rule, and then on occasion as needed to revise or modify.

Necessity of the Information: This proposed rule, if adopted, would implement the Congressional mandate of the Energy Policy Act of 2005 to make long-term transmission rights available in transmission organizations with organized electricity markets. This mandate addresses an identified need for transmission organizations with organized electricity markets to provide longer-term transmission rights that can aid load-serving entities in financing long-term power supply arrangements to meet their service obligations. Making long-term firm transmission rights available will also provide increased certainty regarding the long-term costs of transmission service in organized electricity markets. As a result, long-term firm transmission rights will allow load-serving entities to more effectively plan their power supply portfolios, and encourage load-serving entities and other participants in organized electricity markets to make long-term investments in power supply arrangements.

Internal review: The Commission has reviewed the requirements pertaining to transmission organizations with organized electricity markets and determined the proposed requirements are necessary to meet the statutory provisions of the Energy Policy Act of 2005.

96. These requirements conform to the Commission's plan for efficient information collection, communication and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

97. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE. Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502–8415, fax: (202) 273–0873, e-mail: *michael.miller@ferc.gov*]. Comments on the requirements of the proposed rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission], e-mail: *oira_submission@omb.eop.gov*.

VIII. Environmental Analysis

98. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[87] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that do not substantially change the effect of legislation.[88] The rule proposed in this NOPR falls within this categorical exemption because it implements the requirements of EPAct 2005 relating to long-term firm transmission rights in organized electricity markets. Accordingly, neither an environmental impact statement nor environmental assessment is required.

IX. Regulatory Flexibility Act Certification

99. The Regulatory Flexibility Act of 1980[89] generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. Most, if not all, of the transmission organizations to which the requirements of this rule would apply do not fall within the definition of small entities.[90] Therefore, the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required.

X. Comment Procedures

100. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due March 13, 2006. Reply comments are due March 27, 2006. Comments and reply comments must refer to Docket No. RM06–8–000,[91]

[86] 44 U.S.C. 3507(d) (2000).

[87] *Regulations Implementing the National Environmental Policy Act*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (1987).

[88] 18 CFR 380.4(2)(ii) (2005).

[89] 5 U.S.C. 601–12 (2000).

[90] The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. *See* 15 U.S.C. 632 (2000).

[91] While we are issuing this NOPR in both Docket No. RM06–8–000 and Docket No. AD05–7–000, we expect to issue our Final Rule in only Docket No.

and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. Comments and reply comments may be filed either in electronic or paper format.

101. Comments and reply comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov*. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments and reply comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC, 20426.

102. All comments and reply comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments and reply comments on other commenters.

XI. Document Availability

103. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

104. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

105. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact FERC Online Support at 1–866–208–3676 (toll free) or (202) 502–8222 (e-mail at *FERCOnlineSupport@FERC.gov*), or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659 (e-mail at *public.referenceroom@ferc.gov*).

List of Subjects in 18 CFR Part 40

Electric power rates; Electric utilities.

By direction of the Commission.

Magalie R. Salas,

Secretary.

In consideration of the foregoing, the Commission proposes to amend Subchapter B, Chapter I, Title 18, *Code of Federal Regulations*, by adding a new Part 40 as follows:

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Subchapter B—Regulations Under the Federal Power Act

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PART 40—LONG–TERM FIRM TRANSMISSION RIGHTS IN ORGANIZED ELECTRICITY MARKETS

Sec.

40.1 Requirement that Transmission Organizations with Organized Electricity Markets offer Long-Term Transmission Rights

Authority: 16 U.S.C. 791a–825r and section 217 of the Federal Power Act.

§ 40.1 Requirement that Transmission Organizations with Organized Electricity Markets Offer Long-Term Transmission Rights.

(a) *Purpose.* This section requires a transmission organization with one or more organized electricity markets (administered either by it or by another entity) to make available long-term firm transmission rights, pursuant to section 217(b)(4) of the Federal Power Act, that satisfy the guidelines set forth in paragraph (d) of this section. This section does not require that a specific type of long-term firm transmission right be made available, and is intended to permit transmission organizations flexibility in satisfying the guidelines set forth in paragraph (d) of this section.

(b) *Definitions.* As used in this section:

(1) *Transmission Organization* means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other independent transmission organization finally approved by the Commission for the operation of transmission facilities.

(2) *Load-serving entity* means a distribution utility or an electric utility that has a service obligation.

(3) *Service obligation* means a requirement applicable to, or the exercise of authority granted to, an electric utility under Federal, State, or local law or under long-term contracts to provide electric service to end-users or to a distribution utility.

(4) *Organized Electricity Market* means an auction-based market where a single entity receives offers to sell and bids to buy electric energy and/or ancillary services from multiple sellers and buyers and determines which sales and purchases are completed and at what prices, based on formal rules contained in Commission-approved tariffs, and where the prices are used by a transmission organization for establishing transmission usage charges.

(5) *Long-term power supply arrangements* means the ownership of generation facilities, rights to market the output of Federal generation facilities with a term of longer than one year, or rights under one or more wholesale contracts to purchase electric energy with a term of longer than one year, for the purpose of meeting a service obligation.

(c) *General rule.*

(1) Every public utility that is a transmission organization and that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce and has one or more organized electricity markets (administered either by it or by another entity) must file with the Commission, no later than [INSERT DATE 180 DAYS AFTER PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER], one of the following:

(i) Tariff sheets and rate schedules that make available long-term firm transmission rights that are consistent with the guidelines set forth in paragraph (d) of this section; or

(ii) An explanation of how its current tariff and rate schedules already provide for long-term firm transmission rights that are consistent with the guidelines set forth in paragraph (d) of this section.

(2) Any transmission organization that is approved by the Commission for operation after [INSERT DATE 180 DAYS AFTER PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER] and has one or more organized electricity markets (administered either by it or by another entity) must satisfy this general rule before commencing operation.

(d) *Guidelines for Design and Administration of Long-term Firm-Transmission Rights.* Transmission organizations subject to paragraph (c) of this section must make available long-term firm transmission rights that satisfy the following guidelines:

(1) The long-term firm transmission right should specify a source (injection node or nodes) and sink (withdrawal node or nodes), and a quantity (MW).

(2) The long-term firm transmission right must provide a hedge against day-

RM06–8–000. Comments in response to this NOPR should be filed in Docket No. RM06–8–000 only.

ahead locational marginal pricing congestion charges (or other direct assignment of congestion costs) for the period covered and quantity specified. Once allocated, the financial coverage provided by the right should not be modified during its term except in the case of extraordinary circumstances or through voluntary agreement of both the holder of the right and the transmission organization.

(3) Long-term firm transmission rights made feasible by transmission upgrades or expansions must be available upon request to any party that pays for such upgrades or expansions in accordance with the transmission organization's prevailing cost allocation methods for upgrades or expansions. The term of the rights should be equal to the life of the facility (or facilities) or a lesser term requested by the party paying for the upgrade or expansion.

(4) Long-term firm transmission rights must be made available with terms (and/or rights to renewal) that are sufficient to meet the needs of load-serving entities to hedge long-term power supply arrangements made or planned to satisfy a service obligation. The length of term of renewals may be different from the original term.

(5) Load-serving entities with long-term power supply arrangements to meet a service obligation must have priority to existing transmission capacity that supports long-term firm transmission rights requested to hedge such arrangements.

(6) A long-term transmission right held by a load-serving entity to support a service obligation should be re-assignable to another entity that acquires that service obligation.

(7) The initial allocation of the long-term firm transmission rights shall not require recipients to participate in an auction.

(8) Allocation of long-term firm transmission rights should balance any adverse economic impact between participants receiving and not receiving the right.

[FR Doc. 06–1195 Filed 2–8–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 888

[Docket No. 2006N–0019]

Orthopedic Devices; Reclassification of the Intervertebral Body Fusion Device

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to reclassify intervertebral body fusion devices that contain bone grafting material, from class III (premarket approval) into class II (special controls), and retain those that contain any therapeutic biologic (e.g., bone morphogenic protein) in class III. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a draft guidance document that would serve as the special control if FDA reclassifies this device. The agency is proposing this reclassification based on the recommendation of the Orthopaedic and Rehabilitation Devices Panel (the Panel).

DATES: Submit written or electronic comments by May 10, 2006. See section X of this document for the proposed effective date of a final rule based on this proposed rule.

ADDRESSES: You may submit comments, identified by Docket No. 2006N–0019, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following ways:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*. Follow the instructions for submitting comments on the agency Web site.

Written Submissions

Submit written submissions in the followings ways:

- FAX: 301–827–6870.
- Mail/Hand delivery/courier (for paper, disk, or CD–ROM submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal or the agency Web site, as described in the *Electronic Submissions* portion of this paragraph.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received may be posted without change to *http://www.fda.gov/ohrms/dockets/default.htm*, including any personal information provided. For additional information on submitting comments, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.fda.gov/ohrms/dockets/default.htm* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Jodi N. Anderson, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2036, ext. 186.

SUPPLEMENTARY INFORMATION:

I. Background (Regulatory Authorities)

The Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 301 *et seq.*), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Public Law 94–295), the Safe Medical Devices Act of 1990 (Public Law 101–629), the Food and Drug Administration Modernization Act of 1997 (Public Law 105–115), and the Medical Device User Fee and Modernization Act of 2002 (Public Law 107–250), established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the act, devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), generally referred to as preamendments devices, are classified after FDA has done the following: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's

recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976, generally referred to as postamendments devices, are classified automatically by statute (section 513(f) of the act) into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval, unless and until the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, under section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807) of the regulations.

A preamendments device that has been classified into class III may be marketed, by means of premarket notification procedures, without submission of a premarket approval application (PMA) until FDA issues a final regulation under section 515(b) of the act (21 U.S.C. 360e(b)) requiring premarket approval.

Reclassification of classified postamendments devices is governed by section 513(f) of the act. This section provides that FDA may initiate the reclassification of a device classified into class III under section 513(f)(1) of the act, or the manufacturer or importer of a device may petition the Secretary of Health and Human Services (the Secretary) for the issuance of an order classifying the device in class I or class II. FDA's regulations in 21 CFR 860.134 set forth the procedures for the filing and review of a petition for reclassification of such class III devices. In order to change the classification of the device, it is necessary that the proposed new class have sufficient regulatory controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use.

Under section 513(f)(3)(B)(i) of the act, the Secretary may, for good cause shown, refer a proposed reclassification to a device classification panel. The Panel shall make a recommendation to the Secretary respecting approval or denial of the proposed reclassification. Under section 513(f)(3)(B)(i), any such recommendation must contain the following: (1) A summary of the reasons for the recommendation, (2) a summary of the data upon which the recommendation is based, and (3) an identification of the risks to health (if any) presented by the device with respect to which the proposed reclassification was initiated.

II. Regulatory History of the Device

The intervertebral body fusion device is a postamendments device classified into class III under section 513(f)(1) of the act. It is intended for intervertebral body fusion. The intervertebral body fusion device cannot be placed in commercial distribution for implantation unless it is reclassified under section 513(f)(3), or subject to an approved PMA under section 515 of the act.

Based on information discussed at a December 11, 2003, Panel meeting (see section IV of this document) regarding the intervertebral body fusion device, the FDA believes potential risks associated with the intervertebral body fusion device, except those that contain any therapeutic biologic, can be addressed by special controls in the form of a guidance document. Thus, FDA is proposing to reclassify intervertebral body fusion devices that contain bone grafting material from class III into class II. Consistent with the act and the regulation, FDA referred the proposal to the Panel for its recommendation on the requested changes in classification.

Intervertebral body fusion devices that include any therapeutic biologic (e.g., bone morphogenic protein) will remain in class III. FDA believes that there is insufficient information to determine that general and special controls would provide a reasonable assurance of their safety and effectiveness.

III. Device Description

The following device description is based on the Panel's recommendation and the agency's review:

An intervertebral body fusion device is an implanted single or multiple component spinal device made from a variety of materials, including titanium and polymers. The device is inserted into the intervertebral body space of the cervical or lumbosacral spine, and is intended for intervertebral body fusion.

IV. Recommendation of the Panel

At a public meeting on December 11, 2003, the Panel recommended unanimously that the intervertebral body fusion device, except those that contain any therapeutic biologic, be reclassified from class III into class II (Ref. 1). The Panel believed that class II with special controls, in addition to the general controls, would provide reasonable assurance of the safety and effectiveness of the device. The Panel also recommended that the proposed special controls for the device be mechanical, animal, and clinical testing, labeling, sterilization, and biocompatibility as suggested by FDA staff.

V. Risks to Health

After considering the information in the Panel's recommendation, as well as other information, including Medical Device Reports (MDRs), FDA has evaluated the risks to health associated with use of the intervertebral body fusion device that contains bone grafting material and determined that the following risks to health are associated with its use:

A. Infection

Infection of the soft tissue, bony tissue, and the disc space is a potential risk to health associated with all surgical procedures and implanted spinal devices. Material composition or impurities, wear debris, operative time, and operative environment may compromise the vascular supply to the area or affect the immune system, which could increase the risk of infection. Improper sterilization or packaging may also increase the risk of infection.

B. Adverse Tissue Reaction

Adverse tissue reaction is a potential risk to health associated with all implanted devices. The implantation of the intervertebral body fusion device will elicit a mild inflammatory reaction typical of a normal foreign body response. Incompatible materials or impurities in the materials and wear debris may increase the severity of a local tissue reaction or cause a systemic tissue reaction. If the materials used in the manufacture of intervertebral body fusion device are not biocompatible, the patient could have an adverse tissue reaction.

C. Pain and Loss of Function

Pain and loss of function are risks to health associated with any implanted spinal device. Some device-related complications that may cause pain and loss of function include device fracture, deformation, loosening, extrusion, or migration due to inappropriate patient or device selection. The wear of materials, which may cause osteolysis (dissolution of bone), and component disassembly, fracture, or failure may also result in pain and loss of function.

D. Soft Tissue Injury

Soft tissue injury is a risk to health associated with all spinal surgery. This includes injury to major blood vessels, viscera, nerve roots, spinal cord, and cauda equina.

E. Vertebral Endplate Injury

Vertebral endplate injury is a risk to health associated with the insertion of an intervertebral body fusion device. Surgically inserting a device with a different geometry and modulus of elasticity than bone may lead to vertebral fracture, sinking of the device into the vertebral endplate (subsidence), collapse of the local blood supply, and collapse of the vertebral end plate.

F. Reoperation

Reoperation is a risk to health associated with any surgery. The need for reoperation could result from a failed intervertebral body device or component of the device, from nerve root decompression or adjacent level disease, or from reasons related to any surgery, e.g., infection or bleeding.

G. Pseudarthrosis (i.e., non-union)

Pseudarthrosis (i.e., non-union) is a risk associated with all spinal fusion surgeries. It signifies failure of the bony fusion mass and results in persistent instability.

VI. Summary of the Reasons for the Reclassification

FDA believes that the intervertebral body fusion device that contains bone grafting material should be reclassified into class II because special controls, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device. In addition, there is sufficient information to establish special controls to provide such assurance.

VII. Summary of the Data Upon Which the Reclassification is Based

As discussed previously in this document, FDA is proposing this reclassification based on the Panel's recommendation. In addition FDA has reviewed MDRs related to this device. After evaluating this information, FDA believes that the potential risks to health associated with use of the intervertebral body fusion device described in section V of this document can be addressed by special controls. In addition, there is reasonable knowledge of the benefits of the device, including the provision of mechanical support, which aids in fusion procedures of the anterior spinal column.

VIII. Special Controls

FDA believes that the draft guidance document entitled "Class II Special Controls Guidance Document: Intervertebral Body Fusion Device" (the class II special controls guidance document), in addition to providing general controls, can address the risks to health associated with the use of the device and described in section V of this document. FDA believes further that the class II special controls guidance document, which incorporates voluntary consensus standards and labeling recommendations, addresses the Panel's concerns regarding the content of a special controls guidance document. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice of availability of the draft guidance document that the agency intends to use as the special control for this device.

The class II special controls guidance document contains specific recommendations with regard to device performance testing and other information FDA believes should be included in premarket notification submissions (510(k)s) for the intervertebral body fusion device that contains bone grafting material. Sections of the draft special controls guidance document address the following topics: Material characterization, mechanical testing, animal testing, clinical testing, sterility, biocompatibility, and labeling. FDA has identified the risks to health associated with the use of the device in the first column of table 1 of this document and the recommended mitigation measures identified in the class II special controls guidance document in the second column.

TABLE 1.

Identified Risk	Recommended Mitigation Measures
Infection	Sterility
Adverse Tissue Reaction	Biocompatibility
Pain and Loss of Function	Mechanical Testing Animal Data Clinical Data Labeling
Soft Tissue Injury	Labeling
Vertebral Endplate Injury	Material Characterization Mechanical Testing Biocompatibility Labeling
Reoperation	Labeling
Psuedoarthrosis (i.e., non-union)	Labeling

Following the effective date of a final rule based on this proposal, any firm submitting a 510(k) premarket notification for an intervertebral body fusion device will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurance of safety and effectiveness.

IX. FDA's Findings

FDA believes the intervertebral body fusion device that contains bone grafting material should be reclassified into class II because special controls, in addition to general controls, can provide reasonable assurance of the safety and effectiveness of the device. In addition, there is sufficient information to establish special controls to provide such assurance. FDA, therefore, is proposing to reclassify the intervertebral body fusion device that contains bone grafting material into class II and establish the class II special controls guidance document as the special control for that device, and to retain in class III those devices that contain any therapeutic biologic.

X. Effective Date

FDA proposes that any final rule that may issue based on this proposal become effective 30 days after its date of publication in the **Federal Register**.

XI. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this proposed reclassification action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment, nor an environmental impact statement is required.

XII. Analysis of Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic,

environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this proposed rule is not a significant regulatory action as defined by the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Reclassification of this device from class III to class II will relieve all manufacturers of the device of the costs of complying with the premarket approval requirements in section 515 of the act. Because reclassification will reduce regulatory costs with respect to this device, the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $115 million, using the most current (2003) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this proposed rule to result in any 1-year expenditure that would meet or exceed this amount.

XIII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule, if finalized, would not contain policies that would have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency tentatively concludes that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement has not been prepared.

XIV. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520) is not required.

FDA also tentatively concludes that the special controls guidance document does not contain new information collection provisions that are subject to review and clearance by OMB under the PRA. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice announcing the availability of the draft guidance document entitled "Class II Special Controls Guidance Document: Intervertebral Body Fusion Device;" the notice contains an analysis of the paperwork burden for the draft guidance.

XV. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this proposal. Submit a single copy of electronic comments or two paper copies of mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

XVI. References

The following reference has been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Orthopedic and Rehabilitation Devices Panel Meeting Transcript, pp. 1–141, December 11, 2003.

List of Subjects in 21 CFR Part 888

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 888 be amended as follows:

PART 888—ORTHOPEDIC DEVICES

1. The authority citation for 21 CFR part 888 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

2. Section 888.3080 is added to subpart D to read as follows:

§ 888.3080 Intervertebral body fusion device.

(a) *Identification.* An intervertebral body fusion device is an implanted single or multiple component spinal device made from a variety of materials, including titanium and polymers. The device is inserted into the intervertebral body space of the cervical or lumbosacral spine, and is intended for intervertebral body fusion.

(b) *Classification.* (1) Class II (special controls) for intervertebral body fusion devices that contain bone grafting material. The special control is the FDA guidance document entitled "Class II Special Controls Guidance Document: Intervertebral Body Fusion Device." See § 888.1(e) for the availability of this guidance document.

(2) Class III (premarket approval) for intervertebral body fusion devices that include any therapeutic biologic (e.g., bone morphogenic protein). Intervertebral body fusion devices that contain any therapeutic biologic require premarket approval.

(c) *Date premarket approval application (PMA) or notice of product development protocol (PDP) is required.* Devices described in paragraph (b)(2) of this section shall have an approved PMA or a declared completed PDP in effect before being placed in commercial distribution.

Dated: February 1, 2006.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. E6–1736 Filed 2–8–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–06–006]

RIN 1625-AA08

Special Local Regulations for Marine Events; Maryland Swim for Life, Chester River, Chestertown, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend the special local regulations at 33 CFR 100.533, established for the "Maryland Swim for Life" held annually on the waters of the Chester River, near Chestertown, Maryland by changing the event date to the third Saturday in June. This proposed rule is intended to restrict vessel traffic in portions of the Chester River and is necessary to provide for the safety of life on navigable waters during the event.

DATES: Comments and related material must reach the Coast Guard on or before April 10, 2006.

ADDRESSES: You may mail comments and related material to Commander (oax), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia

23704–5004, hand-deliver them to Room 119 at the same address between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays, or fax them to (757) 398–6203. The Auxiliary and Recreational Boating Safety Branch, Fifth Coast Guard District, maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the above address between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Dennis M. Sens, Project Manager, Auxiliary and Recreational Boating Safety Branch, at (757) 398–6204.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD05–06–006), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the address listed under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

On June 17, 2006, the Maryland Swim for Life Association will sponsor the "Maryland Swim for Life", an open water swimming competition held on the waters of the Chester River, near Chestertown, Maryland. Approximately 100 swimmers start from Rolph's Wharf and swim up-river 2.5 miles then swim down-river returning back to Rolph's Wharf. A fleet of approximately 20 support vessels accompanies the swimmers. The regulations at 33 CFR 100.533 are effective annually for the Maryland Swim for Life marine event. Paragraph (d) of Section 100.533 establishes the enforcement date for the Maryland Swim for Life. This regulation proposes to change the enforcement date from the second Saturday in July to the third Saturday in June each year. Notice of exact time, date and location will be published in the **Federal Register** prior to the event. The Maryland Swim for Life Association who is the sponsor for this event intends to hold it annually. To provide for the safety of participants and support vessels, the Coast Guard will temporarily restrict vessel traffic in the event area during the swim.

Discussion of Proposed Rule

The Coast Guard proposes to amend the regulations at 33 CFR 100.533 by revising the date of enforcement in paragraph (d) to reflect the event will be conducted annually on the third Saturday in June. This proposed change is needed to accommodate attendance by a wide range of participants at the event. The special local regulations will be enforced from 6:30 a.m. to 1:30 p.m. on June 17, 2006, and will restrict general navigation in the regulated area during the swimming event. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area during the effective period. The regulated area is needed to control vessel traffic during the event to enhance the safety of participants and transiting vessels.

Regulatory Evaluation

This proposed rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. The effect of this proposed action merely establishes the dates on which the existing regulations would be in effect and modifies the boundaries of the regulated area and would not impose any new restrictions on vessel traffic.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would effect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of the Chester River during the event.

This proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons. This proposed rule would merely establish the dates on which the existing regulations would be in effect of the regulated area and would not impose any new restrictions on vessel traffic.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the address listed under **ADDRESSES**. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them.We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 *note*) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction, from further environmental documentation. Special local regulations issued in conjunction with a regatta or marine event permit are specifically excluded from further analysis and documentation under that section.

Under figure 2–1, paragraph (34)(h), of the Instruction, an "Environmental Analysis Check List" and a "Categorical Exclusion Determination" are not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; Department of Homeland Security Delegation No. 0170.1.

2. In § 100.533, revise paragraph (d), to read as follows:

§ 100.533 Maryland Swim for Life, Chester River, Chestertown, Maryland.

* * * * *

(d) *Enforcement period.* (1) This section will be enforced annually on the third Saturday in June. A notice of enforcement of this section will be published annually in the **Federal Register** and disseminated through the Fifth Coast Guard District Local Notice to Mariners announcing the specific event dates and times. Notice will also be made via marine Safety Radio Broadcast on VHF–FM marine band radio channel 22 (157.1 MHz).

(2) For 2006, this section will be enforced from 6:30 a.m. to 1:30 p.m. on June 17, 2006.

Dated: January 23, 2006.

Larry L. Hereth,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. E6–1740 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–06–007]

RIN 1625–AA08

Special Local Regulations for Marine Events; Severn River, College Creek, Weems Creek and Carr Creek, Annapolis, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to suspend the special local regulations at

33 CFR 100.518 and establish a temporary rule that will be effective during the suspension period. This rulemaking is intended to accommodate a change in event dates for the year 2006 and modify the boundaries of the regulated area. The marine events included in this proposed rule include the Safety at Sea Seminar, U.S. Naval Academy Crew Races and the Blue Angels Air Show. This proposed rule is intended to restrict vessel traffic in portions of the Severn River during the period of these marine events and is necessary to provide for the safety of life on navigable waters during the event.

DATES: Comments and related material must reach the Coast Guard on or before March 13, 2006.

ADDRESSES: You may mail comments and related material to Commander (oax), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004, hand-deliver them to Room 119 at the same address between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays, or fax them to (757) 398–6203. The Auxiliary and Recreational Boating Safety Branch, Fifth Coast Guard District, maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the above address between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Dennis M. Sens, Project Manager, Auxiliary and Recreational Boating Safety Branch, at (757) 398–6204.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD05–06–007), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the address listed under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

For 2006, we propose to suspend 33 CFR 100.518 and issue a temporary rule to accommodate changes to the enforcement period for U.S. Naval Academy sponsored marine events. The dates for the marine events for 2006 will be; the Safety at Sea Seminar on April 1, 2006, the U.S. Naval Academy crew races on March 25, April 15, April 22, April 23, May 12 and May 28, 2006; and the Blue Angels air show on May 23 and May 24, 2006. The events will be enforced from 5 a.m. to 6 p.m. on those days and if the event's daily activities should conclude prior to 6 p.m., enforcement of this proposed regulation may be terminated for that day at the discretion of the Patrol Commander.

The U.S. Naval Academy who is the sponsor for all of these events intends to hold them annually on the dates provided in 33 CFR 100.518, however, in 2006, this is not possible. To accommodate the availability of the various marine event participants new dates were necessary to support the conduct of the events. The Coast Guard proposes to suspend 33 CFR 100.518 only from March 1, 2006 through June 1, 2006, which would also be the effective period of our proposed temporary rule.

33 CFR 100.518 would also be amended to reflect changes in the regulated area. The proposed northwest boundary of the regulated area is bounded by a line approximately 1300 yards north and parallel with the U.S. 50 Severn River Bridge. The proposed southeast boundary of the regulated area is extended approximately 1100 yards to the south to a point 700 yards east of Chinks Point, MD. These adjustments to the regulated area have been made to accommodate the aerobatic maneuvering area for the Blue Angels Air Show and encompass the rowing course for Naval Academy Crew Races. The proposed temporary rule also reflects these new regulated area boundaries.

Discussion of Proposed Rule

The Coast Guard proposes to suspend the regulations at 33 CFR 100.518 from March 1, 2006 through June 1, 2006 and establish a temporary rule that will be in effect during the time of the suspension. The suspension and creation of a new temporary rule is necessary to reflect new enforcement dates. The Coast Guard also proposes to adjust the boundaries of the regulated area for these events in both 33 CFR 100.518 and the temporary rule. These proposed changes are needed to control vessel traffic during the events to enhance the safety of participants, spectators and transiting vessels.

Regulatory Evaluation

This proposed rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. The effect of this proposed action merely establishes the dates on which the existing regulations would be enforced and modifies the boundaries of the regulated area. It would not impose any additional restrictions on vessel traffic.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of the Severn River during the event.

This proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons. This proposed rule would merely establish the dates on which the existing regulations would be

enforced and modify the boundaries of the regulated area. It would not impose any additional restrictions on vessel traffic.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the address listed under **ADDRESSES**. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction, from further environmental documentation. Special local regulations issued in conjunction with a regatta or marine event permit are specifically excluded from further analysis and documentation under that section.

Under figure 2–1, paragraph (34)(h), of the Instruction, an "Environmental Analysis Check List" and a "Categorical Exclusion Determination" are not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; Department of Homeland Security Delegation No. 0170.1.

2. Revise § 100.518, paragraphs (a)(1) and (c)(1) to read as follows:

§ 100.518 Severn River, College Creek, Weems Creek and Carr Creek, Annapolis, Maryland.

(a) *Regulated area.* (1) The regulated area is established for the waters of the Severn River from shoreline to shoreline, bounded to the northwest by a line drawn from the south shoreline at latitude 39°00′38.9″ N, longitude

076°31′05.2″ W thence to the north shoreline at latitude 39°00′54.7″ N, longitude 076°30′44.8″ W, this line is approximately 1300 yards northwest of the U.S. 50 fixed highway bridge. The regulated area is bounded to the southeast by a line drawn from the Naval Academy Light at latitude 38°58′39.5″ N, longitude 076°28′49″ W thence southeast to a point 700 yards east of Chinks Point, MD at latitude 38°58′1.9″ N, longitude 076°28′1.7″ W thence northeast to Greenbury Point at latitude 38°58′29″ N, longitude 076°27′16″ W. All coordinates reference Datum NAD 1983.

* * * * *

(c) *Enforcement period.* (1) This section will be enforced during, and 30 minutes before each of the following annual events:

* * * * *

§ 100.518 [Suspended]

3. From March 1, 2006 through June 1, 2006, suspend § 100.518.

4. From March 1, 2006 through June 1, 2006, add temporary § 100.35–T06–007 to read as follows:

§ 100.35–T06–007, Severn River, College Creek, Weems Creek and Carr Creek, Annapolis, Maryland.

(a) *Regulated area.* (1) The regulated area is established for the waters of the Severn River from shoreline to shoreline, bounded to the northwest by a line drawn from the south shoreline at latitude 39°00′38.9″ N, longitude 076°31′05.2″ W thence to the north shoreline at latitude 39°00′54.7″ N, longitude 076°30′44.8″ W, this line is approximately 1300 yards northwest of the U.S. 50 fixed highway bridge. The regulated area is bounded to the southeast by a line drawn from the Naval Academy Light at latitude 38°58′39.5″ N, longitude 076°28′49″ W thence southeast to a point 700 yards east of Chinks Point, MD at latitude 38°58′1.9″ N, longitude 076°28′1.7″ W thence northeast to Greenbury Point at latitude 38°58′29″ N, longitude 076°27′16″ W. All coordinates reference Datum NAD 1983.

(b) *Definitions.* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Sector Hampton Roads.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Hampton Roads with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations.* (1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the immediate vicinity of the regulated area shall:

(i) Stop the vessel immediately when directed to do so by any Official Patrol and then proceed only as directed.

(ii) All persons and vessels shall comply with the instructions of the Official Patrol.

(3) Any spectator vessel may anchor outside of the regulated area specified in paragraph (a)(1) of this section but may not block a navigable channel.

(d) *Enforcement period.* (1) This section will be enforced from 5 a.m. to 6 p.m. on those days and if the event's daily activities should conclude prior to 6 p.m., enforcement of this proposed regulation may be terminated for that day at the discretion of the Patrol Commander. Enforcement will be during, and 30 minutes before each of the following annual events:

(i) Safety at Sea Seminar, April 1, 2006;

(ii) Naval Academy Crew Races, March 25, April 15, April 22, April 23, May 12 and May 28, 2006;

(iii) Blue Angels Air Show, May 23 and May 24, 2006.

(2) The Commander, Fifth Coast Guard District will publish a notice in the Fifth Coast Guard District Local Notice to Mariners announcing the specific event times.

(e) *Effective period.* This section is effective from March 1, 2006 through June 1, 2006.

Dated: January 23, 2006.

Larry L. Hereth,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. E6–1738 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[EPA–HQ–OAR–2005–0175; FRL–8030–6]

Transition to New or Revised Particulate Matter (PM); National Ambient Air Quality Standards (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance Notice of Proposed Rulemaking (ANPR).

SUMMARY: The EPA recently issued a notice of proposed revisions to the national ambient air quality standards (NAAQS) for particulate matter (PM). EPA will take final action on the proposal by September 27, 2006. This notice provides advance notice of key issues for consideration in the development of potentially new or revised policies and/or regulations to implement revisions to the NAAQS for PM recognizing that no final decision has been made concerning whether or how to revise the PM NAAQS. The EPA is posing a number of questions related to the transition from the current to potentially revised $PM_{2.5}$ standards, as well as the transition from the current PM_{10} standards to potentially new $PM_{10-2.5}$ standards. In this ANPR, EPA is soliciting comment on the Agency's preferred approaches to revocation of the 1997 $PM_{2.5}$ standards once any new 2006 $PM_{2.5}$ standards would be in place, and also approaches to revocation of the 24-hour PM_{10} standard in areas where it would remain after promulgation of any new $PM_{10-2.5}$ standards. The EPA is also highlighting and providing preliminary thinking on how to address some of the key New Source Review (NSR) issues related to the new $PM_{10-2.5}$ standards, and the transition from PM_{10} standards to $PM_{10-2.5}$ standards. Finally, EPA is requesting comment on potential timeframes for designations, attainment demonstrations and State Implementation Plan (SIP) submittals and attainment dates for both any new $PM_{2.5}$ and $PM_{10-2.5}$ standards.

DATES: Comments must be received on or before April 10, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2005–0175, by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- E-mail: *A-and-R-Docket@epa.gov*, Attention Docket ID No. EPA–HQ–OAR–2005–0175.
- Fax: Fax your comments to (202) 566–1741, Attention Docket ID. No. EPA–HQ–OAR–2005–0175.
- Mail: Docket EPA–HQ–OAR–2005–0175 Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460. Please include a total of two copies.
- Hand Delivery: Deliver your comments to: Air Docket, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B102, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2005–0175. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2005–0175. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For further information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. For additional instruction on submitting a comment, go to "What Should I Consider as I Prepare My Comments for the EPA?" of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions regarding PM implementation issues, contact Ms. Barbara Driscoll, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Mail Code C504–02, Research Triangle Park, NC 27711, phone number (919) 541–1051 or by e-mail at: *driscoll.barbara@epa.gov*. Regarding NSR issues, contact Raj Rao, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Mail Code C339–03, Research Triangle Park, NC 27711, phone number (919) 541–5344 or by e-mail at *rao.raj@epa.gov*.

SUPPLEMENTARY INFORMATION:

How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI.

For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, U.S. EPA, Office of Air Quality Planning and Standards, Mail Code C404–02, Research Triangle Park, NC 27711, telephone (919) 541–0880, e-mail at *morales.roberto@epa.gov*, Attention Docket ID No. EPA–HQ–OAR–2005–0175.

What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

Table of Contents

I. What Actions Related to the PM NAAQS Have Recently Been Proposed or Will Soon Be Proposed Which Relate to This Notice?

This ANPR is intended to solicit input into key issues related to the transition to any new or revised NAAQS for PM. The EPA has proposed two rulemakings, the NAAQS for Particulate Matter; Proposed Rule (71 FR 2620, January 17, 2006) and the Revisions to Ambient Air Monitoring Regulations (71 FR 2710, January 17, 2006), and will be proposing another rulemaking, Treatment of Data Influenced by Exceptional Events (anticipated to be published by March 2006). These proposals are summarized here to provide background for the issues and questions raised in this document. The EPA is not taking comment on these actions here. Rather, if you have comments, you should submit them to the docket for the proposed rulemaking to which they are applicable, following the procedures described in each proposal.

A. National Ambient Air Quality Standards for Particulate Matter

On December 20, 2005, the Administrator signed a notice proposing revisions to the primary and secondary NAAQS for PM, which was published on January 17, 2006 (71 FR 2620). The proposal can be found at: *http://www.epa.gov/oar/particlepollution/actions.html*. For the primary standards for fine particles (particles generally less than or equal to 2.5 micrometers (μm) in diameter, or $PM_{2.5}$), EPA proposed to revise the level of the 24-hour $PM_{2.5}$ standard from 65 micrograms per cubic meter (μmg/m^3) to 35 μg/m^3, providing increased protection against health effects associated with short-term exposure (including premature mortality and increased hospital admissions and emergency room visits) and to retain the level of the annual $PM_{2.5}$ standard at 15 μg/m^3, continuing protection against health effects associated with long-term exposure (including premature mortality and development of chronic respiratory disease). The EPA is also taking comment on alternative NAAQS levels. Additionally, EPA proposed to revise the criteria for spatial averaging of monitors for purposes of the annual $PM_{2.5}$ standard.

In addition, for the primary standards for coarse particles generally less than or equal to 10μm in diameter (PM_{10}), EPA proposed to revise the 24-hour PM_{10} standard in part by establishing a new indicator for thoracic coarse particles (particles generally between 2.5 and 10μm in diameter, $PM_{10-2.5}$), qualified so as to include any ambient mix of $PM_{10-2.5}$ that is dominated by resuspended dust from high-density traffic on paved roads and PM generated by industrial sources and construction sources, and exclude any ambient mix of $PM_{10-2.5}$ that is dominated by rural windblown dust and soils and PM generated by agricultural and mining sources. The EPA also proposed that agricultural sources, mining sources and other similar sources of crustal material shall not be subject to control in meeting the proposed standard. The EPA proposed to set the new $PM_{10-2.5}$ standard at a level of 70 μg/m^3, continuing to provide a generally equivalent level of protection against health effects associated with short-term exposure (including hospital admissions for cardiopulmonary diseases, increased respiratory symptoms and possibly premature mortality).

In addition, EPA proposed to revoke the annual PM_{10} standard everywhere, and the 24-hour PM_{10} standard everywhere except in areas where there is at least one monitor that is located in an urbanized area[1] with a minimum population of 100,000 people and that violates the 24-hour PM_{10} standard based on the most recent 3 years of data. This revocation of the PM_{10} standards would become effective upon promulgation of the $PM_{10-2.5}$ NAAQS (expected to be December 2006). In the January 17, 2006, notice, the Agency provided a specific list of areas where the 24-hour PM_{10} standard would not be revoked under the proposal based on the most recent 3 years of data. EPA proposed to revoke the 24-hour PM_{10} standard in all other areas. In addition, EPA requested comment on whether the 24-hour PM_{10} standard should be retained in additional areas that are either urbanized areas with populations less than 100,000 people or non-urbanized areas (i.e., populations less than 50,000) but where the majority of the ambient mix of $PM_{10-2.5}$ is generated by high density traffic on paved roads, industrial sources, and construction sources, and which have at least one monitor that violated the 24-hour PM_{10} standard based on the most recent 3 years of data.

For the secondary PM standards, EPA proposed to revise the current standards by making them identical to the suite of proposed primary standards for fine and coarse particles.

B. Revisions to Ambient Air Monitoring Regulations

At the same time EPA proposed revisions to the PM NAAQS, EPA also proposed Revisions to the Ambient Air Monitoring Regulations (71 FR 2710, January 17, 2006) for criteria pollutants to support the proposed revisions to the NAAQS. The proposal can be found at: *http://www.epa.gov/oar/particlepollution/actions.html*. Included among the proposed PM-related changes are new provisions to be added to 40 CFR parts 53 and 58 which address approval of monitoring methods and $PM_{10-2.5}$ monitoring requirements. The added provisions in part 53 would address approval of $PM_{10-2.5}$ filter-based Federal Reference Method (FRM) samplers and both filter-based and continuous Federal Equivalent Method (FEM) monitors. Provisions in part 58 would provide the monitoring requirements for a $PM_{10-2.5}$ network, including the minimum number of monitors a State must deploy. In addition, the proposal adds provisions for the conditions under which a $PM_{10-2.5}$ monitor may be compared to the $PM_{10-2.5}$ NAAQS.

The proposal also amends a number of existing provisions for $PM_{2.5}$ monitoring, including changing the criteria for FEM equivalency determinations for continuous $PM_{2.5}$ monitors. This should allow States to operate continuous monitors at more required monitoring sites, thereby providing more robust data for the $PM_{2.5}$ air quality program.

C. Treatment of Data Influenced by Exceptional Events

The EPA will soon propose a rule to govern the review and handling of air

[1] As defined by the U.S. Bureau of the Census, an urbanized area has "a minimum residential population of at least 50,000 people" and generally includes "core census block groups or blocks that have a population density of at least 1,000 people per square mile and surrounding census blocks that have an overall density of at least 500 people per square mile." The Census Bureau notes that "under certain conditions, less densely settled territory may be part of each UA." See *http://www.census.gov/geo/www/ua/ua_2k.html*.

quality monitoring data influenced by exceptional events. Section 319 of the Clean Air Act (CAA) defines an event as an exceptional event if the event affects air quality; is not reasonably controllable or preventable; is a natural event, or an event caused by human activity that is unlikely to recur at a particular location; and is determined by the Administrator to be an exceptional event. The EPA will be proposing procedures and criteria related to the identification, evaluation, interpretation and use of air quality monitoring data related to the NAAQS where State air quality agencies petition EPA to exclude, in whole or in part, air quality data that are directly affected by exceptional events. Section 319 of the CAA, as amended by section 6013 of the Safe Accountable Flexible Efficient-Transportation Equity Act (SAFE–TEA) of 2005, requires EPA to publish a proposed rule in the **Federal Register**, no later than March 1, 2006.

II. What Is EPA's Strategy for Addressing PM?

Our overall strategy for achieving the PM primary and secondary standards is based on the structure outlined in the CAA. The CAA outlines important roles for State and Tribal governments and for EPA in implementing NAAQS.

States have primary responsibility for developing and implementing SIPs that contain local and in-State measures needed to achieve the air quality standards in each area. We assist States and Tribes by providing technical tools, assistance and guidance, including information on potential control measures. The EPA recently issued a Proposed rule to Implement the Fine Particle NAAQS (70 FR 65984) to support implementation of the 1997 $PM_{2.5}$ NAAQS. In addition, we set national emissions standards/limits for some sources, such as new motor vehicles, certain categories of major new sources, and existing stationary sources of toxic air pollutants, all of which may obtain reductions in PM. Where upwind sources (such as coal-fired power plants) significantly contribute to downwind problems in other States or tribal areas, we can issue Federal regulations to ensure that the upwind States address these contributing emissions (such as the Clean Air Interstate Rule), or we can put in place Federal regulations in situations where the upwind States fail to address these sources.

A. The State Implementation Plan (SIP) System

A SIP is the compilation of regulations and programs that a State uses to carry out its responsibilities under the CAA, including the attainment, maintenance, and enforcement of the NAAQS. States use the SIP process to identify the emissions sources that contribute to the nonattainment problem in a particular area, and to select the emissions reductions measures most appropriate for that area, considering technical and economic feasibility, and a variety of local factors such as population exposure, enforceability, and economic impact. Under the CAA, SIPs must ensure that areas reach attainment as expeditiously as practicable. These plans take into consideration emissions reductions resulting from national programs (such as mobile source regulations, the acid rain program, or maximum achievable control technology (MACT) standards for air toxics), as well as from State or local programs not directly mandated under the CAA.

B. National Rules

As described in a recent EPA report, *The Particle Pollution Report: Current Understanding of Air Quality and Emissions through 2003*,[2] State and Federal programs have made substantial progress in reducing ambient concentrations of PM_{10} and $PM_{2.5}$. For example, PM_{10} concentrations have decreased 31 percent nationally since 1988. Regionally, PM_{10} concentrations decreased most in areas with historically higher concentrations—the Northwest (39 percent decline), the Southwest (33 percent decline), and southern California (35 percent decline). Direct emissions of PM_{10} have decreased approximately 25 percent nationally since 1988.

Programs aimed at reducing direct emissions of particles have played an important role in reducing PM_{10} concentrations, particularly in western areas. Some examples of PM_{10} controls include paving unpaved roads and using best management practices for agricultural sources of resuspended soil. Of the 87 areas that were designated nonattainment for PM_{10} in the early 1990's, 64 now meet those standards. In cities that have not attained the PM_{10} standards, the number of times the standard is exceeded is down significantly.

National programs that affect regional emissions have contributed to lower sulfate concentrations and, consequently, to lower $PM_{2.5}$ concentrations, particularly in the Industrial Midwest and Southeast. National ozone-reduction programs designed to reduce emissions of volatile organic compounds (VOCs) and nitrogen oxides (NO_X) also have helped reduce carbon and nitrate particles, both of which are components of $PM_{2.5}$. Power plant emissions of sulfur dioxide dropped 33% from 1990 to 2003, largely as a result of EPA's Acid Rain Program. Nationally, SO_2 emissions have declined 9 percent, NO_X emissions have declined 9 percent, and VOC emissions have declined by 12 percent from 1999 to 2003. In eastern States affected by the Acid Rain Program, sulfates decreased 7 percent over the same period.

Over the next 10 to 20 years, national and regional regulations will make major reductions in ambient $PM_{2.5}$ levels. The Clean Air Interstate Rule (CAIR) and the NO_X SIP Call will reduce SO_2 and NO_X emissions from electric generating units and industrial boilers across the eastern half of the U.S., regulations to implement the current ambient air quality standards for $PM_{2.5}$ will likely result in direct $PM_{2.5}$ and $PM_{2.5}$ precursor controls in nonattainment areas, and new national mobile source regulations affecting off-highway diesel engines, highway gasoline and diesel vehicles, and other mobile sources will reduce emissions of NO_X, direct $PM_{2.5}$, SO_2, and VOCs. The EPA estimates that these Federal regulations for stationary and mobile sources will cut SO_2 emissions by 6 million tons annually in 2015 from 2001 levels. Emissions of NO_X will be cut by 9 million tons annually in 2015 from 2001 levels. Emissions of VOCs will drop by 3 million tons, and direct $PM_{2.5}$ emissions will be cut by 200,000 tons in 2015, compared to 2001 levels.

III. How Should EPA Implement the Transition From the 1997 $PM_{2.5}$ NAAQS to Any New 2006 $PM_{2.5}$ NAAQS?

A. What Is the Status of Areas Designated Under the 1997 $PM_{2.5}$ NAAQS?

On April 5, 2005, nonattainment designations became final for 39 nonattainment areas. These areas were designated based on air quality data from 2001–2003 and 2002–2004. Nationally, $PM_{2.5}$ concentrations have declined by 10 percent from 1999 to 2003. Generally, $PM_{2.5}$ concentrations have also declined the most in regions with the highest concentrations—the Southeast (20 percent decline), southern California (16 percent decline), and the

[2] Environmental Protection Agency (2004). The Particle Pollution Report: Current Understanding of Air Quality and Emissions through 2003. Office of Air Quality Planning and Standards; Emissions, Monitoring, and Analysis Division, Research Triangle Park, NC 27711; report no. EPA–454–R–04–002. December 2004.

Midwest (9 percent decline)—with the exception of the Northeast, where $PM_{2.5}$ concentrations increased by 1%. Direct emissions of $PM_{2.5}$ have decreased by 5 percent nationally over the past 5 years.

Modeling done by EPA indicates that by 2010, 18 of the 39 areas currently not attaining the 1997 $PM_{2.5}$ standards should come into attainment of those standards just based on regulatory programs already in place, including CAIR, the Clean Diesel Rules, and other Federal measures. Four more $PM_{2.5}$ areas are projected to attain the standards by 2015 based on the implementation of these programs. All areas in the eastern U.S. will have lower $PM_{2.5}$ concentrations in 2015 relative to present-day conditions. In most cases, the predicted improvement in $PM_{2.5}$ ranges from 10 percent to 20 percent.

B. How Might EPA Implement the Transition From the 1997 $PM_{2.5}$ NAAQS to Any New 2006 $PM_{2.5}$ NAAQS?

The EPA has evaluated several options for the transition from the 1997 $PM_{2.5}$ standards to any new 2006 $PM_{2.5}$ standards, and is elaborating on two potential options. Should the Agency decide to revise the current $PM_{2.5}$ standards, then either of the following two options would continue the momentum and continuity of the existing implementation program as areas look to reduce ambient $PM_{2.5}$ concentrations to meet the current and revised $PM_{2.5}$ NAAQS. Any suggested alternatives to these approaches should demonstrate how it will continue the momentum and continuity of the implementation program.

1. $PM_{2.5}$ NAAQS Option 1

Option 1 recognizes that the only proposed change to the 1997 annual $PM_{2.5}$ standard is a change in the application of spatial averaging (71 FR 2620). Because the EPA believes that the proposed change, if adopted, would not be significant enough to require new designations under section 107(d), we are soliciting comment on whether it would be appropriate to view this revision as minor, thus not requiring a designation process. Even though section 107(d) calls for EPA to commence the designation process for "any new or revised NAAQS," exceptions could be made for revisions to a NAAQS of a *de minimis* or insignificant nature such that they should not lead to the initiation of the designation process and consequent establishment of new SIP submission and attainment deadlines. Option 1 would be considered only if EPA finalized a revision to the annual $PM_{2.5}$ standard that was of such a minor nature as the proposed revision. It would not be available if EPA revised the standard more substantially.

Following this path, EPA would propose not to revoke the 1997 annual $PM_{2.5}$ standard, and would propose to revoke the 1997 24-hour $PM_{2.5}$ standard 1 year after designations are finalized under any new 2006 $PM_{2.5}$ standard. With the exception of 2 areas in California (South Coast Air Quality District and San Joaquin Valley) all areas designated as nonattainment for $PM_{2.5}$ were only violating the annual standard. Under this path, new nonattainment designations would only be made for the areas which do not meet any new 2006 24-hour $PM_{2.5}$ standard. Therefore, areas which are designated nonattainment for the 1997 annual $PM_{2.5}$ standard would continue to develop and implement their SIPs based on a final implementation rule for the $PM_{2.5}$ NAAQS (proposed on November 1, 2005 at 70 FR 65984). Areas which are newly designated nonattainment under any new 24-hour $PM_{2.5}$ standard would submit a SIP by April 2013 following the proposed schedule in part IV.C below. This approach would maintain the momentum in the $PM_{2.5}$ SIP development and implementation program. It would also not require the development and implementation of an anti-backsliding rule to maintain progress in the program, as no areas are in nonattainment based solely on the 24-hour $PM_{2.5}$ standard. Therefore control measures would still be in place under the approved $PM_{2.5}$ SIPs.

2. $PM_{2.5}$ NAAQS Option 2

Option 2 varies from Option 1 in that EPA would revoke the 1997 annual and 24-hour $PM_{2.5}$ standards 1 year after designations under any new 2006 $PM_{2.5}$ standards. This approach is similar to that promulgated under the ozone program (69 FR 23951, April 30, 2004) for the revocation of the 1-hour ozone standard one year after designations under the 8-hour ozone standard. Following this path, EPA would develop and implement an "anti-backsliding" rule to ensure that SIP control measures developed and adopted under the 1997 $PM_{2.5}$ NAAQS remained in place until SIPs could be submitted and approved to meet any new 2006 $PM_{2.5}$ standards. In the anti-backsliding rule, EPA would address issues similar to those addressed in the anti-backsliding rule adopted as part of the transition from implementation of the 1-hour ozone standard to the 8-hour ozone standard including: (1) Which planning and control requirements should remain in effect; (2) effect of the revised standards on the New Source Review (NSR) program; and (3) how the transition would affect general and transportation conformity programs. In addressing some of these issues, EPA is inclined to follow the precedent set by the ozone program which required areas in nonattainment with both the 1-hour and 8-hour ozone NAAQS to maintain mandatory control measures already in place, and allowed such areas to revise or remove discretionary control measures following a section 110(l) demonstration. In addition, such areas would implement transportation conformity and NSR based on their designations for the revised standard only, for the reasons explained in the ozone anti-backsliding rule (69 FR 23954, April 30, 2004). The EPA invites comment on these two options, and solicits comments on any additional options which would ensure a smooth transition and continued improvement in air quality.

IV. What Are the Potential Timelines for Implementation of Any New 2006 $PM_{2.5}$ NAAQS?

A. How Would the Implementation Schedules of the 1997 $PM_{2.5}$ NAAQS and Any New 2006 $PM_{2.5}$ NAAQS Fit Together if the Revised $PM_{2.5}$ Standards Are More Stringent Than the Current Standards?

Section 109(d)(1) of the CAA requires a thorough review of the NAAQS, and revisions if appropriate, at 5-year intervals. Current requirements of the CAA thus anticipate an overlap in review and implementation of standards. The EPA believes that for planning purposes, when EPA revises a standard as it has proposed to do, it is beneficial for States to understand control strategies that may be useful in attaining any new 2006 $PM_{2.5}$ standards when developing control strategies for the 1997 $PM_{2.5}$ standards.

B. What Is EPA's Preferred Schedule for the Any New 2006 $PM_{2.5}$ Designation Process?

Under the terms of the consent decree governing the review of the 1997 PM NAAQS, EPA agreed that no later than September 27, 2006, it would sign for publication a notice of final rulemaking concerning its review of the PM NAAQS. The EPA expects that any new 2006 $PM_{2.5}$ standards would be published in the **Federal Register** within 4 weeks, and become effective 60 days later probably in December 2006. Timeframes below are outlined based on this assumption. Section 107(d)(1) lays out a schedule allowing States up to 1 year in which to make recommendations to EPA for areas that

might be designated as nonattainment for any new $PM_{2.5}$ standards. State designation recommendations would then be due by December 2007. Tribes would also be encouraged, but not required, to submit designation recommendations to EPA for their reservations or other areas under their jurisdiction by December 2007.

These recommendations would be based on 3 years of the most recent monitoring data (*e.g.*, 2004–2006). The EPA(s evaluation of the existing $PM_{2.5}$ monitoring network indicates that it is adequate for designations under both the proposed revised annual and proposed revised 24-hour standards. Depending on which revocation process is selected for the 1997 $PM_{2.5}$ NAAQS, designations may be for the revised 24-hour standard alone or both the annual and 24-hour standards.

Following submittal of designation recommendations by the States, EPA would evaluate the recommendations and make possible modifications. Consistent with section 107, States would be notified of these changes, and would be allowed to make additional comments on the proposed designations. The EPA would issue final $PM_{2.5}$ designations under any new $PM_{2.5}$ NAAQS no later than December 2009. These designations would be effective by April 2010. The CAA provides EPA with up to 3 years to designate nonattainment areas following promulgation of a new or revised NAAQS. The EPA anticipates that this full time period may be necessary for a variety of reasons as it has been in the past, including evaluating more recent data in order to determine appropriate designation boundaries. This timeline would allow States to look at 2006–2008 monitoring data and update their recommendations to EPA if they choose to do so based on the more recent data.

In addition, as was done for the 1997 $PM_{2.5}$ NAAQS designations, we would anticipate allowing a further update based on 2007–2009 monitoring data, and make designations effective in April 2010. Table 1 at the end of part IV(D) provides a timeline showing the dates that would result from such a designation process. The EPA would appreciate comments on this timeline and other potential approaches.

C. What Would the Schedule Be for Attainment Demonstrations and SIP Submittals for Any New 2006 $PM_{2.5}$ Standards?

Part D of title I of the CAA sets forth the requirements for SIPs needed to attain the NAAQS. Part D includes a general subpart 1 which applies to all NAAQS for which a specific subpart does not exist. These provisions apply to the $PM_{2.5}$ standards and would apply to any revised $PM_{2.5}$ standards. The EPA has currently proposed implementation rules for $PM_{2.5}$ (70 FR 65984) which, when finalized, will govern any revised standards.

Section 172(b) of the CAA requires that at the time the Agency promulgates nonattainment area designations, EPA must also establish a schedule for States to submit SIPs meeting the applicable requirements of section 172(c) and section 110(a)(2) of the CAA. Section 172(b) requires that such schedule allow a State to submit its attainment demonstration and SIP revision within no more than 3 years of nonattainment designation. Following the above timeline (outlined in IV.B), if nonattainment area designations become effective in April 2010, and EPA allows the maximum time for SIP submissions, then attainment demonstrations and SIP revisions would be due by April 2013.

D. What Are Attainment Dates for Any New 2006 $PM_{2.5}$ Standards?

Section 172(a)(2)(A) states that the attainment date for a nonattainment area must be "as expeditiously as practicable, but no later than 5 years from the date of designation for the area." If any new 2006 $PM_{2.5}$ designations are made in December 2009 and have an effective date of April 2010, the initial attainment date for any new $PM_{2.5}$ standard would be no later than April 2015. As an aside, this attainment date would correspond with the latest date an area designated in April 2005 could come into attainment with the 1997 $PM_{2.5}$ NAAQS. For an area with a maximum 5-year attainment date, EPA would determine whether it had attained the standard by evaluating air quality data from the three previous calendar years (2012–2014).

Section 172 also states that if EPA deems it appropriate, the Agency may extend the attainment date for an area for a period not greater than 10 years from the date of designation as nonattainment, taking into account the severity of the nonattainment problem in the area, and the availability and feasibility of pollution control measures. For any area that is granted the full 5-year attainment date extension, the attainment date would be as expeditiously as practicable, but no later than April 2020. For such areas, EPA would determine whether the area attained the standard by evaluating air quality data from 2017, 2018, and 2019. Table 1 is an overview of the proposed timeline for implementing any new 2006 $PM_{2.5}$ standards.

TABLE 1.—PROPOSED TIMELINE FOR ANY NEW 2006 $PM_{2.5}$ STANDARDS

Effective date of standard	December 2006
Monitoring data used for State recommendations	2005–2007.
State recommendations to EPA	December 2007.
Final designations signature	December 2009.
Effective date of designations	April 2010.
SIPs due	April 2013.
Attainment date	Up to April 2015 (based on 2012–2014 data).
Attainment date with a 5-year extension	Up to April 2020 (based on 2017–2019 data).

The EPA is soliciting comments on which relevant factors should influence EPA's decision on any potential timeline.

V. What Are the Potential Timelines for Implementation of Any New $PM_{10-2.5}$ NAAQS?

A. What Is a Potential Schedule for Any New $PM_{10-2.5}$ Designation Process?

Section 107(d)(1)(B) gives the Agency the authority to promulgate designations for all areas as expeditiously as practicable, but no later than 3 years from the date of promulgation of the new or revised NAAQS.

Currently, a $PM_{10-2.5}$ monitoring network does not exist. The EPA's proposed monitoring regulations for $PM_{10-2.5}$ (71 FR 2710) call for monitors to be deployed by January 2009. If this schedule is adopted, the first period

when 3 years of data would be available for State designation recommendations would be mid-2012 based on air quality data for 2009–2011. As noted above, following the statutory timeline, designations for $PM_{10-2.5}$ would be required to occur no later than late 2009. Three years of $PM_{10-2.5}$ monitoring data will not be available at that time. For EPA to meet its statutory obligation, EPA would need to designate all areas as unclassifiable under section 107(d)(1)(A)(iii), on the basis that no information is available to determine whether an area is meeting any new NAAQS for $PM_{10-2.5}$. From a historical perspective this was the situation in 1997 when we established the $PM_{2.5}$ NAAQS. Subsequent, to the establishment of the $PM_{2.5}$ NAAQS in 1997, Congress passed legislation which modified the CAA for the purposes of $PM_{2.5}$ designations. EPA is potentially confronting this issue again with respect to any new $PM_{10-2.5}$ NAAQS. As a policy, EPA does not think that designating all areas of the country as unclassifiable provides useful information to the public about their area meeting new air quality standards. EPA would prefer to not make designations until three years of monitoring data is available. EPA is soliciting comments on the best way to address this issue.

B. What Is EPA's Preferred Schedule for Designations for Any New $PM_{10-2.5}$ Standards?

The first available 3 years of data from a monitoring network for $PM_{10-2.5}$ will be 2009–2011. If EPA had not previously designated areas unclassifiable, EPA could then request recommendations from States for areas that might be designated nonattainment for $PM_{10-2.5}$ by July 2012. This is approximately 6 months after a full 3 years of data would be available for some areas. EPA believes this is adequate time for evaluating and quality assuring data to make recommendations on designations. On the other hand, States have until May 1 to certify that their monitoring data is correct, and may need additional time for designation recommendations. Another option would be to allow the States until October 2012 to make recommendations. The EPA would like to take comment on this option.

Following submittal of designation recommendations by the States, EPA will evaluate the recommendations and make modifications by December 2012. States will be notified of these changes, and given another opportunity to comment on the proposed modifications to designations. The EPA would then issue final modified $PM_{10-2.5}$ designations by May 2013 which would be effective approximately July 2013.

If EPA had previously designated areas unclassifiable, then, once EPA had sufficient monitoring data available, EPA would move forward in accordance with the provisions of section 107(d)(3)(A) to notify States that it believed designations for areas should be revised. States would then have the opportunity to respond in accordance with section 107(d)(3)(B), and EPA would take action regarding any revisions of the designations in accordance with section 107(d)(3)(C).

Since classifications under Title I are done at the same time as designations, EPA is considering the role a classification system could play in facilitating the implementation of any new $PM_{2.5}$ NAAQS. The EPA prefers not to develop a classification system to use in determining the amount of time permitted for attainment, for reasons similar to those outlined in the Proposed Rule to Implement the Fine Particle National Ambient Air Quality Standards; Proposed Rule (70 FR page 66000, November 1, 2005). Developing a classification system is only an option, not a requirement under section 172(a)(1), and for the reasons noted EPA does not believe it would be preferable to implement a classification scheme. The EPA would like comments on this potential designation timeline, and on its intentions to not develop a classification system.

C. What Is EPA's Preferred Schedule for Attainment Demonstrations and SIP Submittals for Any New $PM_{10-2.5}$ Standards?

Section 172(b) of the CAA requires EPA to establish a schedule for a State to submit its attainment demonstration and SIP revision within 3 years of nonattainment designation. Following the schedule outlined in part V(B) above, if nonattainment designations for any new $PM_{10-2.5}$ standards were effective in July 2013, then attainment demonstrations and SIP revisions would be due by July 2016. The EPA would like comments on this proposed timeline.

D. What Is EPA's Preferred Schedule for Attaining Any New $PM_{10-2.5}$ Standards?

Section 172(a)(2)(A) states that the attainment date for a nonattainment area must be "as expeditiously as practicable, but no later than 5 years from the date of designation for the area." If new $PM_{10-2.5}$ designations are made in May 2013 and are effective in July 2013, the initial attainment date for $PM_{10-2.5}$ would be as expeditiously as practicable but no later than July 2018. For an area with an attainment date of July 2018, EPA would determine whether it had attained the $PM_{10-2.5}$ standards by evaluating air quality data from the 3 previous calendar years (*i.e.*, 2015, 2016 and 2017).

Section 172 also states that if EPA deems it appropriate, the Agency may extend the attainment date for an area for a period not greater than 10 years from the date of designation, taking into account the severity of the nonattainment problem in the area, and the availability and feasibility of pollution control measures. For any area that is granted the full 5-year attainment date extension, the attainment date would be no later than July 2023. For such areas, EPA would determine whether they have attained the standard by evaluating air quality data from 2020, 2021 and 2022. Table 2 is an overview of this proposed timeline for designation, SIP submittal and attainment dates under this proposed schedule.

TABLE 2.—PROPOSED TIMELINE FOR A POSSIBLE 2006 $PM_{10-2.5}$ STANDARDS

Effective date of standard	December 2006
Monitoring data used for State recommendations	2009–2011.
State recommendations to EPA	July 2012.
Final designations signature	May 2013.
Effective date of designations	July 2013.
SIPs due	July 2016.
Attainment date	Up to July 2018 (based on 2015–2017 data).
Attainment date with extension	Up to July 2023 (based on 2020–2022 data).

The EPA requests comment on this potential timeline for attaining any new $PM_{10-2.5}$ standards.

VI. How Should EPA Implement the Transition From the PM_{10} Standards to Any New $PM_{10-2.5}$ Standards?

A. What Is EPA's Proposal for Revoking the PM_{10} Standards?

Before areas are designated under any new $PM_{10-2.5}$ standards, we intend to address how to transition from implementation of the PM_{10} standards to any new $PM_{10-2.5}$ standards. As part of the NAAQS proposal (71 FR 2620), EPA proposed to revoke the annual PM_{10} standard everywhere, and the 24-hour PM_{10} standard everywhere except in areas where there is at least one monitor that is located in an urbanized area with a minimum population of 100,000 people and that violates the 24-hour PM_{10} standard based on the most recent 3 years of data. This revocation would be effective upon promulgation of the PM NAAQS in December 2006. The EPA also provided a list of places where the 24-hour PM_{10} standard would not be revoked under the proposal. In addition, EPA requested comment on whether the 24-hour PM_{10} standard should be retained in areas that are either urbanized areas with populations less than 100,000 people or non-urbanized areas (*i.e.*, population less than 50,000) but where the majority of the ambient mix of $PM_{10-2.5}$ is generated by high density traffic on paved roads, industrial sources, and construction sources, and which have at least one monitor that violated the 24-hour PM_{10} standard. Comments on this revocation plan should be submitted under that notice (71 FR 2620).

This raises a number of issues for those areas where the 24-hour PM_{10} standard would still apply including: When and how should the 24-hour PM_{10} standard be revoked for these areas; should anti-backsliding provisions apply; how to address NSR and maintenance issues; and other implementation issues. Our principal objective for the transition is to ensure that air quality will not degrade in areas where the potential new $PM_{10-2.5}$ NAAQS would apply, and that areas continue to make progress toward attainment of the PM standards. Subject to requirements under the CAA for revising SIPs, EPA expects States would take the opportunity to revise their SIPs to reflect the revocation of the PM_{10} standards.

B. What Should the Timing Be for Revoking the 24-Hour PM_{10} Standard for Those Areas Where the 24-Hour PM_{10} Standard Is Retained?

The EPA contemplates that the 24-hour PM_{10} standard would be revoked one year after attainment/nonattainment designations are effective for a 24-hour $PM_{10-2.5}$ standard. Because attainment/nonattainment designations would not occur until July 2013, it is reasonable to expect that some areas where the 24-hour PM_{10} standard has not been revoked would come into attainment with the PM_{10} standard prior to July 2013. We invite comment on how these areas should be treated.

C. What Transition Issues Are Created by Revoking the 24-Hour PM_{10} Standard in Areas Where It Is Currently Proposed To Be Retained and How Might They Be Addressed?

1. Control Measures

EPA wants to ensure that air quality is not degraded if we move from one version of the NAAQS to another. What protections should remain in place to ensure that air quality will not degrade once the 24-hour PM_{10} standard is revoked, and that progress will continue as areas transition from implementing the 24-hour PM_{10} standard to implementing the 24-hour $PM_{10-2.5}$ standard?

a. What requirements based on an area's classification for the PM_{10} standard should continue to apply?

The EPA believes an approach similar to what was done under the ozone transition from the 1-hour to the 8-hour standard (69 FR 23951 page 23969) would be appropriate here in that control measures which remain in place were determined by the area's classification. Such an approach would mean that moderate PM_{10} nonattainment areas should continue to require reasonably available control measures (RACM) (as described in section 189(a)(1)(C) of the CAA). Serious PM_{10} nonattainment areas should also continue to require best available control measures (BACM) (section 189(b)(1)(B) of the CAA). All nonattainment areas should have an EPA-approved part D SIP in place, and continue to implement the nonattainment requirements and control measures identified in the SIP. Any effort to change SIP-approved measures would be subject to a section 110(l) demonstration of no interference with applicable requirements.

The EPA also believes that those areas where the 24-hour PM_{10} standard is being violated and has not been revoked should continue to implement the requirements of the CAA until nonattainment and attainment designations for $PM_{10-2.5}$ are completed. However, this could represent a significant period of time (from 2006–2013). Consequently, EPA is interested in alternative views regarding the appropriate implementation pathway for the PM_{10} standard in these areas.

b. How should EPA address maintenance? Those PM_{10} nonattainment areas where the 24-hour PM_{10} standard has not been revoked which come into attainment with the 24-hour PM_{10} NAAQS prior to designations under the 24-hour $PM_{10-2.5}$ standard, may request to be redesignated as attainment for PM_{10} under section 107(d). As such they would need to submit a maintenance plan under section 175A. Maintenance areas do not have any outstanding obligation to adopt further mandatory control obligations. We would anticipate an approach to maintenance requirements similar to what was provided in the ozone rule where maintenance areas retain the discretion to modify any discretionary control measures upon a demonstration under section 110(l) (69 FR 23951 page 23955). The EPA requests comments on how to address maintenance areas.

2. Transportation Conformity

Transportation conformity is required under section 176(c) of the CAA (42 U.S.C. 7506(c)) to ensure that federally supported highway and transit project activities are consistent with (conform to) the purpose of a SIP. Conformity to the purpose of a SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS. Transportation conformity applies in nonattainment areas and maintenance areas. The EPA's transportation conformity rule, 40 CFR part 93, establishes the criteria and procedures for determining whether transportation activities conform to the State air quality plan. It also establishes criteria and procedures for determining whether transportation activities conform in areas where no SIP containing motor vehicle emissions budgets yet exists.

Transportation conformity rulemakings, as well as other relevant conformity materials such as guidance documents, policy memoranda, the complete text of the conformity rule, and conformity research can be found at EPA's transportation conformity Web site, at *http://www.epa.gov/otaq/transp.htm* (once at the site, click on "Transportation Conformity.".

Until areas are designated nonattainment, transportation conformity will not apply for any new $PM_{10-2.5}$ standard. Based on the timeline outlined above, designations for any new $PM_{10-2.5}$ NAAQS could be effective in July 2013, and for all nonattainment areas transportation conformity would then apply 1 year later. Prior to the designation date, EPA would propose to update the transportation conformity rule to address any new $PM_{10-2.5}$ standard.

The EPA will solicit public comment on these and other issues associated with determining transportation conformity in any new $PM_{10-2.5}$ nonattainment areas when it proposes to revise the conformity rule to address the new standard. Once we revoke the PM_{10} standard and the associated designations, transportation conformity will no longer apply under the terms of the statute for that standard.

3. General Conformity

Section 176(c) of the CAA requires that before a Federal entity takes an action, it must make a determination that the proposed action will not interfere with the SIP or the State's ability to attain and maintain the NAAQS. In November 1993, EPA promulgated two sets of regulations to implement section 176(c). One set, known as the general conformity regulations, deals with all other Federal activities besides funding of highway and mass transit projects. These activities include funding and approval of airport projects, expansion of military bases, and permitting of projects to deepen waterways.

Federal agencies take thousands of actions every day and requiring determinations on every action would not be possible. Therefore, EPA established a number of exemptions to the rule requirements including a de minimis emission level generally based upon the size of a major stationary source in the nonattainment or maintenance area.

Following are a series of questions related to implementation of general conformity on which EPA is soliciting input:

- What de minimis levels should EPA establish for direct and precursor emissions for any new $PM_{10-2.5}$ standards? The EPA currently does not have speciated monitoring data for $PM_{10-2.5}$. Consequently, we do not know if the mass of $PM_{10-2.5}$ contains a significant amount of particulate matter formed by atmospheric chemical reactions.
- In transitioning to a new standard, how should EPA treat previous conformity evaluations and determinations based on the PM_{10} standard?
- Are there any categories of actions that should be exempt from the conformity requirements for any new $PM_{10-2.5}$ standards? If so, how could such exemptions be devised?

4. New Source Review Program

The NSR program is a preconstruction permitting program that applies when a new source is constructed or an existing one is modified. The major NSR program applies to major stationary sources and is comprised of the Prevention of Significant Deterioration (PSD) program that applies in attainment areas and a nonattainment NSR program that applies to pollutants for which an area is designated nonattainment.

There are many major NSR program implementation issues that EPA will address for a new $PM_{10-2.5}$ NAAQS, including revocation of the existing PM_{10} NAAQS. In this ANPR, EPA is highlighting some of the key issues and providing EPA's preliminary thinking on approaches for addressing them. We recognize that there may be other implementation issues not identified here, and we invite you to identify them. When submitting comments, please support your comments with adequate data and/or practical scenarios or illustrations.

a. Does PM_{10} continue to be a regulated NSR pollutant for PSD in areas where the 24-hour PM_{10} NAAQS would be revoked?

The PSD program applies when a major stationary source of any "regulated NSR pollutant", that is located in an area designated as attainment or unclassifiable for any criteria pollutant, is constructed or undergoes a major modification (40 CFR 52.21(a)(2); 40 CFR 51.166(a)(7)). EPA defines a "regulated NSR pollutant" to include (1) any pollutant for which a NAAQS has been promulgated (otherwise known as a "criteria" pollutant); (2) any pollutant subject to a NewSource Performance Standard promulgated under section 111 of the CAA; and (3) any pollutant that is otherwise regulated under the Act, except for hazardous air pollutants regulated under section 112 of the Act[3] (40 CFR 52.21(b)(50); 40 CFR 51.166(b)(49)). Thus, in addition to applying to criteria pollutants for which EPA has promulgated a NAAQS, the PSD program also applies to any non-criteria pollutant that is covered by the additional prongs of the definition of a "regulated NSR pollutant" described above. However, not all of the PSD program requirements outlined below are applicable to non-criteria pollutants that are subject to the PSD program.

The PSD requirements include but are not limited to:

- Installation of Best Available Control Technology (BACT),
- Air quality monitoring and modeling analyses to ensure that a project's emissions will not cause or contribute to a violation of any NAAQS or maximum allowable pollutant increase (PSD increment),
- Notification of Federal Land Manager when a proposed source or modification may affect nearby Class I areas, and
- Public comment on the permit.

For any criteria pollutant subject to PSD, all PSD requirements including the PSD increments analyses apply. However, since there are no NAAQS for non-criteria pollutants, only some requirements, including BACT, apply to these pollutants (See 42 U.S.C. 7475(a)(4); 40 CFR 52.21(j)); 40 CFR 52.166(j)).

The proposed revocation of the 24-hour PM_{10} NAAQS in certain areas raises issues about whether existing PSD regulations would continue to apply to PM_{10} in any respect after the revocation of the NAAQS in these areas. The extent to which all or some of the PSD requirements apply depends on whether PM_{10} continues to be a regulated NSR pollutant in these areas, either as a criteria or a non-criteria pollutant, under EPA's regulations and the CAA. We seek comment on the following options to address these issues:

Option 1. Since the 24-hour PM_{10} standard would remain in effect at least in some areas, we could conclude that PM_{10} continues to be a regulated NSR pollutant for the PSD program. Thus, even in those areas in which the 24-hour PM_{10} NAAQS is revoked (24-hour revoked areas), PM_{10} would be regarded as a regulated NSR pollutant only by virtue of being otherwise subject to regulation under the CAA (40 CFR 52.21(b)(50)(iv)) because a 24-hour PM_{10} NAAQS continues to apply in other areas. Under this approach. PSD for PM_{10} would continue to apply in all areas. However, as stated earlier, only a few PSD requirements, including BACT, would apply in 24-hour revoked areas. since PM_{10} would be regarded as a non-criteria pollutant in those areas. In those areas where the 24-hour PM_{10} NAAQS is not revoked, all PSD program elements would continue to apply for

[3] This definition also covers any pollutant that is subject to any standard promulgated under or established by Title VI of the Act, but this is not relevant to particulate matter.

PM_{10} because it remains a criteria pollutant in these areas.

Option 2. Alternatively, we could interpret all prongs of the "regulated NSR pollutant" definition to be area-specific. Thus, in 24-hour revoked areas, PM_{10} would no longer be a criteria pollutant, and none of the other prongs of the definition of "regulated NSR pollutant" would apply to PM_{10} in these areas. Therefore, none of the PSD requirements would apply to PM_{10} in such areas. We request comment on whether there is any other basis for retaining PM_{10} as a regulated NSR pollutant, even if it is no longer a criteria pollutant.

b. Does the CAA require continued obligation for some form of PM increment?

Section 163 of the CAA states that each SIP should contain measures assuring that maximum allowable increases over baseline concentration (increments) for PM shall not be exceeded in attainment areas. Section 163 contains specific numerical increments (expressed as $\mu g/m^3$) for PM, which EPA initially implemented using the total suspended particulate indicator. After EPA transitioned to PM_{10} as the indicator for PM in 1987, the Agency substituted PM_{10} increments for the PM increments in section 163 based on the authority of section 166(f) of the Act (58 FR 31622, June 3, 1993). Section 166(f), which was enacted in the 1990 amendments to the CAA, authorized EPA to substitute PM_{10} increments "of equal stringency in effect" as the section 163 PM increments, but also required that the PM increments remain in effect until the new PM_{10} increments were promulgated.

For pollutants other than PM and sulfur dioxide,[4] Section 166(a) of the CAA directs the Administrator to conduct a study and promulgate regulations, which may include increments, to prevent significant deterioration of air quality. EPA promulgated increments for nitrogen oxides under this authority (70 FR 59582, Oct. 12, 2005, and 53 FR 40656, Oct. 17, 1988). Section 166(a) also directs the Administrator to promulgate pollutant-specific PSD regulations for pollutants for which NAAQS are promulgated after 1977. The proposed revocation of the PM_{10} NAAQS raises two issues with respect to EPA's PSD regulations for PM. The first is whether EPA has a continuing obligation under section 163 or 166(f) of the CAA to implement some form of a PM increment. The second question concerns the methodology that EPA should use to establish PSD regulations for $PM_{2.5}$ and $PM_{10-2.5}$ to replace the increments for PM_{10}. We seek comment on the following options to address these issues:

Option 1. Once the PM_{10} NAAQS is revoked, one approach would be to conclude that section 166(f), requiring equivalent PM_{10} increments, is no longer applicable in the absence of a PM_{10} NAAQS. Furthermore, since section 166(f) effectively superseded section 163, we would not construe the latter provision to require that EPA maintain a PM increment after the revocation of the PM_{10} NAAQS. Thus, we could conclude that neither the section 163 increment requirement for PM nor the section 166(f) increment requirement for PM_{10} remains effective after revocation of the PM_{10} standard.

Accordingly, we would need to develop new increments[5] for $PM_{2.5}$ and $PM_{10-2.5}$. In the interest of simplicity and ease of implementation, we could develop new increments for $PM_{2.5}$ and $PM_{10-2.5}$ pursuant to section 166 of the CAA. This approach would include among other things, establishing new baseline dates and trigger dates for $PM_{2.5}$ and $PM_{10-2.5}$ on the theory that these are separate, new pollutants, at least for NSR purposes. Otherwise the alternative approach, described below, of trying to continue the implementation of the section 163 increments for PM (using the new indicators) would involve retroactively estimating $PM_{2.5}$ and $PM_{10-2.5}$ emissions in 1978 (based on the original PSD requirements for PM), and would be extremely difficult in most cases.

Option 2. Another approach would be to interpret sections 163 and 166(f) to require some form of PM increments on a continuous basis. However, we would recognize the Congressional intent reflected in section 166(f) that EPA update the PM increments as it modifies the NAAQS for PM. Under this option, we could substitute PM_{10} increments with two new increments ($PM_{2.5}$ and $PM_{10-2.5}$) "of equal stringency in effect" based on section 166(f) of the CAA by using the methodology reflected in our 1993 PM_{10} increments regulation. This approach would provide continuity with the existing PM_{10} increments system and would most likely involve retaining the existing baseline areas and dates.

c. How should permitting authorities implement the $PM_{2.5}$ program upon revocation of the PM_{10} NAAQS?

When EPA first promulgated the NAAQS for $PM_{2.5}$ in 1997, we encountered a number of technical difficulties with implementing the PSD program for $PM_{2.5}$ upon the effective date of the NAAQS for $PM_{2.5}$. To address these difficulties, EPA established a policy that enabled permitting authorities to use the implementation of the PSD program for PM_{10} as a surrogate for a $PM_{2.5}$ PSD program until the necessary tools were in place to measure $PM_{2.5}$ and implement PSD permitting programs for $PM_{2.5}$. See Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Regional Air Directors, Interim Implementation of New Source Review for $PM_{2.5}$ (October 23, 1997) at: *http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/pm25.pdf.* The EPA extended this PM_{10} surrogate policy to implementation of the NSR program in nonattainment areas, once $PM_{2.5}$ nonattainment designations became effective on April 5, 2005. See Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Regional Air Directors, Interim Implementation of New Source Review for $PM_{2.5}$ in Nonattainment Areas (April 5, 2005) at: *http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/pm25guid.pdf).* These policies remain in effect today pending the promulgation of EPA's $PM_{2.5}$ implementation rules for NSR and approval of SIPs containing PSD programs for $PM_{2.5}$.

Because of the proposed revocation of the PM_{10} NAAQS, there may not be a PM_{10} PSD program remaining in 24-hour revoked areas to rely upon as a surrogate for implementation of a PSD program for $PM_{2.5}$. This raises the issue of how States may continue to satisfy the PSD program requirements for $PM_{2.5}$ in the interim period. We seek comment on the following options to address this issue:

Option 1. One approach that we might use would be to continue using an analysis of PM_{10} air quality as a surrogate for the air quality analysis under the $PM_{2.5}$ program with a change. Permitting authorities may continue to analyze PM_{10} emissions and concentrations, but they would have to compare these concentrations with the $PM_{2.5}$ NAAQS to show that the predicted PM_{10} concentrations would not exceed the $PM_{2.5}$ NAAQS. This approach would overpredict actual $PM_{2.5}$ concentrations in most cases, but it would represent a conservative

[4] Section 163 also contains increments for sulfur dioxide. 42 U.S.C. 7473.

[5] Alternatively, if we promulgate such regulations under section 166, EPA could develop equivalent PSD regulations for $PM_{2.5}$ and $PM_{10-2.5}$ that include other measures instead of increments.

screening mechanism that could demonstrate that a new source or major modification would not cause or contribute to a violation of the $PM_{2.5}$ NAAQS. We believe that this would be a suitable interim approach until all the necessary implementation elements for carrying out an independent $PM_{2.5}$ program have been finalized.

Option 2. An alternative approach would be to continue to apply the existing surrogate policy for implementing the $PM_{2.5}$ program, even after the PM_{10} standard has been revoked. In other words, the impacts of the PM_{10} emissions would continue to be compared with the former PM_{10} NAAQS. Again this would serve as an interim policy, until all the $PM_{2.5}$ implementation elements for carrying out an independent $PM_{2.5}$ program have been finalized.

d. How should EPA implement the PSD program for $PM_{10-2.5}$ upon the effective date of the promulgation of the $PM_{10-2.5}$ NAAQS?

The EPA has interpreted various provisions in title I, part C of the CAA to require immediate implementation of the PSD program in all areas for each pollutant upon the effective date of a NAAQS for that pollutant. See SeitzMemorandum (October 27, 1997). As noted earlier, EPA's PSD regulations define a regulated NSR pollutant to include, among other things, any pollutant for which a NAAQS is promulgated (40 CFR 51.166(b)(49); 52.21(b)(50)). In contrast, under part D of the CAA, the nonattainment NSR program is not required to be implemented for a particular pollutant subject to a NAAQS until nonattainment areas are designated pursuant to section 107 of the CAA, and are in effect for that pollutant.

As described in detail in the earlier $PM_{2.5}$ implementation discussion. EPA established a policy that enabled permitting authorities to use the implementation of a PSD program for PM_{10} as a surrogate for implementation of the PSD program for $PM_{2.5}$ until the necessary tools were in place to measure $PM_{2.5}$ and implement permitting programs for $PM_{2.5}$. The EPA anticipates that it will encounter similar difficulties with implementing a PSD program for $PM_{10-2.5}$ upon the effective date of a NAAQS for $PM_{10-2.5}$. However, as discussed above in the context of $PM_{2.5}$, the revocation of the PM_{10} NAAQS may leave EPA without a PM_{10} program to rely upon as a surrogate for implementation of a PSD program for $PM_{10-2.5}$. Thus, we are exploring other approaches that EPA might use to fulfill the PSD requirements in title I, part C of the CAA upon the effective date of a NAAQS for $PM_{10-2.5}$. We request comment on the following approaches and welcome suggestions for additional approaches we might use for a temporary, interim period to prevent significant deterioration of air quality from new and modified sources of $PM_{10-2.5}$:

Option 1. One approach that we might use would be to continue using an analysis of PM_{10} air quality as a surrogate for the air quality analysis under a $PM_{10-2.5}$ program. Permitting authorities may continue to analyze PM_{10} emissions and concentrations and compare that with the $PM_{10-2.5}$ NAAQS to show that the predicted PM_{10} concentrations would not exceed the $PM_{10-2.5}$ NAAQS. This approach would overpredict actual $PM_{10-2.5}$ concentrations in most cases, but it would represent a conservative screening mechanism that could demonstrate that a new source or major modification would not cause or contribute to a violation of the $PM_{10-2.5}$ NAAQS.

Option 2. Another approach might be to compare the PM_{10} analysis to the former PM_{10} NAAQS and thus use compliance with the former PM_{10} NAAQS as a surrogate for compliance with the new $PM_{10-2.5}$ NAAQS for a temporary period. This latter approach might be used independently or as a secondary step in a tiered analysis if the first approach discussed above was found to be overly conservative.

Option 3. Another approach might be to use compliance with BACT for $PM_{10-2.5}$ as a surrogate for the $PM_{10-2.5}$ NAAQS compliance demonstration. In this approach, we might make a determination for an interim period that the first major sources that trigger PSD requirements for $PM_{10-2.5}$ are not likely to cause or contribute to noncompliance with the $PM_{10-2.5}$ NAAQS if they meet BACT for $PM_{10-2.5}$. Thus, we might consider compliance with BACT to represent a surrogate for the $PM_{10-2.5}$ NAAQS compliance demonstration for a limited period until we have the tools in place to assess $PM_{10-2.5}$ concentrations.

e. How should ambient $PM_{10-2.5}$ dominated by rural windblown dust and soils, and generated by agricultural and mining sources be treated in the NSR program for the proposed $PM_{10-2.5}$ standard?

The proposed $PM_{10-2.5}$ indicator is qualified so as to include any ambient mix of $PM_{10-2.5}$ that is dominated by resuspended dust from high density traffic on paved roads and PM generated by industrial sources and construction sources, and excludes any ambient mix of $PM_{10-2.5}$ that is dominated by rural windblown dust and soils and PM generated by agricultural and mining sources. This suggests that the NSR applicability test would exclude these sources from consideration. We request comment on how we would implement the NSR program if we promulgate a NAAQS with these characteristics.

VII. What Emission Inventory Requirements Should Apply Under Any New $PM_{2.5}$ and $PM_{10-2.5}$ NAAQS?

Emission inventories are critical for the efforts of State, local, tribal and Federal agencies to attain and maintain the NAAQS that EPA has established for criteria pollutants including $PM_{2.5}$ and any new $PM_{10-2.5}$ standards. Pursuant to its authority under section 110 of Title I of the CAA, EPA has long required States to submit emission inventories containing information regarding the emissions of criteria pollutants and their precursors. The EPA codified these requirements in 40 CFR part 51, subpart Q in 1979 and amended them in 1987.

In June 2002, EPA promulgated the Consolidated Emissions Reporting Rule (CERR)(67 FR 39602, June 10, 2002). The CERR consolidates the various emissions reporting requirements into one place in the CFR. In January 2006, EPA proposed the Air Emissions Reporting Requirements (AERR) (71 FR 69, January 3, 2006) which proposes to modify some of the reporting requirements established by CERR. In addition, EPA has developed guidance "Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations, EPA–454/R–99–006 available at: *http://www.epa.gov/ttn/chief/eidocs/eiguid/index.html.* The EPA developed this guidance document to complement the CERR and proposed AERR and to provide specific guidance to State and local agencies and Tribes on how to develop emissions inventories for 8-hour ozone, $PM_{2.5}$, and regional haze SIPs. The CERR and AERR set forth national requirements for emission data elements for all States, regardless of NAAQS attainment status. EPA guidance complements these requirements and indicates how the data should be prepared for SIP submissions. The SIP inventory, which may be derived from the CERR inventory, applies only to nonattainment areas. The SIP inventory also must be approved by EPA as a SIP element and is therefore subject to public hearing requirements, and is thus regulatory in nature. The inventory required by the CERR is not. Because of the regulatory significance of the SIP

inventory, EPA will need more documentation on how the SIP inventory was developed by the State as opposed to the documentation required for the CERR inventory.

Therefore, the basis for EPA's emission inventory program is specified in the CERR, the AERR notice of proposed rulemaking (NPRM) and the related guidance document. The EPA is interested in receiving comments on whether or not additional emission inventory requirements or guidance are needed to implement any new $PM_{2.5}$ standards and any new $PM_{10-2.5}$ NAAQS. Following are a set of questions on which we would like input:

a. Are the data elements specified within the CERR and AERR sufficient to develop adequate SIPs for $PM_{2.5}$ and $PM_{10-2.5}$? For example, should EPA expand the listing of reportable compounds to include elemental and organic carbon?

b. Fugitive emissions are a significant contributor to ambient levels of $PM_{10-2.5}$. Should EPA require and/or develop more precise methods for estimating fugitive particulate emissions, perhaps including wind blown dust?

c. The EPA believes that daily emissions will be important under both $PM_{2.5}$ and $PM_{10-2.5}$. Should EPA require any additional emission inventory data elements or temporal allocation techniques to estimate more accurately daily emissions and their variability?

d. Are there other inventory issues that EPA should define through either regulation or guidance?

VIII. Statutory and Executive Order Reviews

Under Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is, therefore, not subject to review by the Office of Management and Budget.

List of Subjects in 40 CFR Part 51

Environmental protection, Particulate matter.

Dated: February 3, 2006.

Stephen L. Johnson,

Administrator.

[FR Doc. E6–1798 Filed 2–8–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[OAR–2005–0124; FRL–8030–1]

RIN 2060–AN34

Air Quality: Revision to Definition of Volatile Organic Compounds—Exclusion of HFE–7300

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes to revise EPA's definition of volatile organic compounds (VOC) for purposes of preparing State implementation plans (SIPs) to attain the national ambient air quality standards (NAAQS) for ozone under title I of the Clean Air Act (CAA). This proposed revision would add 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane [also known as HFE–7300 or L–14787 or $C_2F_5CF(OCH_3)CF(CF_3)_2$] to the list of compounds excluded from the definition of VOC on the basis that this compound makes a negligible contribution to tropospheric ozone formation. If you use or produce HFE–7300 and are subject to EPA regulations limiting the use of VOC in your product, limiting the VOC emissions from your facility, or otherwise controlling your use of VOC for purposes related to attaining the ozone NAAQS, then you will not count HFE–7300 as a VOC in determining whether you meet these regulatory obligations. This action may also affect whether HFE–7300 is considered as a VOC for State regulatory purposes, depending on whether the State relies on EPA's definition of VOC. As a result, if you are subject to certain Federal regulations limiting emissions of VOCs, your emissions of HFE–7300 may not be regulated for some purposes.

DATES: Comments on this proposal must be received by March 13, 2006. Requests for a hearing must be submitted by February 24, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2005–0124, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: Send e-mail to the EPA Docket Center at *a-and-r-Docket@epa.gov*.
- Fax: Send faxes to the EPA Docket Center at (202) 566–1741.
- Mail: Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Attn: Docket No. OAR–2005–0124, "Air Quality: Revision to Definition of Volatile Organic Compounds—Exclusion of HFE–7300." Please include a total of two copies.
- Hand Delivery: EPA Docket Center, U.S. Environmental Protection Agency, EPA West Building, Room B102, 1301 Constitution Avenue, NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. OAR–2005–0124. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material,

is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

Public Hearing: If anyone contacts EPA requesting a public hearing, it will be held at Research Triangle Park, NC. Persons wishing to request a public hearing, wanting to attend the hearing or wishing to present oral testimony should notify Mr. David Sanders, Air Quality Strategies and Standards Division (C539–02), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–3356. EPA will publish notice of a hearing, if requested, in the **Federal Register**. Any hearing will be strictly limited to the subject matter of the proposal, the scope of which is discussed below. Interested persons may call Mr. Sanders to see if a hearing will be held and the date and location of any hearing.

FOR FURTHER INFORMATION CONTACT: David Sanders, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division (C539–02), Research Triangle Park, NC 27711, phone (919) 541–3356, or by e-mail at *sanders.dave@epa.gov*.

SUPPLEMENTARY INFORMATION: This compound has potential for use as a heat-transfer fluid. As a hydrofluoroether (HFE), this compound may be used as an alternative to ozone-depleting substances. Under the Significant New Alternatives Policy (SNAP) program (CAA 612; 40 CFR part 82 subpart G), EPA may identify substitutes for ozone-depleting compounds, evaluate the acceptability of these substitutes, determine as acceptable for use those substitutes believed to present lower overall risks to human health and the environment (relative to the class I and class II compounds being replaced, as well as to other substitutes for the same end-use), and prohibit the use of those substitutes found, based on the same comparisons, to increase overall risks. Because they do not contain chlorine or bromine, they do not deplete the ozone layer. All HFEs have an ozone depletion potential (ODP) of 0 although some HFEs have high global warming potential (GWP).

According to a U.S. patent application submitted by 3M Innovative Properties Company, the organic compound 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl pentane [$C_2F_5CF(OCH_3)CF(CH_3)_2$] that is the subject of this notice possesses the capacity to form myriad azeotrope mixtures with other organic compounds such as 1-bromopropane, hexamethyldisilazane, isobutyl acetate, methylisobutyl ketone, trans-1,2-dichloroethylene, and trifluoromethylbenzene which may not be exempt from VOC regulation. This patent application lists a broad range of processes and applications where these azeotropes can be used. Some of these azeotrope uses include: (1) Coating deposition applications, where the azeotrope functions as a carrier for a coating material, (2) heat-transfer fluids in heat-transfer processes, (3) to clean organic and/or inorganic substrates, and (4) to formulate working fluids or lubricants for machinery operations and manufacturing processes.

The patent application indicated that the azeotrope mixtures can be formulated at compositions of 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl pentane [$C_2F_5CF(OCH_3)CF(CH_3)_2$] ranging from 1 to 100 percent, depending on the organic co-solvent and the desired properties of the azeotrope.

I. Background

Tropospheric ozone, commonly known as smog, occurs when VOC and nitrogen oxides (NO_X) react in the atmosphere. Because of the harmful health effects of ozone, EPA and State governments limit the amount of VOC and NO_X that can be released into the atmosphere. Volatile organic compounds are those compounds of carbon (excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate) which form ozone through atmospheric photochemical reactions. Compounds of carbon (also known as organic compounds) have different levels of reactivity—that is, they do not react at the same speed or do not form ozone to the same extent. It has been EPA's policy that organic compounds with a negligible level of reactivity need not be regulated to reduce ozone. EPA determines whether a given organic compound has "negligible" reactivity by comparing the compound's reactivity to the reactivity of ethane. EPA lists these compounds in its regulations [at 40 CFR 51.100(s)] and excludes them from the definition of VOC. The chemicals on this list are often called "negligibly reactive" organic compounds.

On July 8, 1977, EPA published the "Recommended Policy on Control of Volatile Organic Compounds" (42 FR 35314) which established the basic policy that EPA has used regarding organic chemical photochemical reactivity since that time. In that statement, EPA identified the following four compounds as being of negligible photochemical reactivity and said these should be exempt from regulation under SIPs: Methane; ethane; 1,1,1-trichloroethane (methyl chloroform); and 1,1,2-trichloro-1,2,2-trifluoroethane (CFC–113). That policy statement said that as new information becomes available, EPA may periodically revise the list of negligibly reactive compounds to add compounds to or delete them from the list.

EPA's decision to exempt certain compounds in its 1977 policy was heavily influenced by experimental smog chamber work done earlier in the 1970's. In this experimental work, various compounds were injected into a smog chamber at a molar concentration that was typical of the total molar concentration of VOC in Los Angeles ambient air (4 ppmv). As the compound was allowed to react with NO_X at concentrations of 0.2 ppm, the maximum ozone formed in the chamber was measured. If the compound in the smog chamber did not result in ozone formation of 0.08 ppm (0.08 ppm was the NAAQS for oxidants at that time), it was assumed that emissions of the compound would not cause the oxidant standard to be exceeded. The compound could then be considered to be negligibly reactive. Ethane was the most reactive compound tested that did not cause the 0.08 ppm ozone level in the smog chamber to be met or exceeded. Based on those findings and judgments, EPA designated ethane as negligibly reactive, and ethane became the benchmark VOC species separating reactive from negligibly reactive compounds.

Since 1977, the primary method for comparing the reactivity of a specific compound to that of ethane has been to compare the k_{OH} values for ethane and the specific compound of interest. The k_{OH} value represents the molar rate constant for reactions between the subject compound (e.g., ethane) and the hydroxyl radical (i.e., •OH). This reaction is very important since it is the primary pathway by which most organic compounds initially participate in atmospheric photochemical reaction processes. At this time, EPA has exempted 53 compounds or classes of compounds with 4 of these based on a new comparison using Maximum Incremental Reactivity (MIR) values and

the remainder based on a comparison of k_{OH} values.

On August 30, 2004, the Performance Chemicals and Fluid Division of the 3M Company submitted to EPA a petition requesting that the compound 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane be added to the list of compounds which are considered to be negligibly reactive in the definition of VOC at 40 CFR 51.100(s).

This compound would be used as a heat transfer liquid and for other heat transfer applications. In its petition, 3M points out that it has suggested HFE–7300 be used to reduce greenhouse gases resulting from emissions of compounds such as hydroflurocarbons, perfluorocarbons, and perfluoropolyethers in certain applications and, therefore, help reduce global warming potential.

In support of 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane, 3M Company supplied information on its photochemical reactivity. The 3M Company stated that, as a hydrofluoroether, this compound is very similar in structure, toxicity, and atmospheric properties to other compounds such as $C_4F_9OCH_3$, $(CH_3)_2CFCF_2OCH_3$, $C_4F_9OC_2H_5$, $(CH_3)_2CFCF_2OC_2H_5$, n-$C_3F_7OCH_3$, and $C_3F_7CF(OC_2H_5)CF(CF_3)_2$ which are exempt from the VOC definition.

Other information submitted by 3M Company consists mainly of a peer-reviewed article entitled "Atmospheric Chemistry of Some Fluoroethers," Guschin, Molina, Molina: Massachusetts Institute of Technology, May 1998,which has been submitted to the docket. This article discusses a study in which the rate constant for the reaction of the subject compound with the hydroxyl (OH) radical is shown to be less than that for ethane and slightly more than that for methane. This rate constant (k_{OH} value) is commonly used as one measure of the photochemical reactivity of compounds. The petitioner compared the subject compound rate constant with that of ethane, which has already been listed as photochemically negligibly reactive. The compound under consideration has the reported k_{OH} rate constant as listed in Table 1 which is lower that that of ethane at 2.4×10^{-13}. The scientific information which the petitioner has submitted in support of the petition has been added to the docket for this rulemaking. This information includes references for the journal articles where the rate constant values are published.

EPA has included the 3M Company Material Safety Data Sheet for HFE–7300 indicating the compound as having very low toxicity. This information has been placed in the docket.

TABLE 1.—REACTION RATE AND TOXICITY

Compound	OH Radical at 25 °C (cm^3/molecule/sec)	MIR		Toxicity
		mole	gram	
HFE–7300	1.5×10^{-14}	Not available		Very low.

II. EPA Response to the Petition

For the petition submitted by the 3M Company, the data submitted by the petitioners support the contention that the reactivity of the compound submitted, with respect to reaction with the OH radical in the atmosphere, is lower than that of ethane.

This notice to exempt 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl pentane $[C_2F_5CF(OCH_3)CF(CH_3)_2]$ as negligibly reactive from the VOC definition applies to this compound only in its pure state and does not apply to any of its azeotrope mixtures or organic blends in which any of the other constituents are not VOC exempt compounds. The term "pure state" is taken to mean at a composition purity level of at least 99.96 percent by weight (cited in the patent application 10/739,231 published on June 23, 2005 titled "Azeotrope-like Compositions and Their Use," Publication Number: US 2005/0137113 A1) of 1,1,1,2,2, 3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl pentane $[C_2F_5CF(OCH_3)CF(CH_3)_2]$. For those azeotrope mixtures and organic blends which contain both VOC exempt and non-exempt compounds, the amount of credit that can be apportioned as VOC exempt credit is limited to the total molar fraction of all the VOC exempt constituents contained in the mixture or blend.

EPA is responding to the petition by proposing in this action to add 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane (also known as HFE–7300) to the list of compounds appearing in 40 CFR 51.100(s).

III. Proposed Action

Today's proposed action is based on EPA's review of the material in Docket No. OAR–2005–0124. EPA hereby proposes to amend its definition of VOC at 40 CFR 51.100(s) to exclude HFE–7300 as VOC for ozone SIP and ozone control purposes. States are not obligated to exclude from control as a VOC those compounds that EPA has found to be negligibly reactive. However, if this action is made final, States may not take credit for controlling this compound in their ozone control strategy.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of this Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligation of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is not "significant" because none of the listed criteria apply to this action. Consequently, this action is not submitted to OMB for review under Executive Order 12866.

B. Paperwork Reduction Act

This action does not contain any information collection requirements

subject to OMB review under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* It does not contain any recordkeeping or reporting requirement.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply, with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency does not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The control numbers for EPA(s regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

Today's proposed rule proposes to revise EPA's definition of volatile organic compounds (VOC) for purposes of preparing State implementation plans (SIPs) to attain the national ambient air quality standards (NAAQS) for ozone under title I of the Clean Air Act (CAA). This proposed revision would add 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane [also known as HFE–7300 or L–14787 or $[C_2F_5CF(OCH_3)CF(CF_3)_2]$ to the list of compounds excluded from the definition of VOC on the basis that this compound makes a negligible contribution to tropospheric ozone formation. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. Since this proposed rule is deregulatory in nature and does not impose a mandate upon any source, this rule is not estimated to result in the expenditure by State, local and Tribal governments or the private sector of $100 million in any 1 year. Therefore, the Agency has not prepared a budgetary impact statement or specifically addressed the selection of the least costly, most cost-effective, or least burdensome alternative. Because small governments will not be significantly or uniquely affected by this rule, the Agency is not required to develop a plan with regard to small governments. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposed action addressing the exemption of a chemical compound from the VOC definition does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in

Executive Order 13132. This action does not impose any new mandates on State or local governments. Thus, Executive Order 13132 does not apply to this rule. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This proposed rule does not have Tribal implications. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes, as specified in Executive Order 13175. Today's action does not have any direct effects on Indian Tribes. Thus, Executive Order 13175 does not apply to this rule. In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and Tribal governments, EPA specifically solicits additional comment on this proposed rule from Tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

While this proposed rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, EPA has reason to believe that ozone has a disproportionate effect on active children who play outdoors (62 FR 38856; 38859, July 18, 1997). EPA has not identified any specific studies on whether or to what extent the chemical compound may affect children's health. EPA has placed the available data regarding the health effects of this chemical compound in Docket No. OAR–2005–0124. EPA invites the public to submit or identify peer-reviewed studies and data, of which EPA may not be aware, that assess results of early life exposure to the chemical compound HFE–7300.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d), (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, with explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 3, 2006.

Stephen L. Johnson,

Administrator.

For reasons set forth in the preamble, part 51 of chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS.

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7641q.

§ 51.100 [Amended]

2. Section 51.100 is amended at the end of paragraph (s)(1) introductory text by removing the words "and methyl formate ($HCOOCH_3$), and perfluorocarbon compounds which fall into these classes:" and adding in their place the words; "methyl formate ($HCOOCH_3$), 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane (HFE–7300) and perfluorocarbon compounds which fall into these classes:".

[FR Doc. E6–1800 Filed 2–8–06; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 707 and 799

[EPA–HQ–OPPT–2005–0058; FRL–7752–2]

RIN 2070–AJ01

Export Notification; Proposed Change to Reporting Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing amendments to the Toxic Substances Control Act (TSCA) section 12(b) export notification regulations at subpart D of 40 CFR part 707. One amendment would change the current annual notification requirement to a one-time requirement for exporters of chemical substances or mixtures (hereinafter referred to as "chemicals") for which certain actions have been taken under TSCA. Relatedly, for the same TSCA actions, EPA is proposing to change the current requirement that the Agency notify foreign governments annually after the Agency's receipt of export notifications from exporters to a requirement that the Agency notify foreign governments once after it

receives the first export notification from an exporter. EPA is also proposing de minimis concentration levels below which notification would not be required for the export of any chemical for which export notification under TSCA section 12(b) is otherwise required, proposing other minor amendments (to update the EPA addresses to which export notifications must be sent, to indicate that a single export notification may refer to more than one section of TSCA where the exported chemical is the subject of multiple TSCA actions, and to correct an error), and clarifying exporters' and EPA's obligations where an export notification-triggering action is taken with respect to a chemical previously or currently subject to export notification due to the existence of a previous triggering action.

DATES: Comments must be received on or before April 10, 2006.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2005–0058, by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *Agency Website*: EDOCKET, EPA's electronic public docket and comment system, was replaced on November 25, 2005, by an enhanced Federal-wide electronic docket management and comment system located at *http://www.regulations.gov*. Follow the on-line instructions.
- *E-mail*: *oppt.ncic@epa.gov*.
- *Mail*: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery*: OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID number EPA–HQ–OPPT–2005–0058. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2005–0058. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm/*.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the OPPT Docket (EPA/DC), EPA West, Rm. B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280.

FOR FURTHER INFORMATION CONTACT: *For general information contact*: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001: telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

For technical information contact: Kenneth Moss, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–9232; e-mail address: *moss.kenneth@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you export or intend to export any chemical substance or mixture for which any of the following actions have been taken under TSCA with respect to that chemical substance or mixture: Data are required under TSCA section 4 or 5(b), an order has been issued under TSCA section 5, a rule has been proposed or promulgated under TSCA section 5 or 6, or an action is pending, or relief has been granted under TSCA section 5 or 7. Potentially affected entities may include, but are not limited to:

- Exporters of chemical substances or mixtures (NAICS codes 325 and 324110; e.g., chemical manufacturing and processing and petroleum refineries).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions at 40 CFR 707.60 for TSCA section 12(b)-related obligations. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to using the electronic docket, you may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of both 40 CFR parts 707 and 799 are available on E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

C. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://*

www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the rulemaking by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What Action is the Agency Taking?

EPA is proposing amendments to TSCA section 12(b) export notification regulations at subpart D of 40 CFR part 707. The first amendment would change the current annual notification requirement for exporters of chemicals for which certain actions have been taken under TSCA. Currently, the TSCA section 12(b) regulations require exporters of chemicals to notify EPA of the first export or intended export to a particular country in a calendar year when data are required under TSCA section 5(b), an order has been issued under TSCA section 5, a rule has been proposed or promulgated under TSCA section 5 or 6, or an action is pending, or relief has been granted under TSCA section 5 or 7. For chemicals subject to a final TSCA section 4 action, exporters are currently required to submit an export notification only for the first export or intended export to a particular country. This proposed rule would change the current annual export notification requirement to a one-time requirement for each of the following TSCA section 12(b)-triggering actions per each destination country for each exporter of a chemical: An order issued, an action pending, or an action granting relief under TSCA section 5(e), a proposed or promulgated rule under TSCA section 5(a)(2), or an action requiring the submission of data under TSCA section 5(b). For exports of chemicals that are the subjects of TSCA section 12(b)-triggering actions under TSCA section 5(f), 6, or 7, however, each exporter would continue to be required to submit annual export notifications to EPA.

Relatedly, EPA is proposing a change in the frequency for which the Agency must notify foreign governments after the Agency's receipt of export notifications from exporters. Consistent with the current requirement that EPA notify foreign governments one time regarding the export of chemicals subject to final TSCA section 4 actions, EPA is proposing that the Agency provide a one-time (rather than the current annual) notice to each foreign government to which exported chemicals that are the subjects of any of the following actions are sent: An order issued, an action pending, or an action granting relief under TSCA section 5(e), a rule proposed or promulgated under TSCA section 5(a)(2), or an action requiring the submission of data under TSCA section 5(b). EPA would continue to notify each foreign government on an annual basis regarding the export of chemicals that are the subject of TSCA section 5(f), 6, or 7 actions.

EPA is also proposing de minimis concentration levels below which notification would not be required for the export of any chemical for which export notification under TSCA section 12(b) is otherwise required. Specifically, EPA is proposing that export notification would not be required for such chemicals if the chemical is being exported at a concentration of less than 1% (by weight or volume), unless that chemical is:

1. Listed as a "known to be human carcinogen" or "reasonably anticipated to be human carcinogen" in the Report on Carcinogens issued by the U.S. Department of Health and Human Services National Toxicology Program (NTP) (Ref. 1),

2. Classified as a Group 1, Group 2A, or Group 2B carcinogen by the World Health Organization International Agency for Research on Cancer (IARC) in the list of IARC Monographs on the Evaluation of Carcinogenic Risks to Humans and their Supplements (Ref. 2), or

3. Characterized as a carcinogen or potential carcinogen in the Occupational Safety and Health Administration's (OSHA's) regulations related to toxic and hazardous substances (29 CFR part 1910, subpart Z).

For paragraphs 1–3 of this unit, a de minimis concentration level of less than 0.1% (by weight or volume) would apply. For exports of polychlorinated biphenyls (PCBs), notification would not be required if such chemicals are being exported at a concentration of less than or equal to 50 parts per million (ppm) (by weight or volume).

EPA believes this proposed rule is needed to further focus importing governments' resources and attention on chemicals for which EPA has proposed to make or has made a finding under TSCA that a chemical substance or mixture "presents or will present" an unreasonable risk, and to reduce overall burden on exporters and the Agency. EPA requests comments on these proposed amendments, and is particularly interested in receiving comments discussing whether the proposed changes would continue to provide adequate notice and information to foreign governments about chemicals imported from the United States. EPA is also interested in receiving specific, well supported, information regarding how the proposed changes would affect exporters.

In this **Federal Register** document, EPA is also updating the instructions for the submission of export notifications to the Agency (40 CFR 707.65(c)), clarifying exporters' and EPA's obligations when subsequent TSCA section 12(b)-triggering actions are taken with respect to a chemical previously or currently subject to export notification due to a separate triggering action, indicating in 40 CFR 707.67 that a single export notification may refer to more than one section of TSCA where the exported chemical is the subject of multiple TSCA actions, and correcting 40 CFR 799.19 to make it clear that final multi-chemical TSCA section 4 rules also trigger export notification (see Unit IV.).

B. What is the Agency's Authority for Taking this Action?

EPA is proposing these amendments pursuant to TSCA section 12(b), 15 U.S.C. 2611(b). Section 12(b) of TSCA requires that any person who exports or intends to export to a foreign country a chemical for which the submission of data is required under TSCA section 4 or 5(b), an order has been issued under TSCA section 5, a rule has been proposed or promulgated under TSCA section 5 or 6, or with respect to which an action is pending or relief has been granted under TSCA section 5 or 7 must notify the Administrator of EPA of such exportation or intent to export. Upon receipt of such notification, EPA must furnish the government of the importing country with:

1. Notice of the availability of data received pursuant to an action under TSCA section 4 or 5(b) or

2. Notice of such rule, order, action, or relief under TSCA section 5, 6, or 7.

C. History

In the **Federal Register** of December 16, 1980, EPA promulgated rules at 40 CFR part 707, subpart D, implementing TSCA section 12(b) (Ref. 3). Under these rules, exporters were required to submit a written notification to EPA for the first export or intended export to a particular country in a calendar year for any chemical that was the subject of a TSCA section 12(b)-triggering action. Upon receipt of such notification from an exporter, the implementing rules required (and still require) that EPA provide the importing country with, among other things, a summary of the action taken or an indication of the availability of data received pursuant to action under TSCA section 4 or 5(b) (see 40 CFR 707.70(b)).

To facilitate foreign governments' consideration of export notices for chemicals exported from the United States and to reduce the burden on EPA and exporters, EPA promulgated a rule in the **Federal Register** of July 27, 1993, that amended the regulations in 40 CFR part 707, subpart D (Ref. 4). The amendment limited the notification requirement for each exporter of chemicals subject to a final TSCA section 4 action to a one-time notification to EPA for the export of each such chemical to each particular country, instead of requiring annual notification to EPA for shipments of the chemical to that country. The amended rule also limited EPA's notice to foreign governments to one time for the export of each chemical subject to a final TSCA section 4 action. The 1993 amendment did not change the export notification requirements for chemicals that are the subject of an action under TSCA section 5, 6, or 7; that is, exporters are currently required to provide annual notification of the export of each chemical that is the subject of an action under TSCA section 5, 6, or 7. The 1993 amendment also did not change the frequency of EPA's notice to foreign governments for chemicals subject to TSCA section 5, 6, or 7; EPA notice is provided upon receipt of the first annual export notification for each such chemical to each country.

In support of the 1993 amendment, EPA indicated that an increase in the number of TSCA section 12(b) export notifications during the 1980s made import monitoring more difficult for many foreign countries, and imposed an increasing burden upon foreign governments, industry, and EPA resources. EPA had determined that much of the increase in notifications was associated with the export or intended export of chemicals subject to final TSCA section 4 actions. At the time, EPA believed that the increasing volume of notices made it difficult for foreign countries which receive a large number of notices to generally distinguish between those chemicals for which, for example, EPA had taken an action to restrict use and those chemicals for which EPA has required the generation of data but has not taken an action to restrict use. By decreasing the volume of notices importing countries receive on chemicals subject to final TSCA section 4 actions, EPA believed that the 1993 amendment could increase the relative effectiveness of notices by allowing foreign governments to better focus their efforts on notices for chemicals that are the subject of actions under TSCA section 5, 6, or 7.

To further reduce the information collection burden for TSCA section 12(b) export notification, EPA developed and periodically updates a website that provides a list of chemicals subject to TSCA section 12(b) export notification requirements (see "Current List of Chemical Substances Subject to TSCA Section 12(b) Export Notification Requirements" at *http://www.epa.gov/opptintr/chemtest/main12b.htm*). In addition, exporters' obligation to submit a one-time export notification to EPA for the export of a chemical subject to a final TSCA section 4 action terminates once the reimbursement period for that particular action expires. OPPT has made available a comprehensive listing of these "sunset" dates for all such chemicals (see "Sunset Date/Status of TSCA Section 4 Testing, Reimbursement, and Reporting Requirements and TSCA Section 4-Triggered TSCA Section 12(b) Export Notification Requirements" at *http://www.epa.gov/opptintr/chemtest/sunset.htm*). The regulated community has indicated that these lists serve as useful tools to assist exporters in complying with TSCA and EPA believes that they have resulted in an overall reduction of the information collection burden associated with TSCA section 12(b) export notification requirements.

D. Rotterdam Convention

EPA notes as further background the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) (Ref. 5), a multi-lateral environmental agreement that the United States signed in September of 1998 but has not yet ratified (and thus is not a Party to). This Rotterdam Convention, which went into force in February of 2004, includes the following major obligations:

1. *Notification of control action and imposition of export notification requirement on exporters.* The Rotterdam Convention requires exporting parties to: Determine whether a pesticide or industrial chemical is "banned" or "severely restricted" (BSR); notify the Secretariat of that determination; and notify importing parties of the export of those chemicals from their country prior to their export after making the BSR determination and thereafter for the first export of every calendar year.

2. *Impose export restrictions consistent with importing parties response.* Once a BSR chemical (and its use category, i.e., use as a pesticide or industrial chemical) is, by consensus of the Parties, added to Annex III of the Rotterdam Convention, the Rotterdam Convention requires importing parties to identify any conditions/restrictions on the import of these substances and exporting parties to make sure exports occur consistent with conditions/restrictions identified by importing countries. Annex III of the Rotterdam Convention contains a list of chemicals that are subject to the Prior Informed Consent Procedures described by the Rotterdam Convention (Ref. 5).

3. *Label exported products.* For countries' domestic BSR chemicals and the Rotterdam Convention's Annex III chemicals, the Rotterdam Convention requires labeling to "ensure adequate availability of information with regard to risks and/or hazards to human health or the environment." For the Rotterdam Convention's Annex III chemicals, labels must also include a Harmonized

System Code if available (Ref. 6). For an exporting country's BSR chemicals and the Rotterdam Convention's Annex III chemicals that are to be used in an occupational setting, each exporting Party must send the most up-to-date safety data sheet for the chemical to each importer.

EPA believes the export notification mechanism in the Rotterdam Convention broadly reflects importing governments' interests and that this proposal to amend the TSCA section 12(b) export notification rule is not inconsistent with the export notification provisions of the Rotterdam Convention.

EPA wishes to note that the Administration is committed to the United States becoming a Party to the Rotterdam Convention, as well as two other chemicals-related multi-lateral environmental agreements: the Stockholm Convention on Persistent Organic Pollutants (POPs) (Stockholm Convention) (Ref. 7) and the POPs Protocol to the United Nations Economic Commission for Europe Convention on Long Range Transboundary Air Pollution (LRTAP) (Ref. 8). The Administration has been and intends to continue working with Congress to facilitate the development of legislation that would provide the authority needed for the United States to fully implement and become a Party to those agreements. If and when such legislation is enacted, and depending on the nature of the legislation, it may be appropriate or necessary to further amend the TSCA section 12(b) regulations.

III. Rationale for This Proposed Rule

EPA believes this proposed rule is a reasonable supplement to the 1993 amendments to EPA's export notification regulations because it would further reduce overall burden on exporters and the Agency and would further focus importing governments' resources and attention on chemicals for which EPA has proposed to make or has made a definitive finding that a chemical "presents or will present" an unreasonable risk to human health or the environment.

In the 1993 amendments, it was EPA's view that TSCA section 5(a)(2) and 5(e) actions, which are based on exposure or risk concerns for identified use scenarios, "restrict" in a limited sense, regulated uses. The 1993 amendments further stated that the Agency has authority to take follow-up action under TSCA section 5(a)(2) via TSCA section 5(e) and because there is no similar provision under TSCA section 4 (with the exception of a separate proceeding under TSCA section 6 or 7), there was a reasonable basis for treating the export notification requirement for chemicals regulated under TSCA sections 4 and 5 differently (Ref. 4, p. 40240). This proposed rule, however, would treat actions under TSCA sections 5(a)(2) and 5(e) similarly to final actions under TSCA section 4 for purposes of export notification, such that a one-time notice would be required. Although TSCA sections 5(a)(2) and 5(e) restrict use in some sense, the statutory finding for such actions is based on consideration of "factors" relating to a "significant new use" determination under TSCA section 5(a)(2) or, for TSCA section 5(e), the same "may present an reasonable risk" or "substantial production/significant/substantial exposure" findings required under TSCA section 4 rulemakings. EPA believes foreign governments will want to focus greater attention on chemicals for which the Agency has made a finding that a chemical "presents or will present" an unreasonable risk to human health or the environment (TSCA sections 5(f)(1), 6(a), and 7). This finding represents a definitive determination and thus is different from a finding that a chemical "may present" an unreasonable risk (TSCA sections 4(a)(1)(A)(i) and 5(e)(1)(A)(ii)(I)), substantial production and substantial or significant exposure/release findings ("exposure-based" findings; TSCA sections 4(a)(1)(B)(i), 5(b)(4)(A)(i), and 5(e)(1)(A)(ii)(II)), or factors determining a significant new use (TSCA section 5(a)(2)). Because "presents or will present" an unreasonable risk to human health or the environment is a definitive risk determination, EPA believes that it is reasonable to require more frequent notification for those chemicals that are the subject of each export notification-triggering action under TSCA sections 5(f), 6, and 7. Therefore, EPA would continue to require annual export notification by exporters of chemicals that are the subject of each action under TSCA section 5(f), 6, or 7, and EPA is similarly amending the regulatory provision regarding EPA's notice to foreign governments to limit annual notices to chemicals that are the subject of each TSCA section 5(f), 6, or 7 action.

EPA is also proposing de minimis concentration levels below which notification would not be required for the export of any chemical that is the subject of an action under TSCA section 4, 5, 6, or 7. In 1993, EPA considered but did not adopt a de minimis concentration exemption from its TSCA section 12(b) regulations, although the Agency expected to re-examine that option if further experience indicated that such an exemption would be warranted. Accordingly, this proposed rule provides background on the use of de minimis concentration levels under an international chemical classification and labeling scheme as a basis for incorporation of a de minimis concentration level under TSCA section 12(b).

The 1992 United Nations Conference on Environment and Development (Ref. 9), provided the international mandate for development of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) (Ref. 10). The GHS was adopted by the United Nations Economic and Social Council in July 2003 and is an internationally agreed upon tool for chemical hazard communication that incorporates a harmonized approach to hazard classification and provisions for standardized labels and safety data sheets. The GHS labeling is intended to provide a foundation for national programs to promote safer use, transport and disposal of chemicals, and to facilitate international trade in chemicals whose hazards have been properly assessed and identified based on internationally agreed upon criteria. As with TSCA section 12(b), one of the primary purposes of the GHS labeling scheme is to communicate information on chemicals to foreign governments. Accordingly, EPA believes it is appropriate to look to GHS for guidance on establishing a de minimis concentration exemption under TSCA section 12(b).

Classification of chemical mixtures under the GHS for several health and environmental hazard classes is triggered when generic cut-off values or concentration limits are exceeded, for example, ≥1.0% for target organ systemic toxicity, ≥0.1% for known or presumed human carcinogens, etc. (See Ref. 10, chapter 1.5. The cut-off levels for each hazard class are provided in chapters 3.1–3.10 and chapter 4.1 of Ref. 10.) When a chemical is present below these cut-off levels, the GHS does not require that the chemical appear on labeling or other information sources. The GHS represents international consensus on appropriate de minimis concentrations below which governments do not find information useful for hazard communication on chemicals in international (or domestic) commerce. The focus of GHS is relevant to that of TSCA section 12(b), which is primarily intended to alert and inform foreign governments, in a general manner, of hazards that may be associated with a chemical substance or mixture. As a result, EPA believes it is logical to refer to GHS as a guide to

implementation of TSCA section 12(b). EPA believes the inclusion of de minimis concentration thresholds in GHS is indicative of foreign governments' likely preference not to be notified by the United States about its export of chemicals present in low concentrations.

In order to implement an exemption from export notification requirements for chemicals exported in de minimis concentrations EPA is proposing de minimis concentration levels below which notification would not be required for the export of any chemical for which export notification under TSCA section 12(b) is otherwise required. Specifically, EPA is proposing that export notification would not be required for such chemicals if the chemical is being exported at a concentration of less than 1% (by weight or volume), with two exceptions. The first exception would be made for chemicals treated for export notification purposes as carcinogens or potential carcinogens. These chemicals would be identified in the regulation based on the three sources referred to in OSHA's regulations related to hazard communication (29 CFR 1910.1200(d)(4)), i.e.,:

1. Listed as a "known to be human carcinogen" or "reasonably anticipated to be human carcinogen" in the Report on Carcinogens issued by the U.S. Department of Health and Human Services National Toxicology Program (NTP) (Ref. 1),

2. Classified as a Group 1, Group 2A, or Group 2B carcinogen by the World Health Organization International Agency for Research on Cancer (IARC) in the list of IARC Monographs on the Evaluation of Carcinogenic Risks to Humans and their Supplements (Ref. 2), or

3. Characterized as a carcinogen or potential carcinogen in OSHA's regulations related to toxic and hazardous substances (29 CFR part 1910, subpart Z).

For paragraphs 1–3 of this unit, a de minimis concentration level of less than 0.1% (by weight or volume) would apply.

The NTP Report on Carcinogens is mandated by section 301(b)(4) of the Public Health Service Act, as amended (42 U.S.C. 201 *et seq.*), which stipulates that the Secretary of the Department of Health and Human Services shall publish an annual report which contains a list of all substances:

- Which either are known to be carcinogens in humans or may reasonably be anticipated to be human carcinogens.
- To which a significant number of persons residing in the United States are exposed.

In 1993, Public Law 95–622 was amended to change the frequency of publication of the NTP Report on Carcinogens from an annual to a biennial report.

The IARC Monographs on the Evaluation of Carcinogenic Risks to Humans are independent assessments prepared by international working groups of experts of the evidence on the carcinogenicity of a wide range of agents, mixtures, and exposures. The evaluations of IARC Working Groups are scientific, qualitative judgments on the evidence for or against carcinogenicity provided by the available data. The Monographs are used by national and international authorities to make risk assessments, formulate decisions concerning preventive measures, provide effective cancer control programs, and decide among alternative options for public health decisions.

Copies of the NTP and IARC lists referenced in this proposed rule have been placed in the public version of the official record for this rulemaking. In the final rule, EPA intends to seek approval from the Director of the Office of the Federal Register for the incorporation by reference of the NTP and IARC lists used in the final rule in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

The third source of carcinogens or potential carcinogens which is referred to in OSHA's regulations related to hazard communication (29 CFR 1910.1200(d)(4)) is the group of carcinogens or potential carcinogens in OSHA's toxic and hazardous substances regulations (29 CFR part 1910, subpart Z). In lieu of referencing OSHA's regulations directly in the regulatory text of this proposed rule, this proposed rule republishes the two chemicals characterized by OSHA as carcinogens or potential carcinogens that are not already included on either the NTP or IARC lists referenced in this proposed rule. The rest of the chemicals characterized by OSHA as carcinogens or potential carcinogens are included on either or both the NTP and/or IARC lists.

EPA would update the lists of chemicals identified in its export notification regulation as carcinogens or potential carcinogens, as appropriate, in order to reflect changes made to the sources referred to in OSHA's hazard communication regulations at 29 CFR 1910.1200(d)(4).

Concentration threshold levels like those used in the GHS context are also generally accepted or recognized in other United States Federal regulatory contexts. OSHA has established 1.0% and 0.1% concentration thresholds as a basis for requiring the development of Material Safety Data Sheets (MSDSs) and workplace labeling under the OSHA's Hazard Communication (HAZCOM) Standard (29 CFR 1910.1200 and Ref. 11). The Emergency Planning and Community Right-to-Know Act, section 313 (Toxic Release Inventory (TRI)) regulations use the OSHA HAZCOM Standard for purposes of establishing a chemical's de minimis concentration as either 1.0% or 0.1% for chemical substances when present in a mixture (40 CFR 372.38(a)). EPA's TSCA New Chemicals Program also uses concentration limits of 1.0% and 0.1% in TSCA section 5(e) consent orders as thresholds for hazard communication and personal protective equipment requirements (Ref. 12).

EPA believes that in the context of TSCA section 12(b) export notification, foreign governments would have little interest in notices regarding exports of chemicals present in de minimis concentrations, and that notices for such exports may divert attention from notices for exports of chemicals in higher concentrations that potentially may warrant more serious consideration. Thus, EPA believes that de minimis concentration thresholds are justified in the context of its TSCA section 12(b) regulations and is proposing that the export of chemicals present at a concentration below the specified de minimis concentration levels be exempt from notification requirements.

As EPA has noted in the past, some chemicals retain their toxic properties at levels less than the general thresholds proposed, so the de minimis concentration thresholds proposed in this TSCA section 12(b) context are not an indication that EPA has determined that chemicals are generally not toxic at lesser concentrations. The de minimis concentration exemption in this proposal is only a reflection of the circumstances under which EPA believes foreign governments want to receive information regarding chemicals imported into their countries.

In this proposed rule, the second exception to the proposed generally applicable de minimis concentration levels would be made for PCBs, which, when exported in a concentration of greater than 50 ppm, would require the submission of an export notification. EPA believes it is appropriate to include a different de minimis concentration level for PCBs in its TSCA section 12(b) regulations (i.e., levels less than or equal to 50 ppm versus the proposed general

1%/0.1% for carcinogens levels) after considering the coverage of PCBs under certain international treaties and/or guidance materials developed thereunder, including the Stockholm Convention and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) (Ref. 13). Note that the manufacture and distribution in commerce of PCBs for use within the United States or for export from the United States are generally prohibited, with certain exceptions (see, for example, 40 CFR 761.20(b) and (c)).

The Stockholm Convention, which entered into force on May 17, 2004, and for which there were 113 Parties and 151 Signatories as of November 2005 (the United States is a Signatory but not yet a Party), includes, among other things, provisions that require Parties to reduce and/or eliminate the production and use of listed intentionally produced chemicals or pesticides. Annex A of the Stockholm Convention lists chemicals subject to elimination, including PCBs which are listed with a specific exemption for "articles in use in accordance with the provisions of Part II of this Annex." Part II of Annex A of the Stockholm Convention states, in part:

"Each Party shall:

(a) With regard to the elimination of the use of polychlorinated biphenyls in equipment (e.g., transformers, capacitors or other receptacles containing liquid stocks) by 2025, subject to review by the Conference of the Parties, take action in accordance with the following priorities . . .

(iii) Endeavour to identify and remove from use equipment containing greater than 0.005 percent [50 ppm] polychlorinated biphenyls and volumes greater than 0.05 litres . . .

(d) Except for maintenance and servicing operations, not allow recovery for the purpose of reuse in other equipment of liquids with polychlorinated biphenyls content above 0.005 per cent;

(e) Make determined efforts designed to lead to environmentally sound waste management of liquids containing polychlorinated biphenyls and equipment contaminated with polychlorinated biphenyls having a polychlorinated biphenyls content above 0.005 per cent, in accordance with paragraph 1 of Article 6, as soon as possible but no later than 2028, subject to review by the Conference of the Parties;

(f) In lieu of note (ii) in Part I of this Annex, endeavour to identify other articles containing more than 0.005 per cent polychlorinated biphenyls (e.g., cable-sheaths, cured caulk and painted objects) and manage them in accordance with paragraph 1 of Article 6;"

Annex A of the Stockholm Convention thus focuses attention on PCBs in equipment or articles where the PCBs are at a concentration of more than 50 ppm.

In addition, the Basel Convention, which entered into force on May 5, 1992, and for which there were 166 governments that were Parties as of November 2005 (the United States is a Signatory but not yet a Party), stipulates that any trans-boundary movement of wastes (export, import, or transit) is permitted only when the movement itself and the disposal of the concerned hazardous or other wastes are environmentally sound. The Stockholm Convention directs close cooperation with the Basel Convention to define a "low POPs content" for purposes of safe disposal of wastes contaminated with POPs. Under the Basel Convention, "General Technical Guidelines for the Environmentally Sound Management of Wastes Consisting of, Containing or Contaminated with Persistent Organic Pollutants" (Basel POPs Guidelines) have been developed that provisionally identify the level of 50 milligrams/kilograms (mg/kg) (50 ppm) as "low POPs content" for PCBs (Ref. 14).

Because the 50 ppm level is used in the Stockholm Convention as a cut-off level for purposes of obligations associated with PCB-containing equipment and has been further supported by the Basel POPs Guidelines as a low level not warranting the attention and control required for higher PCB levels, EPA believes it reasonable to propose using it as the basis of a de minimis concentration level for PCBs under TSCA section 12(b). Thus, at this time, EPA believes importing governments would not desire export notices from the United States for PCBs at levels of 50 ppm or less. EPA specifically seeks comment on whether 50 ppm is a reasonable level for the purposes of TSCA section 12(b), and if not, what other, if any, level may be appropriate and why (see Unit VI.).

EPA believes that the most practical means of maintaining the quality of notification, of improving the scrutiny importing countries give to notices, and of reducing burden on both exporters and EPA, is to amend the TSCA section 12(b) regulations under 40 CFR part 707 to reduce the frequency of certain export notifications submitted by exporters to EPA as well as EPA notices sent to foreign governments. EPA's responsibility is both to alert and to make information and data available to the importing government. EPA believes that although the frequency of EPA's notices to foreign governments may be reduced by this rule, if finalized as proposed, the quality of the information provided to them would not be substantially affected.

IV. Additional Proposed Amendments and Clarifications

In addition to the proposed amendments to the TSCA section 12(b) regulations regarding the scope of exporters' and EPA's responsibilities, the Agency is proposing minor amendments to update the EPA addresses to which export notifications must be sent (40 CFR 707.65(c)), to indicate that a single export notification may refer to more than one section of TSCA where the exported chemical is the subject of multiple TSCA actions(40 CFR 707.67), and to correct an error in 40 CFR 799.19, which currently omits mentioning multi-chemical test rules as being among those final TSCA section 4 actions that trigger export notification.

EPA is also clarifying exporters' and EPA's obligations where a TSCA section 12(b)-triggering action is taken with respect to a chemical previously or currently subject to export notification due to the existence of a previous triggering action. EPA's intention is that exporters notify EPA with respect to each TSCA section 12(b)-triggering action to which the chemical becomes subject (as long as the exporter in fact still exports or intends to export the chemical to that country) even if they have previously notified EPA about the export of that chemical to that country as a result of an earlier TSCA section 12(b)-triggering action. Note that an export notification may indicate more than one triggering action, i.e., separate export notifications need not be submitted where the need for export notification as a result of more than one triggering action at the same time exists with respect to a given chemical. Similarly, EPA would notify a foreign government with respect to each TSCA section 12(b)-triggering action to which the chemical becomes subject (as long as the Agency continues to receive an export notification from any exporter for the export of the chemical to that country) even if it has previously notified that government about the export of the chemical as a result of an earlier TSCA section 12(b)-triggering action. In this proposed rule, EPA is amending 40 CFR 707.65 and 707.70 in order to make these obligations clear.

V. Economic Impact

EPA has evaluated the potential costs of these proposed amendments. The Agency anticipates that these proposed amendments would reduce the number of export notifications sent to EPA by exporters of chemicals that are the subject of actions under TSCA section 5(e), 5(a)(2), or 5(b), and that they would also eliminate the submission of export notifications from exporters of chemicals otherwise subject to TSCA section 12(b) where they are present at a concentration below the relevant de minimis concentration threshold. The amendments would also potentially reduce the number of export notices sent by EPA to foreign governments. These reductions would save both exporter and EPA resources.

For the period 1996–2004, EPA received an average of approximately 8,600 export notifications from exporters annually. On average, each year nearly 60% of those export notifications were for chemicals subject to final TSCA section 4 actions, 25% for chemicals that were the subject of actions under TSCA section 5, and the remainder were primarily for chemicals that were the subject of actions under TSCA section 6 and a very few for chemicals subject to actions under TSCA section 7. At this time, EPA is unable to predict with certainty the reduction in export notifications received by EPA from exporters due to the de minimis concentration exemption of this proposed rule, but based on personal communication with the American Chemistry Council (ACC) (Ref. 15), EPA is estimating a 5% across-the-board reduction in TSCA section 12(b) notification burden to exporters due to the de minimis concentration exemption. Based on historical reporting, EPA is able to estimate, after the first year, a 50% reduction in export notifications triggered by TSCA section 5(e). 5(a)(2), or 5(b) actions as a result of the one-time-only provision, if these amendments are finalized as proposed. Thus, EPA expects to receive roughly 8,170 export notifications in the first year, and 7,125 in all subsequent years. These reductions are expected to save the regulated community over $12,000 in the first year of the proposed rule (3%), and over $41,000 in subsequent years (12%). Over 20 years, if finalized as proposed, these proposed amendments would save the regulated community approximately $440,000 at a 7% discount rate, and over $600,000 at a 3% discount rate. See the Economic Analysis of the Proposed Change to TSCA Section 12(b) Export Notification Requirements (Ref. 16) for details on all cost and burden calculations.

The costs to EPA would also likely be reduced based on these proposed amendments, as EPA incurs costs for processing export notifications received, and for sending export notices to foreign governments. While EPA has been sending roughly 1,600 notices to foreign governments annually, that number is expected to drop as a result of these proposed amendments, if finalized as proposed, to an estimated 1,520 notice during the first year in which the rule is effective, and an estimated 980 notices sent in all subsequent years. These reductions are expected to save the Federal Government over $7,500 during the first year in which the rule is effective (4% of current costs), and over $43,000 in subsequent years (24% of current costs). Over 20 years, these proposed amendments, if finalized as proposed, would save the Federal Government approximately $450,000 at a 7% discount rate, and roughly $630,000 at a 3% discount rate.

VI. Request for Comment

The following is a list of issues on which the Agency is specifically requesting public comment. EPA encourages all interested persons to submit comments on these issues, and to identify any other relevant issues as well. This input will assist the Agency in developing a rule that successfully addresses information needs while minimizing potential reporting burdens associated with the rule. EPA requests that commenters making specific recommendations include supporting documentation where appropriate.

1. Based on certain international efforts, specifically GHS and the Stockholm Convention (and the Basel POPs Guidelines), EPA believes foreign governments would have little interest in TSCA section 12(b) notices regarding exports of chemicals present in low concentrations (i.e., 1%, 0.1%, or, for PCBs, 50 ppm or less). EPA specifically seeks comment on whether the proposed thresholds are set at a reasonable level for the purposes of TSCA section 12(b), and if not, what other, if any, level(s) may be appropriate and why.

2. This proposal makes the point that GHS represents international consensus on appropriate de minimis concentrations below which foreign governments do not find information useful for hazard communication on chemicals in international commerce. As with TSCA section 12(b), one of the primary purposes of the GHS labeling scheme is to communicate information on chemicals to foreign governments. Accordingly, EPA believes it is appropriate to look to GHS for guidance on establishing a de minimis concentration exemption under TSCA section 12(b). EPA is specifically seeking comment on the appropriateness of using GHS.

3. The proposal uses the Stockholm Convention as a basis for selecting a 50 ppm threshold for PCBs. Is this appropriate?

4. EPA estimates that the proposed de minimis concentration exemption would reduce the burden of TSCA section 12(b) reporting by 5%. However, since EPA does not currently require exporters to consider the concentration of chemicals they are exporting, the potential burden reduction is difficult to estimate. EPA is seeking information that might further inform the Agency's burden estimate.

VII. References

The official record for this proposed rule has been established under docket ID number EPA–HQ–OPPT–2005–0058, and the public version of the official record is available for inspection as specified under **ADDRESSES**. These references have been placed in the public docket.

1. Report on Carcinogens, Eleventh Edition; United States Department of Health and Human Services, Public Health Service, National Toxicology Program. Available online at *http://ntp.niehs.nih.gov/index.cfm?objectid=32BA9724-F1F6-975E-7FCE50709CB4C932.*

2. International Agency for Research on Cancer Monographs on the Evaluation of Carcinogenic Risks to Humans and their Supplements. Available online at *http://www-cie.iarc.fr/monoeval/allmonos.html.*

3. EPA. 1980. Chemical Imports and Exports; Notification of Export. Final Rule. **Federal Register** (45 FR 82844, December 16, 1980). Available on-line at *http://www.heinonline.org/HOL/Index?index=fedreg/fedreg&collection=fedreg.*

4. EPA. 1993. Export Notification Requirement; Change to Reporting Requirements. Final Rule. **Federal Register** (58 FR 40238, July 27, 1993). Available on-line at *http://www.heinonline.org/HOL/Index?index=fedreg/fedreg&collection=fedreg.*

5. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. September, 1998 (amended September 2004). Available on-line at *http://www.pic.int/en/viewpage.asp?id_cat=0.* Annex III: Chemicals Subject to the Prior Informed

Consent Procedure. Available on-line at *http://www.pic.int/en/ViewPage.asp?id=104#III%20Annex.*

6. Harmonized System Convention. World Customs Organization (WCO). Available on-line at *http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html.* June 14, 1983. The Harmonized Commodity Description and Coding System, generally referred to as "Harmonized System" or simply "HS," is a multi-purpose international product nomenclature developed by the WCO.

7. Stockholm Convention on Persistent Organic Pollutants (POPs). May 22, 2001. Available on-line at *http://www.pops.int.*

8. United Nations Economic Commission for Europe Convention on Long Range Transboundary Air Pollution (LRTAP) Protocol on Persistent Organic Pollutants (POPs), June 24, 1998. Available on-line at *http://www.unece.org/env/lrtap/pops_h1.htm.*

9. United Nations Conference on Environment and Development (Earth Summit) Agenda 21; Chapter 19: Environmentally Sound Management of Toxic Chemicals, Including Prevention of Illegal International Traffic in Toxic and Dangerous Products. Rio de Janeiro, June 1992. Available on-line at *http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter19.htm.*

10. GHS. Available on-line at *http://www.unece.org/trans/danger/publi/ghs/ghs_welcome_e.html.* United Nations, 2003. GHS Chapter 1.5: Hazard Communication: Safety Data Sheets Table 1.5.1: Cut-off values/concentration limits for each health and environmental hazard class. See *http://www.unece.org/trans/danger/publi/ghs/ghs_rev01/English/01e_part1.pdf.*GHS Chapter 1.3: Classification of Hazardous Substances and Mixtures Subparagraph 1.3.3.2: Use of cut-off values/concentration limits. See *http://www.unece.org/trans/danger/publi/ghs/ghs_rev00/English/GHS-PART-3e.pdf.*

11. OSHA. Hazard Communication, Final Rule. **Federal Register** (48 FR 53280–53348, November 25, 1983). For discussion of 1% and 0.1% concentration thresholds, see pages 53290–53293.

12. New Chemicals Program Boilerplate TSCA Section 5(e) Consent Orders. Available on-line at *http://www.epa.gov/opptintr/newchems/boilerpl.htm.*

13. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal Adopted by the Conference of the Plenipotentiaries March 22 1989. Entry into force May 1992.

14. Basel Convention General Technical Guidelines for Environmentally Sound Management of wastes consisting of, containing or contaminated with Persistent Organic Pollutants (POPs). April 2005. See *http://www.basel.int/techmatters/techguid/frsetmain.php.*

15. Personal Communication. James Miller, EPA Economist, and members of the American Chemistry Council's TSCA Action Group. November 15, 2005.

16. Economic and Policy Analysis Branch, Office of Pollution Prevention and Toxics, EPA. November 2005. Economic Analysis of the Proposed Change to TSCA Section 12(b) Export Notification Requirements.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), the Office of Management and Budget (OMB) has determined that this proposed rule is not a "significant regulatory action" under section 3(f) of the Executive Order.

In addition, EPA has prepared an economic assessment of the potential costs and benefits associated with this proposed action, which is contained in a document entitled *Economic Analysis of the Proposed Change to TSCA Section 12(b) Export Notification Requirements* (Ref. 16). This document is available in the docket, and is briefly summarized in Unit V.

B. Paperwork Reduction Act

This action does not impose any new information collection burden that would require additional approval by OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* This rule is expected to reduce the existing burden that is approved under OMB Control No. 2070–0030 (EPA ICR No. 0795), which covers the information collection activities contained in the existing regulations at 40 CFR part 707, related to export notification under TSCA section 12(b).

The annual respondent burden for the collection of information currently approved by OMB is estimated to be about 1 hour per response. A copy of the OMB approved Information Collection Request (ICR) has been placed in the docket for this rulemaking, and the Agency's estimated burden reduction is presented in the *Economic Analysis* (Ref. 16) that has been prepared for this rule.

Under the PRA, "burden" means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information that is subject to approval under the PRA, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Submit any comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, along with your comments on the proposed rule. The Agency will consider any comments related to the information collection requirements contained in this proposal as it develops a final rule. Any changes to the burden estimate for the ICR will be effectuated with the final rule.

C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, due to the burden-reducing nature of this rule, the Agency hereby certifies that this proposed rule will not have a significant adverse economic impact on a substantial number of small entities. The factual basis for the Agency's determination is presented in the small entity impact analysis prepared as part of the *Economic Analysis* for this proposed rule (Ref. 16), which is summarized in Unit V., and a copy of which is available in the docket for this rulemaking. The

following is a brief summary of the factual basis for this certification.

For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as:

1. A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201 based on the applicable NAICS code for the business sector impacted.

2. A small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000.

3. A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Available information indicates that small governmental jurisdictions and small not-for-profit organizations would not generally engage in the activities regulated. As such, the Agency assessed the impacts on small exporters of chemical substances or mixtures within NAICS codes 325 (chemical manufactures and processors) and 324110 (petroleum refineries).

As discussed in Unit V., this proposed rule, if finalized as proposed, will amend an existing requirement and result in a reduction of burden and costs for exporters, regardless of the size of the firm. As such, these amendments will not have a significant adverse economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, EPA has determined that this proposed rule, which would result in a burden reduction upon being finalized, does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. It is estimated that the total cost reduction of the rule, which is summarized in Unit V. and presented in the *Economic Analysis* (Ref. 16), over 20 years, would be $440,000 to $600,000 to the regulated community and $450,000 to $630,000 to the Federal Government. In addition, based on EPA's experience with the TSCA 12(b) reporting, State, local, and tribal governments have not been affected by this reporting requirement, and EPA does not have any reason to believe that any State, local, or tribal government will be affected by these proposed amendments. As such, EPA has determined that this regulatory action does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any affect on small governments subject to the requirements of UMRA sections 202, 203, 204, or 205.

E. Executive Order 13132

Pursuant to Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), EPA has determined that this proposed rule does not have "federalism implications," because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Order. As indicated previously, EPA does not have any reason to believe that any State or local government will be affected by these proposed amendments. Thus, Executive Order 13132 does not apply to this proposed rule.

F. Executive Order 13175

As required by Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000), EPA has determined that this proposed rule does not have tribal implications because it will not have any affect on tribal governments, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in the Order. As indicated previously, EPA does not have any reason to believe that any tribal governments will be affected by these proposed amendments. Thus, Executive Order 13175 does not apply to this proposed rule.

G. Executive Order 13045

This proposed rule does not require special consideration pursuant to the terms of Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this proposed rule is not designated as an "economically significant" regulatory action as defined by Executive Order 12866, nor does it establish an environmental standard, or otherwise have a disproportionate effect on children.

H. Executive Order 13211

This proposed rule is not subject to Executive Order 13211, entitled *Actions concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) because it is not designated as an "economically significant" regulatory action as defined by Executive Order 12866, nor is it likely to have any significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rule does not impose any technical standards that would require EPA to consider any voluntary consensus standards.

J. Executive Order 12898

This proposed rule does not have an adverse impact on the environmental and health conditions in low-income and minority communities. Therefore, under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994), the Agency does not need to consider environmental justice-related issues.

List of Subjects in 40 CFR Parts 707 and 799

Environmental protection, Chemicals, Exports, Hazardous substances, Imports, Reporting and recordkeeping requirements.

Dated: January 31, 2006.

Susan B. Hazen,

Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

PART 707—[AMENDED]

1. The authority citation for part 707 continues to read as follows:

Authority: 15 U.S.C 2611(b) and 2612.

2. By redesignating paragraphs (c) through (e) of § 707.60 as paragraphs (d) through (f) of § 707.60.

3. By adding a new paragraph (c) to § 707.60 and revising newly

redesignated paragraph (d) of § 707.60 to read as follows:

§ 707.60 Applicablity and compliance.

* * * * *

(c) No notice of export is required for the export of a chemical substance or mixture for which export notification is otherwise required, where such chemical substance or mixture is present in a concentration of less than 1% (by weight or volume), except that:

(1) No notice of export is required for the export of the following chemical substances or mixtures where such chemical substance or mixture is present in a concentration of less than 0.1% (by weight or volume) (The listed chemicals and mixtures are treated by EPA in paragraph (c)(1) of this section as carcinogens or potential carcinogens for the limited purpose of application of the 0.1% concentration export notification threshold.):

(i) A chemical substance or mixture listed as a "known to be human carcinogen" or "reasonably anticipated to be human carcinogen" in the Report on Carcinogens, Eleventh Edition issued by the U.S. Department of Health and Human Services National Toxicology Program,

(ii) A chemical substance or mixture classified as a Group 1, Group 2A, or Group 2B carcinogen by the World Health Organization International Agency for Research on Cancer (IARC) in the list of IARC Monographs on the Evaluation of Carcinogenic Risks to Humans and their Supplements, or

(iii) Alpha-naphthylamine (Chemical Abstract Service Registry Number (CAS No.) 134–32–7) or 4-nitrobiphenyl (CAS No. 92–93–3).

(2) No notice of export is required for the export of polychlorinated biphenyl chemicals (PCBs) (see definition in 40 CFR 761.3), where such chemical substances are present in a concentration of less than or equal to 50 ppm (by weight or volume).

(d) Any person who exports or intends to export PCBs or PCB articles (see definition in 40 CFR 761.3), for any purpose other than disposal, shall notify EPA of such intent or exportation under TSCA section 12(b), except as specified in § 707.60(c)(2).

* * * * *

4. By revising pragraph (a) introductory text, (a)(2), and (c) of § 707.65 to read as follows:

§ 707.65 Submission to agency.

(a) For each action under TSCA triggering export notification, exporters must notify EPA of their export or intended export of each subject chemical substance or mixture for which export notice is required under § 707.60 in accordance with the following:

* * * * *

(2) (i) The notice must be for the first export or intended export by an exporter to a particular country in a calendar year when the chemical substance or mixture is the subject of an order issued, an action that is pending, or relief that has been granted under TSCA section 5(f), a rule that has been proposed or promulgated under TSCA section 6, or an action that is pending or relief that has been granted under TSCA section 7.

(ii) The notice must be for only the first export or intended export by an exporter to a particular country when the chemical substance or mixture is the subject of an order issued, an action that is pending, or relief that has been granted under TSCA section 5(e), a rule that has been proposed or promulgated under TSCA section 5(a)(2), or when the submission of data is required under TSCA section 4 or 5(b).

* * * * *

(c) *Notices shall be marked "TSCA Section 12(b) Notice" and sent to EPA by mail or delivered by hand or courier.* Send notices by mail to: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001 (Attention: TSCA Section 12(b) Notice). Hand delivery of TSCA section 12(b) notices should be made to: OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, Environmental Protection Agency, 1201 Constitution Ave., NW., Washington, DC (Attention: TSCA Section 12(b) Notice). The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation.

5. By adding an "and/" in front of the "or" in the first sentence of paragraph (a) and paragraph (e) of § 707.67.

6. By revising paragraph (a) of § 707.70 to read as follows:

§ 707.70 EPA notice to foreign governments.

(a)(1) Notice by EPA to the importing country shall be sent no later than 5 working days after receipt by the TSCA Document Processing Center of the first annual notification from any exporter for each chemical substance or mixture that is the subject of an order issued, an action that is pending, or relief that has been granted under TSCA section 5(f), a rule that has been proposed or promulgated under TSCA section 6, or an action that is pending or relief that has been granted under TSCA section 7.

(2) Notice by EPA to the importing country shall be sent no later than 5 working days after receipt by the TSCA Document Processing Center of the first notification from any exporter for each chemical substance or mixture that is the subject of an order issued, an action that is pending, or relief that has been granted under TSCA section 5(e), a rule that has been proposed or promulgated under TSCA section 5(a)(2), or for which the submission of data is required under TSCA section 4 or 5(b).

* * * * *

PART 799—[AMENDED]

7. The authority citation for part 799 continues to read as follows:

Authority: 15 U.S.C 2603, 2611, 2625.

8. By revising § 799.19 to read as follows:

§ 799.19 Chemical imports and exports.

Persons who export or who intend to export chemical substances or mixtures listed in subpart B, subpart C, or subpart D of this part are subject to the requirements of part 707 of this title.

[FR Doc. E6–1797 Filed 2–8–06; 8:45am]

BILLING CODE 6560–50–S

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2005–22895]

RIN 2127–AI53

Federal Motor Vehicle Safety Standards No. 111 Rearview Mirrors

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of petition for rulemaking.

SUMMARY: This document denies the petition for rulemaking submitted by Mr. Bernard Cox, requesting that NHTSA amend the Federal Motor Vehicle Safety Standard for rearview mirrors to require manufacturers to install a mirror of unit magnification (a flat mirror) on the passenger's side of multipurpose passenger vehicles (MPVs) and trucks with a gross vehicle weight rating (GVWR) of 4,536 kg (10,000 pounds) or less when such vehicles are equipped with a tow hitch package. Accordingly, manufacturers of

MPVs, trucks, and buses (other than school buses) with a GVWR of 4,536 kg (10,000 pounds) or less continue to have the option of installing either a flat mirror or a convex mirror on the passenger's side of the vehicle provided that either mirror meets the applicable requirements of the standard.

FOR FURTHER INFORMATION CONTACT: *For non-legal issues:* Mr. John Lee, Office of Crash Avoidance Standards, NVS–123, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone number: (202) 366–2720. Fax: (202) 366–7002.

For legal issues: Mr. Eric Stas, Office of the Chief Counsel, NCC–112, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone number: (202) 366–2992. Fax: (202) 366–3820.

SUPPLEMENTARY INFORMATION:

Background

On June 5, 2004, Mr. Bernard Cox submitted a petition for rulemaking [1] requesting that NHTSA amend Federal Motor Vehicle Safety Standard (FMVSS) No. 111, *Rearview Mirrors*, to require original equipment manufacturers (OEMs) to install a mirror of unit magnification (called a "flat" mirror) on the passenger's side of MPVs and trucks with a GVWR of 4,536 kg (10,000 pounds) or less when such vehicles are equipped with a tow hitch package, thereby eliminating the current option for vehicle manufacturers to install either a flat mirror or a convex mirror in that location. The petitioner expressed his belief that when the vehicle's interior flat rearview mirror is obstructed by an object in tow, it is unsafe to make a lane change relying solely on an exterior passenger-side convex rearview mirror. Mr. Cox stated that he attempted to replace the outside passenger side convex mirror with a flat mirror and was told by his local automobile dealership that a flat mirror was unavailable for that application. The petitioner did not provide any data in support of his recommended amendments to Standard No. 111.

Agency Analysis

Under paragraph S6, *Requirements for multipurpose passenger vehicles, trucks, and buses, other than school buses, with GVWR of 4,536 kg or less*, FMVSS No. 111 currently requires such vehicles to be equipped with either with: (1) Mirrors that conform to the requirements of S5, or (2) outside mirrors of unit magnification, each with not less than 126 cm^2 of reflective surface, installed with stable supports on both sides of the vehicle, located so as to provide the driver a view to the rear along both sides of the vehicle, and adjustable in both the horizontal and vertical directions to view the rearward scene (*see* S6.1 of FMVSS No. 111). *S5.3, Outside rearview mirror passenger's side*, permits either a mirror of unit magnification or a convex mirror to be installed in that location. Thus, Standard No. 111 provides a choice to vehicle manufacturers in terms of the type of passenger-side mirror that they install on MPVs, trucks, and buses (other than school buses) within the above-referenced weight class, which is the subject of the present petition.

That portion of the vehicle fleet currently covered by S6 of the standard reflects a mix of convex mirrors and mirrors of unit magnification on the passenger's side of the vehicle. Each type of mirror has its advantages. Convex mirrors have the advantage of providing a wider field of view than a mirror of unit magnification of the same size. However, convex mirrors tend to provide an image that causes objects to appear further away and to be moving more slowly than they actually are. In contrast, mirrors of unit magnification generally provide a realistic rendering of approaching vehicles, although a narrower field of view and a larger "blind spot."

Consumer preferences also vary in terms of the type of rearview mirror installed on the passenger's side of vehicles. The agency has received complaints from some vehicle owners who find convex mirrors annoying when trying to back up and maneuver trailers. However, others have asked the agency to allow convex mirrors in situations in locations where only a mirror of unit magnification is permitted (*e.g.*, driver-side outside rearview mirrors).

The critical question posed by Mr. Cox's petition is whether there is evidence that use of a convex mirror at the passenger's side location on the vehicles in question has a negative impact on vehicle safety. To examine this issue, we reviewed the available research, including a relevant, agency-sponsored fleet study whose results were reported in a DOT research report titled, "Field Test Evaluation of Rearview Mirror Systems for Commercial Vehicles." [2] This study involved a two-year field examination of fleets of telephone company repair vans, some using passenger-side mirrors of unit magnification and others using passenger-side convex mirrors. In that study, the convex mirrors had a 40-inch radius of curvature, similar to the OEM supplied passenger-side mirrors that the petitioner is seeking to have changed. Although those vans were not pulling trailers, such cargo vans generally have poor direct rear visibility, so the situations are generally analogous. The study reported that vans equipped with passenger-side convex mirrors had a lower crash rate than vans equipped with passenger-side mirrors of unit magnification. Thus, the available safety data do not demonstrate adverse safety consequences associated with the use of passenger-side convex mirrors. As noted previously, the petitioner did not provide any data, to demonstrate a safety problem that would be remedied by his requested amendments to the standard.

Furthermore, consumers who experience difficulty adjusting to the field of view provided by a passenger-side convex mirror, including on vehicles towing a trailer, have a readily available alternative. There are currently many mirrors available in the aftermarket specifically designed to improve the visibility for drivers towing trailers, the majority of which are inexpensive and do not require significant vehicle modification.

In summary, the petitioner has not demonstrated and the agency's own research has not revealed the existence of a safety problem, as would justify amending FMVSS No. 111. People's attitudes regarding side-mounted rearview mirrors may vary based upon physiological differences or personal preference. For those consumers who desire a passenger-side mirror of unit magnification, aftermarket equipment is available to effectuate such a change. Accordingly, we do not see any reason to diminish the range of choice which FMVSS No. 111 currently provides to manufacturers to equip the vehicles in question with either a passenger-side convex mirror or mirror of unit magnification which meets the requirements of the safety standard.

Decision To Deny the Petition

In accordance with 49 CFR part 552, this completes the agency's review of the petition for rulemaking. In light of the considerations discussed above, the agency has concluded that agency resources should be spent addressing higher priority safety issues. Therefore, the petition for rulemaking is denied.

Authority: 49 U.S.C. 332, 30111, 30115, 30117; and 30166; delegation of authority at 49 CFR 1.50.

[1] Docket No. NHTSA–2004–16856–61.

[2] DOT HS 806 948 (Sept. 1985).

Issued on: February 3, 2006.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E6–1739 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Petition To List the Polar Bear as Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the polar bear (*Ursus maritimus*) as threatened under the Endangered Species Act of 1973, as amended (Act). We find that the petition presents substantial scientific or commercial information indicating that the petitioned action of listing the polar bear may be warranted. We, therefore, are initiating a status review of the polar bear to determine if listing under the Act is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding this species.

DATES: We must receive your comments on or before April 10, 2006.

ADDRESSES: If you wish to comment, you may submit your comments and/or information concerning this species and the status review by any one of the following methods:

1. You may submit written comments and information to the Supervisor, U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, Alaska 99503.

2. You may hand-deliver written comments to our office at the address given above.

3. You may send your comments by electronic mail (e-mail) directly to the Service at *AK_Polarbear@fws.gov*, or to the Federal eRulemaking Portal at *http://www.regulations.gov*. Your submission must include "Attn: Polar Bear" in the beginning of your message, and you must not use special characters or any form of encryption. Electronic attachments in standard formats (such as .pdf or .doc) are acceptable, but please name the software necessary to open any attachments in formats other than those given above. Also, please include your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, please submit your comments in writing using one of the alternate methods described above. In the event that our Internet connection is not functional, please submit your comments by one of the alternate methods mentioned above.

FOR FURTHER INFORMATION CONTACT: Scott Schliebe (see **ADDRESSES**), telephone, 907–786–3800; facsimile, 907–786–3816.

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend that any final action resulting from this status review will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, concerned governmental agencies, the scientific community, industry, or any other interested party. We are opening a 60-day public comment period to allow all interested parties an opportunity to provide information on the status of the polar bear throughout its range, including:

(1) Information on taxonomy, distribution, habitat selection (especially denning habitat), food habits, population density and trends, habitat trends, and effects of management on polar bears;

(2) Information on the effects of climate change and sea ice change on the distribution and abundance of polar bears and their principal prey over the short- and long-term;

(3) Information on the effects of other potential threat factors, including oil and gas development, contaminants, hunting, poaching, and changes of the distribution and abundance of polar bears and their principal prey over the short and long term;

(4) Information on management programs for polar bear conservation, including mitigation measures related to oil and gas exploration and development, hunting conservation programs, anti-poaching programs, and any other private, tribal, or governmental conservation programs which benefit polar bears, and

(5) Information relevant to whether any populations of the species may qualify as distinct population segments.

We will base our finding on a review of the best scientific and commercial information available, including all information received during the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

All comments and materials received will be available for public inspection, by appointment, during normal business hours at our Anchorage, Marine Mammals Management Office (see **ADDRESSES**).

Background

We received a petition from the Center for Biological Diversity dated February 16, 2005, to list the polar bear as threatened throughout its range with critical habitat in the United States. The petition, which was clearly identified as such, contained detailed information on the natural history and biology of the polar bear, and the current status and distribution of the species. It also contained information on what they reported as potential threats to the species from climate change, oil and gas development, contaminants, hunting, and poaching. The petition also discussed existing regulatory mechanisms and their perceived inadequacy. In a letter dated July 5, 2005, the petitioners informed us that two additional parties were joining as petitioners: The Natural Resources Defense Council and Greenpeace, Inc. In the same letter, the petitioners informed us of two new scientific articles, Henson *et al.* 2005, and Stroeve *et al.* 2005, that they wanted us to take into consideration when conducting our evaluation on the petition to list the polar bear. The petitioner further submitted new information in a letter received on December 27, 2005, to be considered, along with the information in the initial petition, in making our 90-day finding.

Subsequent to the filing of the initial petition with the Service, a petitioner may submit additional information relevant to the petitioned action. If the petitioner requests that the Service consider the information in making the 90-day finding on the petition, the Service will treat the new information,

together with the information in the initial petition, as a new petition filed on the date that the new information is received. In such case, the Service will consider the initial petition to be withdrawn by the petitioner. This has the effect of "resetting the clock" for the purpose of calculating the statutory deadlines under section 4(b)(3) of the Act. Applying this reasoning to the Center for Biological Diversity's petition regarding the polar bear, we consider the petition to have been received on December 27, 2005.

On the basis of information provided in the petition we have determined that the petition presents substantial scientific or commercial information that listing the polar bear as threatened may be warranted. Therefore, we are initiating a status review to determine if listing the species is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding this species. Under section 4(b)(3)(B) of the Act, we are required to make a finding as to whether listing the polar bear is warranted by December 27, 2006.

The petitioners also requested that critical habitat be designated for this species. We always consider the need for critical habitat designation when listing species. If we determine in our 12-month finding that listing the polar bear is warranted, we will address the designation of critical habitat in a subsequent proposed rule.

Author

The primary author of this document is Scott Schliebe, Polar Bear Project Leader, Marine Mammals Management Office, U.S. Fish and Wildlife Service, Anchorage, Alaska.

Authority: The authority for this action is the Endangered Species Act of 1973 as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 3, 2006.

H. Dale Hall,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 06–1226 Filed 2–8–06; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 71, No. 27
Thursday, February 9, 2006

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Public Information Collections Being Reviewed by the U.S. Agency for International Development; Comments Requested

SUMMARY: U.S. Agency for International Development (USAID) is making efforts to reduce the paperwork burden. USAID invites the general public and other Federal agencies to take this opportunity to comment on the following proposed and/or continuing information collections, as required by the Paperwork Reduction Act for 1995. Comments are requested concerning: (a) Whether the proposed or continuing collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Submit comments on or before April 10, 2006.

FOR FURTHER INFORMATION CONTACT: Beverly Johnson, Bureau for Management, Office of Administrative Services, Information and Records Division, U.S. Agency for International Development, Room 2.07–106, RRB, Washington, DC 20523, (202) 712–1365 or via e-mail *bjohnson@usaid.gov*.

SUPPLEMENTARY INFORMATION: *OMB No:* OMB 0412–0011.

Form No.: AID 1010–2.

Title: Application for Assistance—American Schools and Hospitals Abroad.

Type of Review: Revision of Information Collection.

Purpose: USAID finances grant assistance to U.S. founders or sponsors who apply for grant assistance from the Office of Private-Voluntary Cooperation, American Schools and Hospitals Abroad (PVCASHA) on behalf of their institutions overseas. PVCASHA is a competitive grants program. The Office of PVCASHA is charged with judging which applicants may be eligible for consideration and receive what amounts of funding for what purposes. To aid in such determination, the Office of PVCASHA has established guidelines as the basis for deciding upon the eligibility of the applicants and the resolution on annual grant awards. These guidelines are published in the **Federal Register**, Doc. 79–36221.

Annual Reporting Burden:

Respondents: 85.

Total annual responses: 85.

Total annual hours requested: 900 hours.

Dated: February 2, 2006.

Joanne Paskar,

Chief, Information and Records Division, Office of Administrative Services, Bureau for Management.

[FR Doc. 06–1191 Filed 2–8–06; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF AGRICULTURE

National Agricultural Library

Notice of Intent To Seek Approval To Collect Information

AGENCY: National Agricultural Library, Agricultural Research Service, USDA.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget (OMB) regulations at 5 CFR Part 1320 (60 FR 44978, August 29, 1995), this notice announces the National Agricultural Library's intent to request approval for a new electronic mailing list subscription form from those working with water quality and water resources.

DATES: Comments on this notice must be received by April 17, 2006 to be assured of consideration.

ADDRESSES: Address all comments concerning this notice to Joseph Makuch, Coordinator, Water Quality Information Center, National Agricultural Library, 10301 Baltimore Avenue, Beltsville, MD 20705–2351. Comments may be sent by facsimile to (301) 504–6409. Submit electronic comments to: *wqic@nal.usda.gov*.

FOR FURTHER INFORMATION CONTACT: Joseph Makuch (301) 504–6077.

SUPPLEMENTARY INFORMATION: *Title:* Electronic Mailing List Subscription Form.

OMB Number: Not yet assigned.

Expiration Date: Not yet assigned.

Type of Request: Approval for data collection from individuals working in the areas of water quality and water resources.

Abstract: The form would include the following items:

This form contains five items and is used to collect information about participants who are interested in joining an electronic discussion group. The form collects data to see if a person is eligible to join the discussion group. Because these electronic discussion groups are only available to people who work in the areas of water quality and water resources, it is necessary to gather this information. The questionnaire asks for the person's name, e-mail address, job title, work affiliation, and topics of interest.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 minute per response.

Respondents: Individuals who are interested in joining an electronic discussion group.

Estimated Number of Respondents: 750 per year.

Estimated Total Annual Burden on Respondents: 750 minutes or 12.5 hours.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who respond, including the use of appropriate automated, electronic, mechanical, or other technology. Comments should be sent to the address in the preamble. All responses to the notice will be summarized and included in the request

for Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

Dated: February 1, 2006.

Antoinette A. Betschart,

Associate Administrator, ARS.

[FR Doc. E6–1792 Filed 2–8–06; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Housing Service (RHS).

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's intention to request an extension for a currently approved information collection in support of Form RD 410–8 "Applicant Reference Letter."

DATES: Comments on this notice must be received by April 10, 2006 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Gale Richardson, Loan Specialist, Single Family Housing, Rural Housing Service, 1400 Independence Avenue, SW., Mail Stop 0783, Washington, DC 20250–0783, Telephone 202–720–1459.

SUPPLEMENTARY INFORMATION: *Title:* Form RD 410–8, "Applicant Reference Letter."

OMB Number: 0575–0091.

Expiration Date of Approval: June 30, 2006.

Type of Request: Extension of a currently approved information collection.

Abstract: The Rural Housing Service (RHS), under Section 502 of Title V of the Housing Act of 1949, as amended, provides financial assistance to construct, improve, alter, repair, replace, or rehabilitate dwellings, which will provide modest, decent, safe, and sanitary housing to eligible individuals in rural areas. To assist a customer, they must provide the Agency with a standard housing application (used by government and private lenders), and provide documentation, including their credit history, to support the same. Form RD 410–8 is used to obtain information about an applicant's credit history that might not appear on a credit report. It is used to document an ability to handle credit effectively for applicants who have not used sources of credit that appear on a credit report. This form provides a mechanism for following up on repayment history for debts reported by the applicant on the application that do not appear on the credit report. This information is used by the Loan Originator serving the area in which the applicant or borrower will live to determine whether the applicant's credit history meets the Agency criteria. In addition to supplementing or verifying other debts when a credit report is limited and unavailable to determine the applicant's eligibility and credit worthiness, the Form RD 410–8 is widely used by the Agency because credit reports are not always used to obtain credit information when an applicant/borrower lives in a remote area.

RHS must, by law, make available to the applicant, upon request, the source of information used to make an adverse decision. Individual references may be solicited with the clear understanding that if the information is used to deny credit the information will be made available to the applicant upon request. Without this information, the Agency is unable to determine if a customer would qualify for services.

Estimate of Burden: Public burden for this collection of information is estimated to average 6 minutes per response.

Respondents: Applicants seeking direct single family housing loans and grants from the Agency.

Estimated Number of Respondents: 13,466.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Responses: 13,466.

Estimated Total Annual Burden on Respondents: 1,346 hours.

Copies of this information collection can be obtained from Brigitte Sumter, Regulations and Paperwork Management Branch, at (202) 692–0042.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Rural Housing Service, including whether the information will have practical utility; (b) the accuracy of the Rural Housing Service's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Brigitte Sumter, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave. SW., Washington, and DC 20250–0742. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: February 2, 2006.

Russell T. Davis,

Administrator, Rural Housing Service.

[FR Doc. E6–1749 Filed 2–8–06; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Request for Nominations of Members To Serve on the Census Advisory Committee on the African American Population

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of request for nominations.

SUMMARY: The Bureau of the Census (Census Bureau) is requesting nominations of individuals to the Census Advisory Committee on the African American Population. The Census Bureau will consider nominations received in response to this notice, as well as from other sources. The **SUPPLEMENTARY INFORMATION** section of this notice provides Committee and membership criteria.

DATES: Please submit nominations by March 2, 2006.

ADDRESSES: Please submit nominations to Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233. Nominations also may be submitted via fax at 301–457–8608 or e-mail to *edwina.martha.jaramillo@census.gov.*

FOR FURTHER INFORMATION CONTACT: Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233, telephone (301) 763–4047.

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2) in 1995. The following provides information about the Committee, membership, and the nomination process.

Objectives and Duties

1. The Committee provides an organized and continuing channel of communication between African American communities and the Census Bureau. Committee members identify useful strategies to reduce the differential undercount for the African American population and on ways data can be disseminated for maximum usefulness to the African American population.

2. The Committee draws upon prior decennial planning efforts, research studies, test censuses, and other experiences to provide advice and recommendations for the 2010 Census, the American Community Survey, and related decennial programs.

3. The Committee functions solely as an advisory body under the Federal Advisory Committee Act.

4. The Committee reports to the Director of the Census Bureau.

Membership

1. Members are appointed by and serve at the discretion of the Secretary of Commerce.

2. Members are appointed to the nine-member Committee for a period of three years. Members will be reevaluated at the conclusion of the three-year term with the prospect of renewal, pending advisory committee needs and the Secretary's concurrence. Committee members are selected in accordance with applicable Department of Commerce guidelines. The Committee aims to have a balanced representation, considering such factors as geography, gender, technical expertise, community involvement, and knowledge of census procedures and activities. The Committee aims to include members from diverse backgrounds, including state and local governments, academia, media, research, community-based organizations, and the private sector. No employee of the federal government can serve as a member of the Committee. Meeting attendance and active participation in the activities of the Advisory Committee are essential for sustained Committee membership.

Miscellaneous

1. Members of the Committee serve without compensation, but receive reimbursement for committee-related travel and lodging expenses.

2. The Committee meets at least once a year, budget permitting, but additional meetings may be held as deemed necessary by the Census Director or Designated Federal Official. All Committee meetings are open to the public in accordance with the Federal Advisory Committee Act.

Nomination Information

1. Nominations are requested as described above.

2. Nominees should have expertise and knowledge of the cultural patterns and issues and/or data needs of the African American community. Such knowledge and expertise are needed to provide advice and recommendations to the Census Bureau on how best to enumerate the African American population and obtain complete and accurate data on this population. Individuals, groups, or organizations may submit nominations on behalf of a potential candidate. A summary of the candidate's qualifications (résumé or curriculum vitae) must be included along with the nomination letter. Nominees must have the ability to participate in Advisory Committee meetings and tasks. Besides Committee meetings, active participation may include Committee assignments and participation in conference calls and working groups.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Committee membership.

Dated: February 2, 2006.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. E6–1746 Filed 2–8–06; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Census

Request for Nominations of Members To Serve on the Census Advisory Committee on the American Indian and Alaska Native Populations

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of request for nominations.

SUMMARY: The Bureau of the Census (Census Bureau) is requesting nominations of individuals to the Census Advisory Committee on the American Indian and Alaska Native Populations. The Census Bureau will consider nominations received in response to this notice, as well as from other sources. The **SUPPLEMENTARY INFORMATION** section of this notice provides Committee and membership criteria.

DATES: Please submit nominations by March 2, 2006.

ADDRESSES: Please submit nominations to Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233. Nominations also may be submitted via fax at 301–457–8608 or e-mail to *dwina.martha.jaramillo@census.gov.*

FOR FURTHER INFORMATION CONTACT: Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233, telephone (301) 763–4047.

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2) in 1995. The following provides information about the Committee, membership, and the nomination process.

Objectives and Duties

1. The Committee provides an organized and continuing channel of communication between American Indian and Alaska Native communities and the Census Bureau. Committee members identify useful strategies to reduce the differential undercount for the American Indian and Alaska Native populations and on ways data can be disseminated for maximum usefulness to the American Indian and Alaska Native populations.

2. The Committee draws upon prior decennial planning efforts, research studies, test censuses, and other experiences to provide advice and recommendations for the 2010 Census, the American Community Survey, and related decennial programs.

3. The Committee functions solely as an advisory body under the Federal Advisory Committee Act.

4. The Committee reports to the Director of the Bureau of the Census.

Membership

1. Members are appointed by and serve at the discretion of the Secretary of Commerce.

2. Members are appointed to the nine-member Committee for a period of three years. Members will be reevaluated at

the conclusion of the three-year term with the prospect of renewal, pending Advisory Committee needs and the Secretary's concurrence. Committee members are selected in accordance with applicable Department of Commerce guidelines. The Committee aims to have a balanced representation, considering such factors as geography, gender, technical expertise, community involvement, and knowledge of census procedures and activities. The Committee aims to include members from diverse backgrounds, including state, local, and tribal governments; academia; media; research; community-based organizations; and the private sector. No employee of the federal government can serve as a member of the Committee. Meeting attendance and active participation in the activities of the Advisory Committee are essential for sustained Committee membership.

Miscellaneous

1. Members of the Committee serve without compensation, but receive reimbursement for committee-related travel and lodging expenses.

2. The Committee meets at least once a year, budget permitting, but additional meetings may be held as deemed necessary by the Census Director or Designated Federal Official. All Committee meetings are open to the public in accordance with the Federal Advisory Committee Act.

Nomination Information

1. Nominations are requested as described above.

2. Nominees should have expertise and knowledge of the cultural patterns and issues and/or data needs of the American Indian and Alaska Native communities. Such knowledge and expertise are needed to provide advice and recommendations to the Census Bureau on how best to enumerate the American Indian and Alaska Native populations and obtain complete and accurate data on these populations. Individuals, groups, or organizations may submit nominations on behalf of a potential candidate. A summary of the candidate's qualifications (résumé or curriculum vitae) must be included along with the nomination letter. Nominees must have the ability to participate in Advisory Committee meetings and tasks. Besides Committee meetings, active participation may include Committee assignments and participation in conference calls and working groups.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Committee membership.

Dated: February 2, 2006.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. E6–1747 Filed 2–8–06; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Request for Nominations of Members To Serve on the Census Advisory Committee on the Asian Population

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of request for nominations.

SUMMARY: The Bureau of the Census (Census Bureau) is requesting nominations of individuals to the Census Advisory Committee on the Asian Population. The Census Bureau will consider nominations received in response to this notice, as well as from other sources. The **SUPPLEMENTARY INFORMATION** section of this notice provides Committee and membership criteria.

DATES: Please submit nominations by March 2, 2006.

ADDRESSES: Please submit nominations to Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233. Nominations also may be submitted via fax at 301–457–8608 or e-mail to *edwina.martha.jaramillo@census.gov.*

FOR FURTHER INFORMATION CONTACT: Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233, telephone (301) 763–4047.

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2) in 2000. The following provides information about the Committee, membership, and the nomination process.

Objectives and Duties

1. The Committee provides an organized and continuing channel of communication between Asian communities and the Census Bureau. Committee members identify useful strategies to reduce the differential undercount for the Asian population and on ways data can be disseminated for maximum usefulness to the Asian population.

2. The Committee draws upon prior decennial census activities, research studies, test censuses, and other experiences to provide advice and recommendations for the 2010 Census, the American Community Survey, and related decennial programs.

3. The Committee functions solely as an advisory body under the Federal Advisory Committee Act.

4. The Committee reports to the Director of the Census Bureau.

Membership

1. Members are appointed by and serve at the discretion of the Secretary of Commerce.

2. Members are appointed to the nine-member Committee for a period of three years. Members will be reevaluated at the conclusion of the three-year term with the prospect of renewal, pending Advisory Committee needs and the Secretary's concurrence. Committee members are selected in accordance with applicable Department of Commerce guidelines. The Committee aims to have a balanced representation, considering such factors as geography, gender, technical expertise, community involvement, and knowledge of census procedures and activities. The Committee aims to include members from diverse backgrounds, including state and local governments, academia, media, research, community-based organizations, and the private sector. No employee of the federal government can serve as a member of the Committee, nor can a member serve on existing census consultation or advisory groups. Meeting attendance and active participation in the activities of the Advisory Committee are essential for sustained Committee membership.

Miscellaneous

1. Members of the Committee serve without compensation, but receive reimbursement for committee-related travel and lodging expenses.

2. The Committee meets at least once a year, budget permitting, but additional meetings may be held as deemed necessary by the Census Director or Designated Federal Official. All Committee meetings are open to the public in accordance with the Federal Advisory Committee Act.

Nomination Information

1. Nominations are requested as described above.

2. Nominees should have expertise and knowledge of the cultural patterns

and issues and/or data needs of Asian communities. Such knowledge and expertise are needed to provide advice and recommendations to the Census Bureau on how best to enumerate the Asian population and obtain complete and accurate data on these populations. Individuals, groups, or organizations may submit nominations on behalf of a potential candidate. A summary of the candidate's qualifications (resume or curriculum vitae) must be included along with the nomination letter. Nominees must have the ability to participate in Advisory Committee meetings and tasks. Besides Committee meetings, active participation may include Committee assignments and participation in conference calls and working groups.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Committee membership.

Dated: February 2, 2006.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. E6–1745 Filed 2–8–06; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Request for Nominations of Members To Serve on the Census Advisory Committee on the Hispanic Population

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of request for nominations.

SUMMARY: The Bureau of the Census (Census Bureau) is requesting nominations of individuals to the Census Advisory Committee on the Hispanic Population. The Census Bureau will consider nominations received in response to this notice, as well as from other sources. The **SUPPLEMENTARY INFORMATION** section of this notice provides Committee and membership criteria.

DATES: Please submit nominations by March 2, 2006.

ADDRESSES: Please submit nominations to Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233. Nominations also may be submitted via fax at 301–457–8608 or e-mail to *edwina.martha.jaramillo@census.gov.*

FOR FURTHER INFORMATION CONTACT: Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233, telephone (301) 763–4047.

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2) in 1995. The following provides information about the Committee, membership, and the nomination process.

Objectives and Duties

1. The Committee provides an organized and continuing channel of communication between Hispanic communities and the Census Bureau. Committee members identify useful strategies to reduce the differential undercount for the Hispanic population and on ways data can be disseminated for maximum usefulness to the Hispanic population.

2. The Committee draws upon prior decennial planning efforts, research studies, test censuses, and other experiences to provide advice and recommendations for the 2010 Census, the American Community Survey, and related decennial programs.

3. The Committee functions solely as an advisory body under the Federal Advisory Committee Act.

4. The Committee reports to the Director of the Census Bureau.

Membership

1. Members are appointed by and serve at the discretion of the Secretary of Commerce.

2. Members are appointed to the nine-member Committee for a period of three years. Members will be reevaluated at the conclusion of the three-year term with the prospect of renewal, pending advisory committee needs and the Secretary's concurrence. Committee members are selected in accordance with applicable Department of Commerce guidelines. The Committee aims to have a balanced representation, considering such factors as geography, gender, technical expertise, community involvement, and knowledge of census procedures and activities. The Committee aims to include members from diverse backgrounds, including state and local governments, academia, media, research, community-based organizations, and the private sector. No employee of the federal government can serve as a member of the Committee. Meeting attendance and active participation in the activities of the Advisory Committee are essential for sustained Committee membership.

Miscellaneous

1. Members of the Committee serve without compensation, but receive reimbursement for committee-related travel and lodging expenses.

2. The Committee meets at least once a year, budget permitting, but additional meetings may be held as deemed necessary by the Census Director or Designated FederalOfficial. All Committee meetings are open to the public in accordance with the Federal Advisory Committee Act.

Nomination Information

1. Nominations are requested as described above.

2. Nominees should have expertise and knowledge of the cultural patterns and issues and/or data needs of the Hispanic community. Such knowledge and expertise are needed to provide advice and recommendations to the Census Bureau on how best to enumerate the Hispanic population and obtain complete and accurate data on this population. Individuals, groups, or organizations may submit nominations on behalf of a potential candidate. A summary of the candidate's qualifications (résumé or curriculum vitae) must be included along with the nomination letter. Nominees must have the ability to participate in Advisory Committee meetings and tasks. Besides Committee meetings, active participation may include Committee assignments and participation in conference calls and working groups.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Committee membership.

Dated: February 2, 2006.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. E6–1748 Filed 2–8–06; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Request for Nominations of Members To Serve on the Census Advisory Committee on the Native Hawaiian and Other Pacific Islander Populations

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of request for nominations.

SUMMARY: The Bureau of the Census (Census Bureau) is requesting

nominations of individuals to the Census Advisory Committee on the Native Hawaiian and Other Pacific Islander Population. The Census Bureau will consider nominations received in response to this notice, as well as from other sources. The **SUPPLEMENTARY INFORMATION** section of this notice provides Committee and membership criteria.

DATES: Please submit nominations by March 2, 2006.

ADDRESSES: Please submit nominations to Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233. Nominations also may be submitted via fax at 301–457–8608 or e-mail to *edwina.martha.jaramillo@census.gov.*

FOR FURTHER INFORMATION CONTACT: Edwina Jaramillo, Race and Ethnic Advisory Committee Program Coordinator, Census Advisory Committee Office, U.S. Census Bureau, Room 3627, Federal Building 3, 4700 Silver Hill Road, Washington, DC 20233, telephone (301) 763–4047.

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2) in 2000. The following provides information about the Committee, membership, and the nomination process.

Objectives and Duties

1. The Committee provides an organized and continuing channel of communication between Native Hawaiian and Other Pacific Islander communities and the Census Bureau. Committee members identify useful strategies to reduce the differential undercount for the Native Hawaiian and Other Pacific Islander populations and on ways data can be disseminated for maximum usefulness to the Native Hawaiian and Other Pacific Islander populations.

2. The Committee draws upon prior decennial census activities, research studies, test censuses, and other experiences to provide advice and recommendations for the 2010 Census, the American Community Survey, and related decennial programs.

3. The Committee functions solely as an advisory body under the Federal Advisory Committee Act.

4. The Committee reports to the Director of the Census Bureau.

Membership

1. Members are appointed by and serve at the discretion of the Secretary of Commerce.

2. Members are appointed to the nine-member Committee for a period of three years. Members will be reevaluated at the conclusion of the three-year term with the prospect of renewal, pending Advisory Committee needs and the Secretary's concurrence. Committee members are selected in accordance with applicable Department of Commerce guidelines. The Committee aims to have a balanced representation, considering such factors as geography, gender, technical expertise, community involvement, and knowledge of census procedures and activities. The Committee aims to include members from diverse backgrounds, including state and local governments, academia, media, research, community-based organizations, and the private sector. No employee of the Federal Government can serve as a member of the Committee, nor can a member serve on existing census consultation or advisory groups. Meeting attendance and active participation in the activities of the Advisory Committee are essential for sustained Committee membership.

Miscellaneous

1. Members of the Committee serve without compensation, but receive reimbursement for committee-related travel and lodging expenses.

2. The Committee meets at least once a year, budget permitting, but additional meetings may be held as deemed necessary by the Census Director or Designated Federal Official. All Committee meetings are open to the public in accordance with the Federal Advisory Committee Act.

Nomination Information

1. Nominations are requested as described above.

2. Nominees should have expertise and knowledge of the cultural patterns and issues and/or data needs of Native Hawaiian and Other Pacific Islander communities. Such knowledge and expertise are needed to provide advice and recommendations to the Census Bureau on how best to enumerate the Native Hawaiian and Other Pacific Islander populations and obtain complete and accurate data on these populations. Individuals, groups, or organizations may submit nominations on behalf of a potential candidate. A summary of the candidate's qualifications (résumé or curriculum vitae) *must* be included along with the nomination letter. Nominees must have the ability to participate in Advisory Committee meetings and tasks. Besides Committee meetings, active participation may include Committee assignments and participation in conference calls and working groups.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Committee membership.

Dated: February 2, 2006.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. 06–1190 Filed 2–8–06; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 2–2006]

Foreign-Trade Zone 106—Oklahoma City, OK, Area Application for Reorganization/Expansion

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Port Authority of the Greater Oklahoma City Area, grantee of FTZ 106, requesting authority to expand its zone in the Oklahoma City, Oklahoma, area, within and adjacent to the Oklahoma City Customs port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on January 30, 2006.

FTZ 106 was approved on September 14, 1984 (Board Order 271, 49 FR 37133, 9/21/84) and expanded on December 7, 1989 (Board Order 455, 54 FR 51441, 12/15/89), and on February 10, 2000 (Board Order 1078, 65 FR 8337, 2/18/00).

FTZ 106 currently consists of 11 sites (1,675 acres) in the Oklahoma City area: *Site 1* (876 acres)—within the 6,700-acre Will Rogers World Airport complex; *Site 2* (6 acres)—106,000-square foot distribution and storage warehouse, 3501 Melcat Drive in the Lakeside Business Park, adjacent to the Will Rogers World Airport; *Site 3* (5 acres)—Mid America Business Park I, 6205 S. Sooner, Oklahoma City; *Site 4* (50 acres)—Mid America Business Park II, Mid America Boulevard, Oklahoma City; *Site 5* (292 acres)—South River Industrial Park, IH–35 and IH 40, Oklahoma City; *Site 6* (42 acres)—Continental Distribution Park, SW. 29th and Council, Oklahoma City; *Site 7* (110 acres)—Western Heights Properties, L.L.C., industrial park, south of SW. 29th between South Rockwell &

Council, Oklahoma City; *Site 8* (30 acres)—Airport NE. located northeast of Will Rogers World Airport, Oklahoma City; *Site 9* (200 acres)—Kelley Pointe Industrial Park, 33rd Street and Kelley Avenue, Edmond; *Site 10* (43 acres)—Kelley Avenue International Trade Center, south of 15th between Kelley Avenue and AT&SF Railroad, Edmond; and, *Site 11* (21 acres)—Tower Industrial Park, Tract II, Tower Drive and Woodview, Moore.

The applicant is requesting authority to expand *Site 1* to include an additional 185 acres (2 parcels) within the 6700-acre Will Rogers World Airport complex (new total—1,061 acres) and to expand the zone to include two new sites in the area: *Proposed Site 12* (26 acres)—ICON Center Industrial Park, 300 East Arlington, Ada; and, *Proposed Site 13* (308 acres)—within the 401-acre Guthrie/Edmond Regional Airport, 520 Airport Road, Guthrie. The proposed sites are owned by Robbie Sherrell and the City of Guthrie, respectively. The applicant is also requesting authority to remove the following sites from the zone project due to changed circumstances: South River Industrial Park (Site 5—292 acres); Continental Distribution Park (Site 6—42 acres); Kelley Pointe Industrial Park (Site 9—200 acres); and, Tower Industrial Park (Site 11—21 acres). No specific manufacturing requests are being made at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at one of the following addresses:

1. *Submissions via Express/Package Delivery Services:* Foreign-Trade Zones Board, U.S. Department of Commerce, Franklin Court Building—Suite 4100W, 1099 14th Street, NW., Washington, DC 20005; or,

2. *Submissions via the U.S. Postal Service:* Foreign-Trade Zones Board, U.S. Department of Commerce, FCB—Suite 4100W, 1401 Constitution Avenue, NW., Washington, DC 20230.

The closing period for their receipt is April 10, 2006. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to April 25, 2006).

A copy of the application and accompanying exhibits will be available during this time for public inspection at the Office of the Foreign-Trade Zones Board's Executive Secretary at the first address listed above, and at the U.S. Department of Commerce, Export Assistance Center, 301 NW 63rd Street, Suite 330, Oklahoma City, Oklahoma 73116.

Dated: January 30, 2006.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 06–1224 Filed 2–8–06; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of issuance of an export trade certificate of review, application no. 05–00001.

SUMMARY: On January 30, 2006, The U.S. Department of Commerce issued an export trade certificate of Review to Central America Poultry Export Quota, Inc. ("CA–PEQ"). This notice summarizes the conduct for which certification has been granted.

FOR FURTHER INFORMATION CONTACT: Jeffrey C. Anspacher, Director, Export Trading Company Affairs, International Trade Administration, by telephone at (202) 482–5131 (this is not a toll-free number), or by e-mail at *oetca@ita.doc.gov*.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing Title III are found at 15 CFR Part 325 (2005).

Export Trading Company Affairs ("ETCA") is issuing this notice pursuant to 15 CFR 325.6(b), which requires the U.S. Department of Commerce to publish a summary of the certification in the **Federal Register**. Under section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Certified Conduct

Export Trade

Chicken leg quarters, (or parts of chicken leg quarters, including legs or thighs), fresh, chilled or frozen, seasoned or unseasoned, marinated or not marinated, classifiable under HTS 0207.13.99, 0207.14.99 and 1602.32.00.

Export Markets

Chicken leg quarters for which awards will be made will be exported to El Salvador, Guatemala, Honduras and Nicaragua.

Export Trade Activities and Methods of Operation

I. *Purpose.* CA–PEQ will manage on an open tender basis the tariff-rate quotas ("TRQs") for poultry products granted by El Salvador, Guatemala, Honduras, and Nicaragua to the United States under the terms of the United States—Dominican Republic—Central America Free Trade Agreement ("DR–CAFTA") or any amended or successor agreement providing for Central American poultry TRQs for the United States of America. CA–PEQ also will provide for distributions of the proceeds received from the aforementioned tender process ("the TRQ System") for the benefit of the poultry industries in El Salvador, Guatemala, Honduras, Nicaragua, and the United States.

II. *Implementation.* A. *Administrator.* CA–PEQ shall contract with a neutral third party Administrator who is not engaged in the production, sale, distribution or export of poultry or poultry products and who shall bear responsibility for administering the TRQ System, subject to general supervision and oversight by the Board of Directors of CA–PEQ.

B. *Membership.* CA–PEQ has been formed jointly by the USA Poultry and Egg Export Council ("USAPEEC") on behalf of the U.S. poultry industry; by Asociación Nacional de Avicultores de Guatemala ("ANAVI") on behalf of the Guatemalan poultry industry; by Asociación Nacional de Avicultores de El Salvador ("AVES") on behalf of the Salvadoran poultry industry; and by Asociación Nacional de Avicultores y Productores de Alimentos de Nicaragua ("ANAPA") on behalf of the Nicaraguan poultry industry.

C. *Open Tender Process.* CA–PEQ shall offer TRQ Certificates for duty-free shipments of chicken leg quarters to El Salvador, Guatemala, Honduras, and Nicaragua solely and exclusively through an open tender process with certificates awarded to the highest bidders ("TRQ Certificates"). CA–PEQ shall hold tenders in accordance with tranches established in the relevant regulations of El Salvador, Guatemala, Honduras or Nicaragua, or in the absence of such, at least three times each year. The award of TRQ Certificates under the open tender process shall be determined solely by

the Administrator in accordance with Section I without any participation by the Board of Directors.

D. *Persons or Entities Eligible to Bid.* Any person or entity incorporated or domiciled in the United States of America shall be eligible to bid in the open tender process.

E. *Notice.* The Administrator shall publish notice ("Notice") of each open tender process to be held to award TRQ Certificates in the Journal of Commerce and, at the discretion of the Administrator, in other publications of general circulation within the U.S. poultry industry. The Notice will invite independent bids and will specify (i) the total amount (in metric tons) that will be allocated pursuant to the applicable tender; (ii) the shipment period for which the TRQ Certificates will be valid; (iii) the date and time by which all bids must be received by the Administrator in order to be considered (the "Bid Date"); and (iv) a minimum bid amount per ton, as established by the Board of Directors, to ensure the costs of administering the auction are recovered. The Notice normally will be published not later than 30 business days prior to the first day of the shipment period and will specify a Bid Date that is at least 10 business days after the date of publication of the Notice. The Notice will specify the format for bid submissions. Bids must be received by the Administrator not later than 5:00 p.m. EST on the Bid Date.

F. *Contents of Bid.* The bid shall be in a format established by the Administrator and shall state (i) the name, address, telephone and facsimile numbers, and email address of the bidder; (ii) the quantity of poultry bid, in an amount that is a multiple of 25 metric tons; (iii) the bid price in U.S. dollars per metric ton; and (iv) the total value of the bid. The bid form shall contain a provision, that must be signed by the bidder, agreeing that (i) any dispute that may arise relating to the bidding process or to the award to TRQ Certificates shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules; and (ii) judgment on any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

G. *Performance Security.* The bidder shall submit with each bid a performance bond, an irrevocable letter of credit drawn on a U.S. bank, cashier's check, wire transfer or equivalent security, in a form approved and for the benefit of an account designated by the Administrator, in the amount of $50,000 or the total value of the bid, whichever is less. The bidder shall forfeit such performance security if the bidder fails to pay for any TRQ Certificates awarded within five (5) business days. The bidder may chose to apply the performance security to the price of any successful bid, or to retain the performance security for a subsequent open tender process. Promptly after the close of the open tender process, the Administrator shall return any unused or non-forfeited security to the bidder.

H. *Confidentiality of Information.* The Administrator shall treat all bids and their contents as confidential. The Administrator shall disclose any such information only to another neutral third party or authorized government official of the United States, El Salvador, Guatemala, Honduras or Nicaragua, signatories to the DR–CAFTA, and only where necessary to ensure the effective operation of the TRQ System or where required by law (including appropriate disclosure in connection with the arbitration of a dispute). However, after the issuance of all TRQ Certificates from an open tender process, the Administrator shall notify all bidders and shall disclose publicly (i) the total tonnage for which TRQ Certificates were awarded, and (ii) the lowest price per metric ton of all successful bids.

I. *Award of TRQ Certificates.* The Administrator shall award TRQ Certificates for the available tonnage to the bidders who have submitted the highest price conforming bids. If two or more bidders have submitted bids with identical prices, the Administrator shall divide the remaining available tonnage in proportion to the quantities of their bids, and offer each TRQ Certificates in the resulting tonnages. If any bidder declines all or part of the tonnage offered, the Administrator shall offer that tonnage first to the other tying bidders, and then to the next highest bidder.

J. *Payment for TRQ Certificates.* Promptly after being notified of a TRQ award and within the time specified in the Notice, the bidder shall pay the full amount of the bid, either by wire transfer or by certified check, to an account designated by the Administrator. If the bidder fails to make payment within five (5) days, the Administrator shall revoke the award and award the tonnage to the next highest bidder(s).

K. *Delivery of TRQ Certificates.* The Administrator shall establish an account for each successful bidder in the amount of tonnage available for TRQ Certificates. Upon request, the Administrator will issue TRQ Certificates in the tonnage designated by the bidder, consistent with the balance in that account. The TRQ Certificate shall state the delivery period for which it is valid.

L. *Transferability.* TRQ Certificates shall be freely transferable except that (i) any TRQ Certificate holder who intends to sell, transfer or assign any rights under that Certificate shall publish such intention on a Web site maintained by the Administrator at least three (3) business days prior to any sale, transfer or assignment; and (ii) any TRQ holder that sells, transfers or assigns its rights under a TRQ Certificate shall provide the Administrator with notice and a copy of the sale, transfer or assignment within three (3) business days.

M. *Deposit of Proceeds:* The Administrator shall cause all proceeds of the open tender process to be deposited in an interest-bearing account in a financial institution approved by the CA–PEQ Board of Directors.

N. *Disposition of Proceeds.* The proceeds of the open tender process shall be applied and distributed as follows:

1. The Administrator shall pay from tender proceeds, as they become available, all operating expenses of CA–PEQ, including legal, accounting and administrative costs of establishing and operating the TRQ System, as authorized by the Board of Directors.

2. Of the proceeds remaining at the end of each year of operations after all costs described in (1) above have been paid—

(a) Fifty percent (50%) shall be distributed to fund export market development, educational, scientific and technical projects to benefit the United States poultry industry. CA–PEQ shall accept proposals for the funding of projects approved by the Board of Directors of USAPEEC. The Administrator shall disburse funds to those projects approved for funding by the CA–PEQ Board of Directors.

(b) Fifty percent (50%) shall be distributed to fund market development, educational, scientific and technical projects to benefit the poultry industries of El Salvador, Guatemala, Honduras, and Nicaragua. CA–PEQ shall accept proposals for funding of projects approved by the Boards of Directors of ANAVI, AVES, and ANAPA, as the case may be. The Administrator shall disburse funds to those projects approved for funding by the CA–PEQ Board of Directors.

O. *Arbitration of Disputes.* Any dispute, controversy or claim arising out of or relating to the TRQ System or the breach thereof shall be settled by arbitration administered by the

American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

P. *Annual Reports.* CA–PEQ shall publish an annual report including a statement of its operating expenses and data on the distribution of proceeds, as reflected in the audited financial statement of the CA–PEQ TRQ System.

III. *Cooperation with the U.S. Government and with the Governments of El Salvador, Guatemala, Honduras, and Nicaragua.* CA–PEQ will provide whatever information or consultations may be useful in order to ensure effective consultations between the government of the United States of America and the governments of El Salvador, Guatemala, and Nicaragua concerning the implementation and operation of the TRQ System. In particular, while maintaining the confidentiality of information submitted by bidders and Members, CA–PEQ will provide its annual report, regular reports following each tender held, reports on distributions of tender proceeds, and any other information that might be requested by the U.S. Government. Directly or through the U.S. Government, CA–PEQ will endeavor to accommodate any information request from the governments of El Salvador, Guatemala, Honduras, and Nicaragua, while protecting confidential information; and will consult with officials of those governments as appropriate.

IV. *Miscellaneous Implementing Provisions.* CA–PEQ and/or Members may (i) meet, discuss and provide for an administrative structure to implement the foregoing tariff-rate quota management system, assess its operations and discuss modifications as necessary to improve its workability; (ii) meet, exchange and discuss information regarding the structure and method for implementing the foregoing tariff-rate quota management system; (iii) meet, exchange and discuss the types of information needed regarding the bidding process and distribution of the bid proceeds, that are necessary for implementation of the system; (iv) meet, exchange and discuss information regarding U.S. and foreign government agreements, legislation and regulations affecting the tariff rate quota management system; and (v) otherwise meet, discuss and exchange information as necessary to implement the activities described above and take the necessary action to implement the foregoing tariff-rate quota management system.

Terms and Conditions of Certificate

1. Except as authorized in Paragraphs 2.H and 2.N of the Export Trade Activities and Methods of Operation, in engaging in Export Trade Activities and Methods of Operation, neither CA–PEQ, the Administrator, any Member, nor any neutral third party shall intentionally disclose, directly or indirectly, to any Member (including parent companies, subsidiaries, or other entities related to any Member) any information regarding any other Member's or bidder's costs, production, inventories, domestic prices, domestic sales, capacity to produce Products for domestic sale, domestic orders, terms of domestic marketing or sale, or U.S. business plans, strategies, or methods, unless such information is already generally available to the trade or public.

2. CA–PEQ and Members will comply with requests made by the Secretary of Commerce on behalf of the Secretary or the Attorney General for information or documents relevant to conduct under the Certificate. The Secretary of Commerce will request such information or documents when either the Attorney General or the Secretary of Commerce believes that the information or documents are required to determine that the Export Trade, Export Trade Activities and Methods of Operation of a person protected by this Certificate of Review continue to comply with the standards of section 303(a) of the Act.

Definition

Neutral third party, as used in this Certificate of Review, means a party not otherwise associated with CA–PEQ or any Member and who is not engaged in the production, distribution, or sale of chicken.

Members (Within the Meaning of Section 325.2(1) of the Regulations)

Members (in addition to applicant): USA Poultry and Egg Export Council; Asociación Nacional de Avicultores de Guatemala; Asociación Nacional de Avicultores de El Salvador; and Asociación Nacional de Avicultores y Productores de Alimentos de Nicaragua.

Protection Provided by Certificate

This Certificate protects CA–PEQ; Members; and their directors, officers, and employees acting on their behalf from private treble damage actions and government criminal and civil suits under U.S. federal and state antitrust laws for the export conduct specified in the Certificate and carried out during its effective period in compliance with its terms and conditions.

Effective Period of Certificate

This Certificate continues in effect from the effective date indicated below until it is relinquished, modified, or revoked as provided in the Act and the Regulations.

Other Conduct

Nothing in this Certificate prohibits CA–PEQ and Members from engaging in conduct not specified in this Certificate, but such conduct is subject to the normal application of the antitrust laws.

Disclaimer

The issuance of this Certificate of Review to CA–PEQ by the Deputy Secretary of Commerce with the concurrence of the Attorney General under the provisions of the Act does not constitute, explicitly or implicitly, an endorsement or opinion by the Secretary of Commerce or by the Attorney General concerning either (a) the viability or quality of the business plans of CA–PEQ or Members or (b) the legality of such business plans of CA–PEQ or Members under the laws of the United States (other than as provided in the Act) or under the laws of any foreign country.

A copy of the certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, Room 4100, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Dated: February 2, 2006.

Jeffrey C. Anspacher,

Director, Export Trading Company Affairs.

[FR Doc. E6–1791 Filed 2–8–06; 8:45 am]

BILLING CODE 3510–DR–P

COMMODITY FUTURES TRADING COMMISSION

In the Matter of the New York Mercantile Exchange, Inc. Petition To Extend Interpretation Pursuant to Section 1a(12)(C) of the Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: On February 4, 2003, in response to a petition from the New York Mercantile Exchange, Inc. ("NYMEX" or "Exchange") the Commodity Futures Trading Commission ("Commission"), issued an order [1] pursuant to section 1a(12)(C) of the Commodity Exchange Act ("Act").

[1] 68 FR 5621 (February 4, 2003).

The order provided that, subject to certain conditions, Exchange floor brokers and floor traders (collectively referred to hereafter as "floor members") who are registered with the Commission, when acting in a proprietary trading capacity, shall be deemed to be "eligible contract participants" as that term is defined in section 1a(12) of the Act. The order (hereafter the "original order" or the "ECP Order") was effective for a two year period and would have expired on February 4, 2005.

On February 2, 2005, in response to a petition by the Exchange, the Commission determined to extend the original order for a further one-year period, to February 4, 2006 (hereafter, the "initial extension"). The initial extension contemplated that the Exchange might request a further modification or extension of the original order. On January 25, 2006, the Exchange petitioned the Commission to extend the original order for an additional six month period (hereafter, the "second extension"). Based on a review of all the relevant facts and circumstances, including its review of a report required as a condition of any further extension, detailing the experiences of the Exchange, its floor members and its clearing members under that order, the Commission has determined to grant the Exchange's petition for a second extension of the original order.

Accordingly, subject to certain conditions as set forth in this order, NYMEX floor members, when acting for their own accounts, are permitted to continue to enter into certain specified over-the-counter ("OTC") transactions in exempt commodities pursuant to section 2(h)(1) of the Act. In order to participate, the floor member must have its OTC trades guaranteed by, and cleared at NYMEX by, an Exchange clearing member that is registered with the Commission as a futures commission merchant ("FCM") and that meets certain minimum working capital requirements. This order is effective for a six-month period commencing on the expiration date of the initial extension.

DATES: This order is effective on February 4, 2006.

FOR FURTHER INFORMATION CONTACT: Donald H. Heitman, Senior Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581. Telephone: 202–418–5041. E-mail: *dheitman@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Section 1a(12) of the Act, as amended by the Commodity Futures Modernization Act of 2000 ("CFMA"), Public Law 106–554, which was signed into law on December 21, 2000, defines the term "eligible contract participant" ("ECP") by listing those entities and individuals considered to be ECPs.[2] Under sections 2(d)(1), 2(g), and 2(h)(1) of the Act, OTC transactions[3] entered into by ECPs in an "excluded commodity" or an "exempt commodity," as those terms are defined by the Act,[4] are exempt from all but certain requirements of the Act.[5] Floor brokers and floor traders are explicitly included in the ECP definition only to the extent that the floor broker or floor trader acts "in connection with any transaction that takes place on or through the facilities of a registered entity or an exempt board of trade, or any affiliate thereof, on which such person regularly trades."[6]

The Act, however, gives the Commission discretion to expand the ECP category as it deems appropriate. Specifically, section 1a(12)(C) provides that the list of entities defined as ECPs shall include "any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person."

II. The Original NYMEX Petition

A. Introduction

By letter dated May 23, 2002, NYMEX submitted a petition seeking a Commission interpretation pursuant to section 1a(12)(C) of the Act. Specifically, NYMEX, acting on behalf of Exchange floor members and member clearing firms, requested that the Commission make a determination pursuant to section 1a(12)(C) of the Act that floor members, when acting in a proprietary capacity, may enter into certain specified OTC transactions in exempt commodities pursuant to section 2(h)(1) of the Act if such floor members have obtained a financial guarantee for such transactions from an Exchange clearing member that is registered with the Commission as an FCM.[7] NYMEX suggested that the permissible OTC transactions be limited to trading in a commodity that either (1) is listed only for clearing at the Exchange,[8] or (2) is listed for trading and clearing at the Exchange and where Exchange rules provide for the exchange of futures for swaps ("EFS") in that

[2] Included generally in section 1a(12) as ECPs are: Financial institutions; insurance companies and investment companies subject to regulation; commodity pools and employee benefit plans subject to regulation and asset requirements; other entities subject to asset requirements or whose obligations are guaranteed by an ECP that meets a net worth requirement; governmental entities; brokers, dealers, and FCMs subject to regulation and organized as other than natural persons or proprietorships; brokers, dealers, and FCMs subject to regulation and organized as natural persons or proprietorships subject to total asset requirements or whose obligations are guaranteed by an ECP that meets a net worth requirement; floor brokers or floor traders subject to regulation in connection with transactions that take place on or through the facilities of a registered entity or an exempt board of trade; individuals subject to total asset requirements; an investment adviser or commodity trading advisor acting as an investment manager or fiduciary for another ECP; and any other person that the Commission deems eligible in light of the financial or other qualifications of the person.

[3] For these purposes, OTC transactions are transactions that are not executed on a trading facility. As defined in section 1a(33)(A) of the Act, the term "trading facility" generally means "a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions by accepting bids and offers made by other participants that are open to multiple participants in the facility or system."

[4] Section 1a(14) defines the term "exempt commodity" to mean a commodity that is not an excluded commodity or an agricultural commodity. Section 1a(13) defines the term "excluded commodity" to mean, among other things, an interest rate, exchange rate, currency, credit risk or measure, debt instrument, measure of inflation, or other macroeconomic index or measure. Although the term "agricultural commodity" is not defined in the Act, section 1a(4) enumerates a non-exclusive list of several agricultural-based commodities and products. The broadest types of commodities that fall into the exempt category are energy and metals products.

[5] OTC transactions in excluded commodities entered into by ECPs pursuant to section 2(d)(1) are generally not subject to any provision of the Act. OTC transactions in exempt or excluded commodities that are individually negotiated by ECPs pursuant to section 2(g) are also generally not subject to any provision of the Act. OTC transactions in exempt commodities entered into by ECPs pursuant to section 2(h)(1) are generally not subject to any provision of the Act other than antimanipulation provisions and anti-fraud provisions in certain situations.

[6] Section 1a(12)(A)(x) of the Act.

[7] To qualify for the section 2(h)(1) exemption, the transaction must: (1) Be in an exempt commodity, (2) be entered into by ECPs, and (3) not be entered into on a trading facility.

[8] By letter dated May 24, 2002, NYMEX filed rule changes implementing an initiative to provide clearing services for specified energy contracts executed in the OTC markets. NYMEX certified that the rules comply with the Act and the Commission's regulations. Under the provision, NYMEX initially listed 25 contracts that are entered into OTC and accepted for clearing by NYMEX, but are not listed for trading on the Exchange. In connection with the NYMEX initiative, on May 30, 2002, the Commission issued an order pursuant to section 4d of the Act. The order provides that, subject to certain terms and conditions, the NYMEX Clearinghouse and FCMs clearing through the NYMEX Clearinghouse may commingle customer funds used to margin, secure, or guarantee transactions in futures contracts executed in the OTC markets and cleared by the NYMEX Clearinghouse with other funds held in segregated accounts maintained in accordance with section 4d of the Act and Commission Regulations thereunder.

contract.[9] By a petiton dated February 6, 2004, NYMEX requested a technical amendment to the original order to apply it to a third category—contracts listed only for clearing at the Exchange and with respect to which the Exchange's rules provide for exchanges of options for options ("EOOs"). The Commission granted the Exchange's request by order dated February 10, 2004. NYMEX's initial petition further proposed that transactions subject to the requested interpretation would be subject to additional conditions and restrictions detailed in the petition and described below.[10]

B. Arguments in Support of the Original Petition

In its original petition, NYMEX offered supporting arguments based on both public interest considerations and a detailed analysis of the Act's ECP definition. Those arguments are fully described in the **Federal Register** notice implementing the original 2003 order.[11]

C. Trading Restrictions and Exchange Oversight

In its original petition, NYMEX represented that it would have appropriate compliance systems in place to monitor OTC trading by Exchange floor members.[12] NYMEX also suggested that, consistent with the standards already applicable to floor members with respect to their trading on the Exchange, the Commission should provide that floor members' transactions in the permissible contracts that are not executed on a trading facility be executed only pursuant to the section 2(h)(1) exemption. As indicated above, all section 2(h)(1) transactions would be subject to the Act's antimanipulation provisions and, in certain situations, its antifraud provisions.[13] Finally, the Exchange represented that it would agree, as a condition for its members participating in the OTC markets, to limit OTC trading by floor members such that the counterparties to their trades must not be other floor members for contracts that are listed for trading on the Exchange. Thus, for example, floor members could not be counterparties in connection with an OTC natural gas swap to be exchanged for a futures position in the NYMEX Natural Gas Futures contract. NYMEX floor members could be counterparties in connection with a Chicago Basis swap that is subsequently cleared at NYMEX through EFS procedures because that contract is listed only for clearing at the Exchange.

D. The Commission's Conclusion Regarding the Original Petition

After consideration of the original NYMEX petition, the Commission determined that NYMEX floor members, subject to certain conditions and for a two-year period commencing on the date of publication of the order in the **Federal Register**, would be eligible to be ECPs as that term is defined in section 1a(12) of the Act.[14] The floor members were required to meet the financial qualifications of an ECP by having a financial guarantee for the OTC transactions from a NYMEX clearing member that is registered as an FCM and that meets certain minimum working capital requirements.

The Commission noted that the execution and clearing of such transactions has financial implications for the clearing system.[15] Thus, the Commission added certain safeguards to the original order to limit the possibility of a trader entering into OTC transactions that could create financial difficulty for the guarantor FCM, the clearing entity or other clearing firms. First, the guarantor FCM must clear, at NYMEX, every OTC transaction for which it provides such a guarantee. Second, in order to assure that the guarantor FCM is adequately capitalized, the guarantor FCM must have and maintain at all times minimum working capital [16] of at least $20 million.[17]

The Commission determined to make the original order effective for a two-year period in order to provide the opportunity to evaluate the impact of the OTC trading on both the OTC market and on NYMEX. Thus, the Commission required that NYMEX submit a report reviewing its experiences and the experiences of its floor members and clearing members with respect to OTC trading, including: The levels of OTC trading and related clearing activity; the number of floor members and clearing members who participated in these activities; and an evaluation of whether the Commission should extend this Order and, if so, whether any modifications should be made thereto. This report was incorporated into the Exchange's January 19, 2005 petition seeking the initial extension of the relief granted in the original petition.

III. The Initial Extension

The Exchange's petition seeking the initial extension of the relief granted in the original order included the required report concerning the experiences of the Exchange, its floor members and clearing members under the original order. For details regarding that report and the Exchange's arguments in support of the initial extension, see the Commission Order granting the initial extension.[18]

IV. The Second Extension

A. The Exchange Report

The order granting the initial extension contemplated the possibility of a further extension. It provided, however, that "[i]n the event NYMEX requests a further * * * extension of the ECP Order, the request shall include a report to the Commission reviewing the experiences of the Exchange and its floor members and clearing members under the Order." [19]

The request for a second extension did include the required report. The

[9] EFS transactions are permitted at the Exchange pursuant to NYMEX Rule 6.21A, "Exchange of Futures for, or in Connection with, Swap Transactions." The swap component of the transaction must involve the commodity underlying a related NYMEX futures contract, or a derivative, byproduct, or related product of such a commodity. In furtherance of its effort to permit OTC clearing at the Exchange, NYMEX amended the rule to include as eligible EFS transactions "any contract executed off the Exchange that the Exchange has designated as eligible for clearing at the Exchange." The Division notes that, subsequent to the Commission's ECP Order responding to the Exchange's original petition, NYMEX listed on its ClearPort(sm) Trading venue a significant number of futures contracts modeled after OTC energy swap agreements. While these futures contracts are competitively traded on the ClearPort(sm) Trading market, the vast majority of positions in these contracts are established via EFS transactions that are executed non-competitively away from the Exchange and then submitted to NYMEX via its ClearPort(sm) Clearing service.

[10] NYMEX also suggested a further limitation on floor members' permissible transactions by not permitting any OTC transactions in electricity commodities.

[11] 68 FR 5621 (February 4, 2003).

[12] *Id.*

[13] *See supra* note 5.

[14] A NYMEX floor member who is determined to be an ECP based upon compliance with the provisions set forth in the Commission's original order is an ECP only for the purpose of entering into transactions executed pursuant to section 2(h)(1) of the Act and as described in the order.

[15] The Commission noted that the guarantor FCM could restrict or otherwise condition the trading for which the guarantee is provided. The guarantor could, for instance, limit trading to certain commodities, place financial limits on overall or daily positions, or restrict trading by number or size of acceptable transactions.

[16] For the purposes of an FCM clearing member, NYMEX Rule 9.21 defines "working capital" to mean "adjusted net capital" as defined by CFTC Regulation 1.17.

[17] The original order provided a sliding scale for the two-year duration of the original order whereby a clearing member was required to have minimum working capital of $5 million during the first 12 months, $10 million during the thirteenth through eighteenth months, and $20 million thereafter. The final $20 million requirement is carried over into this order.

[18] 70 FR 6630 at 6632 (February 8, 2005).

[19] *Id.* at 6633.

Exchange based its report on calendar 2005 statistics, effectively covering 11 months of the one-year initial extension period. The Exchange reported that, during 2005, 15 floor members who did not qualify as an ECP on their own participated in EFS transactions through the Exchange program under the ECP Order, three more participants than in 2004. (By contrast, the Exchange's Compliance Department identified 10 floor members who engaged in EFS transactions on the basis of their outright qualification as ECPs.) Exchange data indicate that these 15 floor members participated in cleared transactions constituting a total of 1,028,362 contracts, or 2.9% of the total number of NYMEX Clearport transactions cleared during calendar 2005. In general, this EFS activity was largely concentrated in EFS transactions in the smaller cash settled natural gas or natural gas basis futures contracts that are listed in the NYMEX Clearport Clearing system.

The Exchange attributes this continued light participation by floor members in the ECP program to several possible factors. One factor might be noticeable price volatility in NYMEX's core floor-traded products, which has provided ample trading opportunities on the Exchange's trading floors and made it less necessary for professional futures traders to look to OTC markets for other trading opportunities. Another factor is that the Exchange permits EFS transactions in natural gas futures, but not in crude oil, unleaded gasoline or heating oil futures. Thus, the program would seem to be of interest primarily to only those floor members who already trade natural gas futures.

The Exchange also notes that many floor traders focus upon trading in the front month, or the first few listed months, of a contract (*e.g.*, by putting on spreads between those months) whereas the OTC natural gas market seems to put greater emphasis upon trading in longer periods, such as calendar strips or quarterly or seasonal strip trading. One result of this different trading approach is that a floor member actively engaging in OTC natural gas trading would probably need to hire an additional clerk to provide active position management for that trader's OTC transactions. In addition, the Exchange points out that the $20 million working capital requirement under the ECP Order has restricted the number of participating clearing members. Of the four clearing members who provide clearing services to the majority of NYMEX floor members, only two are eligible to participate in the ECP program under the $20 million limitation. The Exchange report concludes by noting that the volume of trading by floor members under the ECP program continues to be relatively modest. As noted above, the calendar 2005 volume represented by floor members participating in the program amounted to 1,028,362 contracts, whereas total volume for NYMEX Clearport cleared transactions was 35,229,7865 contracts.

B. The Extension Request

The Commission order granting the initial extension stated that the Commission would welcome petitions requesting similar relief from other designated contract markets. The Commission did, in fact, receive such a petition from the Chicago Mercantile Exchange ("CME"), on November 21, 2005. Whereas the NYMEX petition requested ECP relief on a temporary basis, the CME petition requests that ECP relief for floor members be granted on a permanent basis. NYMEX notes that "[t]he outcome of the CME petition and the possible granting of a permanent Order have a direct bearing on whether NYMEX will petition for an additional limited term extension or a permanent order." Therefore, NYMEX has requested this additional six-month extension to allow sufficient time for the Commission to act on the CME petition. If the Commission grants a permanent order to the CME, NYMEX is expected to request similar relief on the same terms as any CME order.

V. Conclusion

Accordingly, the Commission has determined, consistent with the NYMEX petition of January 25, 2006, that it is appropriate to issue an order pursuant to section 1a(12)(C) of the Act extending the relief granted in its original February 4, 2003 order whereby, subject to certain conditions and for a further six-month period commencing on February 4, 2006, NYMEX floor brokers and floor traders are included within the definition of ECPs who can enter into OTC transactions pursuant to section 2(h)(1) of the Act. Although this order applies only to NYMEX and NYMEX members, the Commission would continue to welcome, in response to a petition so requesting, providing substantially similar relief to other designated contract markets and members of designated contract markets.

VI. Cost Benefit Analysis

Section 15 of the Act, as amended by section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation or order under the Act. By its terms, section 15 does not require the Commission to quantify the costs and benefits of its action or to determine whether the benefits of the action outweigh its costs. Rather, section 15 simply requires the Commission to "consider the costs and benefits" of the subject rule or order.

Section 15(a) further specifies that the costs and benefits of the proposed rule or order shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule or order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act. The Commission undertook a detailed costs-benefits analysis in considering the original order.[20] Actual experience under that order has been consistent with the Commission's analysis.

By further extending the essential provisions of the original 2003 order, this order is intended to reduce regulatory barriers by continuing to permit NYMEX members registered with the Commission as floor brokers or floor traders, when acting in a proprietary capacity, to enter into OTC transactions in exempt commodities pursuant to section 2(h)(1) of the Act if such floor members have obtained a financial guarantee for such transactions from an Exchange clearing member that is registered with the Commission as an FCM. The Commission has considered the costs and benefits of this order in light of the specific provisions of section 15(a) of the Act.

VII. Order

Upon due consideration, and pursuant to its authority under section 1a(12)(C) of the Act, the Commission hereby determines that a NYMEX member who is registered with the Commission as a floor broker or a floor trader, when acting in a proprietary trading capacity, shall continue to be deemed to be an eligible contract participant and may continue to enter into Exchange-specified OTC contracts, agreements or transactions in an exempt

[20] *See* 68 FR 5621 at 5624–25 (February 4, 2003).

commodity under the following conditions:

1. This Order is effective for six months, commencing on February 4, 2006.

2. The contracts, agreements or transactions must be executed pursuant to section 2(h)(1) of the Act.

3. The floor broker or floor trader must have obtained a financial guarantee for the contracts, agreements or transactions from a NYMEX clearing member that:

(a) Is registered with the Commission as an FCM; and,

(b) Clears the OTC contracts, agreements or transactions thus guaranteed.

4. Permissible contracts, agreements or transactions must be limited to trading in a commodity that either:

(a) Is listed only for clearing at NYMEX,

(b) Is listed for trading and clearing at NYMEX and NYMEX's rules provide for exchanges of futures for swaps in that contract, or

(c) Is listed only for clearing at NYMEX and NYMEX's rules provide for exchanges of options for options in that contract,

and each OTC contract, agreement or transaction executed pursuant to the order must be cleared at NYMEX.

5. The floor broker or floor trader may not enter into OTC contracts, agreements or transactions with another floor broker or floor trader as the counterparty for contracts that are listed for trading on the Exchange.

6. NYMEX must have appropriate compliance systems in place to monitor the OTC contracts, agreements or transactions of its floor brokers and floor traders.

7. Clearing members that guarantee and clear OTC contracts, agreements or transactions pursuant to this order must have and maintain at all times minimum working capital of at least $20 million. A clearing member must compute its working capital in accordance with exchange rules and generally accepted accounting principles consistently applied.

8. In the event NYMEX requests a further modification or extension of the ECP Order, the request shall include a report to the Commission reviewing the experiences of the Exchange and its floor members and clearing members under the Order. The report shall include information on the levels of OTC trading and related clearing activity, the number of floor members and clearing members participating in the activity, and the Exchange's reasons supporting the further modification or extension of the Order.

This order is based upon the representations made and supporting material provided to the Commission by NYMEX. Any material changes or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its finding that the provisions set forth herein are appropriate. Further, if experience demonstrates that the continued effectiveness of this order would be contrary to the public interest, the Commission may condition, modify, suspend, terminate or otherwise restrict the provisions of this order, as appropriate, on its own motion.

Issued in Washington, DC on February 3, 2006, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. E6–1777 Filed 2–8–06; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Foreign Futures and Options Transactions

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is granting an exemption to firms designated by the Tokyo Commodity Exchange (TOCOM) from the application of certain of the Commission's foreign futures and option rules based on substituted compliance with certain comparable regulatory and self-regulatory requirements of a foreign regulatory authority consistent with conditions specified by the Commission, as set forth herein. This Order is issued pursuant to Commission Regulation 30.10, which permits persons to file a petition with the Commission for exemption from the application of certain of the Regulations set forth in Part 30 and authorizes the Commission to grant such an exemption if such action would not be otherwise contrary to the public interest or to the purposes of the provision from which exemption is sought.

DATES: *Effective Date:* February 9, 2006.

FOR FURTHER INFORMATION CONTACT: Lawrence B. Patent, Esq., Deputy Director, Susan A. Elliott, Esq., Special Counsel, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5430.

SUPPLEMENTARY INFORMATION: The Commission has issued the following Order:

Order Under CFTC Regulation 30.10 Exempting Firms Designated by the Tokyo Commodity Exchange (TOCOM) From the Application of Certain of the Foreign Futures and Option Regulations the Later of the Date of Publication of the Order Herein in the **Federal Register** or After Filing of Consents by Such Firms and TOCOM, as Appropriate, to the Terms and Conditions of the Order Herein.

Commission Regulations governing the offer and sale of commodity futures and option contracts traded on or subject to the regulations of a foreign board of trade to customers located in the U.S. are contained in part 30 of the Commission's regulations.[1] These regulations include requirements for intermediaries with respect to registration, disclosure, capital adequacy, protection of customer funds, recordkeeping and reporting, and sales practice and compliance procedures that are generally comparable to those applicable to transactions on U.S. markets.

In formulating a regulatory program to govern the offer and sale of foreign futures and option products to customers located in the U.S., the Commission, among other things, considered the desirability of ameliorating the potential extraterritorial impact of such a program and avoiding duplicative regulation of firms engaged in international business. Based upon these considerations, the Commission determined to permit persons located outside the U.S. and subject to a comparable regulatory structure in the jurisdiction in which they were located to seek an exemption from certain of the requirements under part 30 of the Commission's regulations based upon substituted compliance with the regulatory requirements of the foreign jurisdiction.

Appendix A to part 30, "Interpretative Statement With Respect to the Commission's Exemptive Authority Under 30.10 of Its Rules" (Appendix A), generally sets forth the elements the Commission will evaluate in determining whether a particular regulatory program may be found to be comparable for purposes of exemptive relief pursuant to Regulation 30.10.[2] These elements include: (1) Registration, authorization or other form of licensing, fitness review or qualification of persons that solicit and

[1] Commission regulations referred to herein are found at 17 CFR Ch. I (2005).

[2] 52 FR 28990, 29001 (August 5, 1987).

accept customer orders: (2) minimum financial requirements for those persons who accept customer funds; (3) protection of customer funds from misapplication: (4) recordkeeping and reporting requirements; (5) sales practice standards; (6) procedures to audit for compliance with, and to take action against those persons who violate the requirements of the program; and (7) information sharing arrangements between the Commission and the appropriate governmental and/or self-regulatory organization to ensure Commission access on an "as needed" basis to information essential to maintaining standards of customer and market protection within the U.S.

Moreover, the Commission specifically stated in adopting Regulation 30.10 that no exemption of a general nature would be granted unless the persons to whom the exemption is to be applied: (1) Submit to jurisdiction in the U.S. by designating an agent for service of process in the U.S. with respect to transactions subject to part 30 and filing a copy of the agency agreement with the National Futures Association (NFA); (2) agree to provide access to their books and records in the U.S. to Commission and Department of Justice representatives; and (3) notify NFA of the commencement of business in the U.S.[3]

On February 16, 2005, TOCOM petitioned the Commission on behalf of its member firms, located and doing business in Japan, for an exemption from the application of the Commission's part 30 Regulations to those firms. In support of its petition, TOCOM states that granting such an exemption with respect to such firms that it has authorized to conduct foreign futures and option transactions on behalf of customers located in the U.S. would not be contrary to the public interest or to the purposes of the provisions from which the exemption is sought because such firms are subject to a regulatory framework comparable to that imposed by the Commodity Exchange Act (Act) and the regulations thereunder.

Based upon a review of the petition, supplementary materials filed by TOCOM and the recommendation of the Commission's staff, the Commission has concluded that the standards for relief set forth in Regulation 30.10 and, in particular, Appendix A thereof, have been met and that compliance with applicable Japanese law and TOCOM regulations may be substituted for compliance with those sections of the Act and regulations thereunder more particularly set forth herein.

By this Order, the Commission hereby exempts, subject to specified conditions, those firms identified to the Commission by TOCOM as eligible for the relief granted herein from:

—Registration with the Commission for firms and for firm representatives;
—The requirement in Commission Regulation 30.6(a) and (d), 17 CFR 30.6(a) and (d), that firms provide customers located in the U.S. with the risk disclosure statements in Commission Regulation 1.55(b), 17 CFR 1.55(b), and Commission Regulation 33.7, 17 CFR 33.7, or as otherwise approved under Commission Regulation 1.55(c), 17 CFR 1.55(c);
—The separate account requirement contained in Commission Regulation 30.7, 17 CFR 30.7;
—Those sections of part 1 of the Commission's financial regulations that apply to foreign futures and options sold in the U.S. as set forth in part 30; and
—Those sections of part 1 of the Commission's regulations relating to books and records which apply to transactions subject to part 30,

based upon substituted compliance by such persons with the applicable statutes and regulations in effect in Japan.

This determination to permit substituted compliance is based on, among other things, the Commission's finding that the regulatory framework governing persons in Japan who would be exempted hereunder provides:

(1) A system of qualification or authorization of firms who deal in transactions subject to regulation under part 30 that includes, for example, criteria and procedures for granting, monitoring, suspending and revoking licenses, and provisions for requiring and obtaining access to information about authorized firms and persons who act on behalf of such firms;

(2) Financial requirements for firms including, without limitation, a requirement for a minimum level of working capital and daily mark-to-market settlement and/or accounting procedures;

(3) A system for the protection of customer assets that is designed to preclude the use of customer assets to satisfy house obligations and requires separate accounting for such assets;

(4) Recordkeeping and reporting requirements pertaining to financial and trade information;

(5) Sales practice standards for authorized firms and persons acting on their behalf that include, for example, required disclosures to prospective customers and prohibitions on improper trading advice;

(6) Procedures to audit for compliance with, and to redress violations of, the customer protection and sales practice requirements referred to above, including, without limitation, an affirmative surveillance program designed to detect trading activities that take advantage of customers, and the existence of broad powers of investigation relating to sales practice abuses; and

(7) Mechanisms for sharing of information between the Commission, TOCOM, and the Japanese regulatory authorities on an "as needed" basis including, without limitation, confirmation data, data necessary to trace funds related to trading futures products subject to regulation in Japan, position data, and data on firms' standing to do business and financial condition.

This finding was first made in 1993, with the issuance of Regulation 30.10 relief to the Tokyo Grain Exchange (TGE).[4] Commission staff have concluded, upon review of the petition of TOCOM and accompanying exhibits that describe in detail changes to the Japanese regulatory regime since 1993, that Japanese regulation of futures and options exchanges continues to be comparable to that of the U.S. in the areas specified in Appendix A of part 30, as described above.

This Order does not provide an exemption from any provision of the Act or regulations thereunder not specified herein, such as the antifraud provision in Regulation 30.9. Moreover, the relief granted is limited to brokerage activities undertaken on behalf of customers located in the U.S. with respect to transactions on or subject to the regulations of TOCOM for products that customers located in the U.S. may trade.[5] The relief does not extend to regulations relating to trading, directly or indirectly, on U.S. exchanges. For example, a firm trading in U.S. markets for its own account would be subject to the Commission's large trader reporting requirements.[6] Similarly, if such a firm were carrying a position on a U.S. exchange on behalf of foreign clients, it would be subject to the reporting requirements applicable to foreign brokers.[7] The relief herein is inapplicable where the firm solicits or

[3] 52 FR 28980, 28981 and 29002.

[4] *See* TGE Regulation 30.10 Order, issued February 17, 1993, 58 FR 10953 (February 23, 1993).

[5] *See, e.g.*, sections 2(a)(1)(C) and (D) of the Act.

[6] *See, e.g.*, 17 CFR part 18 (2005).

[7] *See, e.g.*, 17 CFR parts 17 and 21 (2005).

accepts orders from customers located in the U.S. for transactions on U.S. markets. In that case, the firm must comply with all applicable U.S. laws and regulations, including the requirement to register in the appropriate capacity.

The eligibility of any firm to seek relief under this exemptive Order is subject to the following conditions:

(1) The regulatory or self-regulatory organization responsible for monitoring the compliance of such firms with the regulatory requirements described in the Regulation 30.10 petition must represent in writing to the CFTC[8] that:

(a) Each firm for which relief is sought is registered, licensed or authorized, as appropriate, and is otherwise in good standing under the standards in place in Japan; such firm is engaged in business with customers in Japan as well as in the U.S.; and such firm and its principals and employees who engage in activities subject to part 30 would not be statutorily disqualified from registration under section 8a(2) of the Act, 7 U.S.C. 12a(2);

(b) It will monitor firms to which relief is granted for compliance with the regulatory requirements for which substituted compliance is accepted and will promptly notify the Commission or NFA of any change in status of a firm that would affect its continued eligibility for the exemption granted hereunder, including the termination of its activities in the U.S.;

(c) All transactions with respect to customers resident in the U.S. will be made on or subject to the regulations of TOCOM and the Commission will receive prompt notice of all material changes to the relevant laws in Japan, any regulations promulgated thereunder and TOCOM regulations;

(d) Customers located in the U.S. will be provided no less stringent regulatory protection than Japanese customers under all relevant provisions of Japanese law; and

(e) It will cooperate with the Commission with respect to any inquiries concerning any activity subject to regulation under the part 30 Regulations, including sharing the information specified in Appendix A on an "as needed" basis and will use its best efforts to notify the Commission if it becomes aware of any information that in its judgment affects the financial or operational viability of a member firm doing business in the U.S. under the exemption granted by this Order.

(2) Each firm seeking relief hereunder must represent in writing that it:

(a) Is located outside the U.S., its territories and possessions and, where applicable, has subsidiaries or affiliates domiciled in the U.S. with a related business (*e.g.*, banks and broker/dealer affiliates) along with a brief description of each subsidiary's or affiliate's identity and principal business in the U.S.;

(b) Consents to jurisdiction in the U.S. under the Act by filing a valid and binding appointment of an agent in the U.S. for service of process in accordance with the requirements set forth in Regulation 30.5;

(c) Agrees to provide access to its books and records related to transactions under part 30 required to be maintained under the applicable statutes and regulations in effect in Japan upon the request of any representative of the Commission or U.S. Department of Justice at the place in the U.S. designated by such representative, within 72 hours, or such lesser period of time as specified by that representative as may be reasonable under the circumstances after notice of the request;

(d) Has no principal or employee who solicits or accepts orders from customers located in the U.S. who would be disqualified under section 8a(2) of the Act, 7 U.S.C. 12a(2), from doing business in the U.S.;

(e) Consents to participate in any NFA arbitration program that offers a procedure for resolving customer disputes on the papers where such disputes involve representations or activities with respect to transactions under part 30, and consents to notify customers located in the U.S. of the availability of such a program;

(f) Undertakes to comply with the applicable provisions of Japanese laws and TOCOM regulations that form the basis upon which this exemption from certain provisions of the Act and Regulations thereunder is granted; and

(g) Maintains the greater of regulatory capital as required by TOCOM or by Commission regulations.[9]

As set forth in the Commission's September 11, 1997 Order delegating to NFA certain responsibilities, the written representations set forth in paragraph (2) shall be filed with NFA.[10] Each firm seeking relief hereunder has an ongoing obligation to notify NFA should there be a material change to any of the representations required in the firm's application for relief.

This Order will become effective as to any designated TOCOM firm the later of the date of publication of the Order in the **Federal Register** or the filing of the consents set forth in paragraphs (2)(a)–(g). Upon filing of the notice required under paragraph (1)(b) as to any such firm, the relief granted by this Order may be suspended immediately as to that firm. That suspension will remain in effect pending further notice by the Commission, or the Commission's designee, to the firm and TOCOM.

This Order is issued pursuant to Regulation 30.10 based on the representations made and supporting material provided to the Commission and the recommendation of the staff, and is made effective as to any firm granted relief hereunder based upon the filings and representations of such firms required hereunder. Any material changes or omissions in the facts and circumstances pursuant to which this Order is granted might require the Commission to reconsider its finding that the standards for relief set forth in Regulation 30.10 and, in particular, Appendix A, have been met. Further, if experience demonstrates that the continued effectiveness of this Order in general, or with respect to a particular firm, would be contrary to public policy or the public interest, or that the systems in place for the exchange of information or other circumstances do not warrant continuation of the exemptive relief granted herein, the Commission may condition, modify, suspend, terminate, withhold as to a specific firm, or otherwise restrict the exemptive relief granted in this Order, as appropriate, on its own motion.

The Commission will continue to monitor the implementation of its program to exempt firms located in jurisdictions generally deemed to have a comparable regulatory program from the application of certain of the foreign futures and option regulations and will make necessary adjustments if appropriate.

Issued in Washington, DC on February 6, 2006.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. E6–1776 Filed 2–8–06; 8:45 am]

BILLING CODE 6351–01–P

[8] As described below, these representations are to be filed with NFA.

[9] *See*, Final Rulemaking, "Minimum Financial and Related Reporting Requirements for Futures Commission Merchants and Introducing Brokers," (Risk-based Capital Regulation), 69 FR 49784–49800, August 12, 2004.

[10] 62 FR 47792, 47793 (September 11, 1997). Among other duties, the Commission authorized NFA to receive requests for confirmation of Regulation 30.10 relief on behalf of particular firms, to verify such firms' fitness and compliance with the conditions of the appropriate Regulation 30.10 Order and to grant exemptive relief from registration to qualifying firms.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0159]

Federal Acquisition Regulation; Information Collection; Central Contractor Registration

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning the Central Contractor Registration database. The clearance currently expires on June 30, 2006.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before April 10, 2006.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT Mr. Ernest Woodson, Contract Policy Division, GSA, (202) 501–3775.

SUPPLEMENTARY INFORMATION:

A. Purpose

The Central Contractor Registration (CCR) is the primary vendor database for the U.S. Federal Government. CCR collects, validates, stores, and disseminates data in support of agency acquisition missions.

Both current and potential Federal Government vendors are required to register in CCR in order to be awarded contracts by the Federal Government. Vendors are required to complete a one-time registration to provide basic information relevant to procurement and financial transactions. Vendors must update or renew their registration at least once per year to maintain an active status.

CCR validates the vendor information and electronically shares the secure and encrypted data with Federal agency finance offices to facilitate paperless payments through electronic funds transfer (EFT). Additionally, CCR shares the data with Federal Government procurement and electronic business systems.

B. Annual Reporting Burden

Respondents: 54,199.
Responses Per Respondent: 1.
Annual Responses: 54,199.
Hours Per Response: 1.
Total Burden Hours: 54,199.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VIR), Room 4035, 1800 F Street, NW, Washington, DC 20405; telephone (202) 501–4755. Please cite OMB Control Number 9000–0159, Central Contractor Registration, in all correspondence.

Dated: February 6, 2006.

Gerald Zaffos,

Director, Contract Policy Division.

[FR Doc. 06–1210 Filed 2–8–06; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Business Board; Notice of Advisory Committee Meeting

AGENCY: Department of Defense, DoD.

ACTION: Notice of Advisory Committee Meeting.

SUMMARY: The Defense Business Board (DBB) will meet in open session on Wednesday, March 8, 2006, at the Pentagon, Washington, DC from 9 a.m. until 10 a.m. The mission of the DBB is to advise the Secretary of Defense on effective strategies for implementation of best business practices of interest to the Department of Defense. At this meeting, the Board will deliberate on their findings and recommendations related to: Human Resources Management and the Enterprise Transition Plan.

DATES: Wednesday, March 8, 2006, 9 a.m. to 10 a.m.

ADDRESSES: 1155 Defense Pentagon, 3C288, Washington, DC 20301–1155

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to attend the meeting must contact the Defense Business Board no later than Wednesday, March 1st for further information about escort arrangements in the Pentagon. Additionally, those who wish to make oral comments or delivery written comments should also request to be scheduled, and submit a written text of the comments by Wednesday, March 1st to allow time for distribution to the Board members prior to the meeting. Individual oral comments will be limited to five minutes, with the total oral comment period not exceeding 30 minutes.

The DBB may be contacted at: Defense Business Board, 1155 Defense Pentagon, Room 3C288, Washington, DC 20301–1155, via e-mail at *defensebusinessboard2@oosd.mil* or via phone at (703) 697–2168.

Dated: February 3, 2006.

L.M. Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–1181 Filed 2–8–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for the Construction and Operation of an Open Pit Taconite Mine Proposed by Ispat Inland Mining Between Biwabik and McKinley in St. Louis County, MN

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent.

SUMMARY: Ispat Inland Mining (Ispat) has applied to the St. Paul District, Corps of Engineers (Corps) for a permit to discharge dredged or fill material into wetlands to facilitate the construction and operation of a taconite mine consisting of two conventional open pits in a deposit known as the East Reserve (formerly known as the J&L East Reserve) between Biwabik and McKinley in St. Louis County, MN. The combined area of the two open pits would be 364 acres. The proposed pits contain an estimated 116,000,000 long

tons of ore. The ore would be hauled by truck approximately 1.9 miles on a proposed new haul road spur and then an additional 5.5 miles on an existing haul road to Ispat's currently permitted and operating Minorca taconite processing facility north of Virginia, MN. Tailing waste would be disposed of in Ispat's currently permitted and operating Minorca and Upland tailings basins. The mining process would require the construction of overburden, waste rock, and lean ore stockpiles on the north side of the proposed pits. The total stockpile area would cover approximately 375 acres. Project plans call for the mining of an average of just over six million long tons of crude ore per year over the proposed 18-year life of the mine. The project would allow mining operations and taconite processing at the Minorca Plant to continue until 2024.

The project would require the discharge of dredged or fill material into approximately 75.7 acres of wetlands. While some of the wetlands may be isolated, the majority of the wetlands are adjacent to an unnamed tributary to the Embarrass River, which is a tributary to the St. Louis River, which is a navigable water of the U.S., or the wetlands are adjacent to an unnamed tributary to the Pike River, which is a navigable water of the United States. Ispat proposes to utilize wetland credits from the existing Ispat Inland wetland mitigation bank in Aitkin County, MN to compensate for the lost wetland functions and values that would be caused by the proposed project. The discharge of dredged or fill material into waters of the United States requires a permit issued by the Corps under Section 404 of the Clean Water Act. The final environmental impact statement will be used as a basis for the permit decision and to ensure compliance with the National Environmental Policy Act (NEPA).

ADDRESSES: Questions concerning the Draft Environmental Impact Statement (DEIS) can be addressed to Mr. Jon K. Ahlness, Regulatory Branch by letter at U.S. Army Corps of Engineers, 190 Fifth Street East, Suite 401, St. Paul, MN 55101–1638, by telephone or by e-mail at *jon.k.ahlness@mvp02.usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: Mr. Jon K. Ahlness, (651) 290–5381.

SUPPLEMENTARY INFORMATION: The Corps and the State of Minnesota will jointly prepare the DEIS. The Corps is the lead federal agency and the Minnesota Department of Natural Resources (MnDNR) is the lead agency. The MnDNR has already completed its scoping process and had hired a consultant to prepare its DEIS. The Corps is joining with the MnDNR to prepare a joint Federal/State DEIS. The Corps, with assistance from the MnDNR, will prepare and release to the public a Draft Scoping Decision Document, along with the MnDNR Scoping Environmental Assessment Worksheet (EAW). The public will have 30 days to provide comments on those two documents. In accordance with 40 CFR 1506.5(c) and Corps policy, the Corps will determine the suitability of the MnDNR consultant for Federal purposes. We anticipate that the DEIS will be available to the public in May of 2006.

The DEIS will assess impacts of the proposed action and reasonable alternatives, identify and evaluate mitigation alternatives, and discuss potential environmental monitoring. Significant issues and resources to be identified in the DEIS will be determined through coordination with responsible federal, state, and local agencies; the general public; interested private organizations and parties; and affected Native American Tribes. Anyone who has an interest in participating in the development of the DEIS is invited to contact the St. Paul District, Corps of Engineers. Major issues identified to date for discussion in the DEIS are the impacts of the proposed project on:

1. Fish, wildlife, and ecologically sensitive resources.

2. Water resources, including: Water use and potential impacts to the water supplies of Biwabik and McKinley; surface water hydrology; groundwater hydrology; waters of the U.S., including wetlands; and receiving stream geomorphology.

3. Water quality, including: Surface water runoff; storm water management; and mercury discharges from pit dewatering.

4. Cumulative impacts, including: Wildlife habitat loss/fragmentation and habitat corridor obstruction/landscape barriers: wetlands; and water flow/volume and water quality in unnamed streams and the Embarrass River.

Additional issues of interest may be identified through the public scoping process.

Issuing a permit for the development of an open pit taconite mine is considered to be a major Federal action that may have a significant impact on the quality of the human environment. The project: (1) Would have a significant adverse effect on wetlands (which are special aquatic sites), and (2) has the potential to significantly affect water quality, groundwater, fish, and wildlife. Our environmental review will be conducted to the requirements of the National Environmental Policy Act of 1969, National Historic Preservation Act of 1966, Council of Environmental Quality Regulations, Endangered Species Act of 1973, Section 404 of the Clean Water Act, and other applicable laws and regulations.

Dated: January 29, 2006.

Michael F. Pfenning,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 06–1212 Filed 2–8–06; 8:45 am]

BILLING CODE 3710–CY–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Inland Waterways Users Board

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of open meeting.

SUMMARY: In Accordance with 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the forthcoming meeting.

Name of Committee: Inland Waterways Users Board (Board).

Date: February 22, 2006.

Location: The Embassy Suites—Old Town Alexandria, 1900 Diagonal Road, Alexandria, VA 22314, (703–684–5900).

Time: Registration will begin at 8:30 a.m. and the meeting is scheduled to adjourn at 12:30 p.m.

Agenda: The Board will consider its project investment priorities for the next fiscal year. The Board will also hear briefings on the status of both the funding for inland navigation projects and studies, and the Inland Waterways Trust Fund.

FOR FURTHER INFORMATION CONTACT: Mr. Mark R. Pointon, Headquarters, U.S. Army Corps of Engineers, CECW–MVD, 441 G Street, NW., Washington, DC 20314–1000; Ph: 202–761–4258.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 06–1211 Filed 2–8–06; 8:45 am]

BILLING CODE 3710–92–M

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Correction Notice.

SUMMARY: On January 18, 2006, the Department of Education published a notice in the **Federal Register** (Page 2915, Column 2) for the information collection, "Fiscal Operations Report for 2005–2006 and Application To Participate for 2007–2008 (FISAP) and Reallocation Form E40–4P." This notice hereby corrects the Abstract to read, "This application data will be used to compute the amount of funds needed by each school for the 2007–2008 award year. The Fiscal Operations Report data will be used to assess program effectiveness, account for funds expended during the 2005–2006 award year, and as part of the school funding process. The Reallocation form is part of the FISAP on the web. Schools will use it in the summer to return unexpended funds for 2005–2006 and request supplemental FWS funds for 2006–2007."

The IC Clearance Official, Regulatory Information Management Services, Office of the Chief Information Officer, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: February 3, 2006.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of the Chief Information Officer.

[FR Doc. E6–1761 Filed 2–8–06; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Safe and Drug-Free Schools; Overview Information; Alcohol and Other Drug Prevention Models on College Campuses Notice Inviting Applications for New Awards for Fiscal Year (FY) 2006

Catalog of Federal Domestic Assistance (CFDA) Number: 84.184N.

Dates:

Applications Available: February 9, 2006.

Deadline for Transmittal of Applications: March 22, 2006.

Deadline for Intergovernmental Review: May 22, 2006.

Eligible Applicants: Institutions of higher education (IHEs) that offer an associate or baccalaureate degree. Additionally, an IHE must not have received an award under this grant competition (CFDA 84.184N) during the previous five fiscal years (fiscal years 2001 through 2005).

Estimated Available Funds: $750,000. Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2007 based on the list of unfunded applications from this competition.

Estimated Range of Awards: $125,000–$175,000.

Estimated Average Size of Awards: $150,000.

Estimated Number of Awards: 5.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 15 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The goals of this program are to identify models of effective campus-based alcohol and other drug prevention programs and disseminate information about these programs to other colleges and universities where similar efforts may be adopted.

Priority: This priority is from the notice of final priority and eligibility requirements for this program, published in the **Federal Register** on June 24, 2005 (70 FR 36570).

Absolute Priority: For FY 2006 and any subsequent year in which we make awards on the basis of the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is: Under this priority the Department provides funding to institutions of higher education (IHEs) that have been implementing effective alcohol and other drug prevention programs on their campuses. An IHE that receives funding under this priority must identify, enhance, further evaluate, and disseminate information about an effective alcohol or other drug prevention program being implemented on its campus. To meet the priority, applicants must provide in their application—

(1) A description of an alcohol or other drug prevention program that has been implemented for at least two full academic years on the applicant's campus;

(2) Evidence of the effectiveness of the program on the applicant's campus;

(3) A plan to enhance and further evaluate the program during the project period; and

(4) A plan to disseminate information to assist other IHEs in implementing a similar program

Program Authority: 20 U.S.C. 7131.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, 99, and 299. (b) The notice of final priority and eligibility requirements published in the **Federal Register** on June 24, 2005 (70 FR 36570).

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $750,000. Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2007 based on the list of unfunded applications from this competition.

Estimated Range of Awards: $125,000–$175,000.

Estimated Average Size of Awards: $150,000.

Estimated Number of Awards: 5.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 15 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs that offer an associate or baccalaureate degree. Additionally, an IHE must not have received an award under this grant competition (CFDA 84.184N) during the previous five fiscal years (fiscal years 2001 through 2005).

2. *Cost Sharing or Matching:* This program does not involve cost sharing or matching.

IV. Application and Submission Information

1. *Address To Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.184N.

Copies of the application package for this competition can also be found at: *http://www.ed.gov/programs/dvpcollege/applicant.html.*

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to one of the contact persons listed in section VII of this

notice under **FOR FURTHER INFORMATION CONTACT.**

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

3. *Submission Dates and Times:* Applications Available: February 9, 2006. Deadline for Transmittal of Applications: March 22, 2006.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV.6. *Other Submission Requirements* in this notice.

Deadline for Intergovernmental Review: May 22, 2006.

We do not consider an application that does not comply with the deadline requirements.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Alcohol and Other Drug Prevention Models on College Campuses-CFDA Number 84.184N must be submitted electronically using the Grants.gov Apply site at: *http://www.grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for Alcohol and Other Drug Prevention Models on College Campuses Program at: *http://www.grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search.

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are time and date stamped. Your application must be fully uploaded and submitted, and must be date/time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not consider your application if it is date/time stamped by the Grants.gov system later than 4:30 p.m., Washington, DC time, on the application deadline date. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date/time stamped by the Grants.gov system after 4:30 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*
- To submit your application via Grants.gov, you must complete all of the steps in the Grants.gov registration process (see *http://www.Grants.gov/GetStarted*). These steps include (1) registering your organization, (2) registering yourself as an Authorized Organization Representative (AOR), and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/assets/GrantsgovCoBrandBrochure8X11.pdf).* You also must provide on your application the same D–U–N–S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to successfully submit an application via Grants.gov.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information typically included on the Application for Federal Education Assistance (SF 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified above or submit a password protected file, we will not review that material.
- Your electronic application must comply with any page limit requirements described in this notice.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Department will retrieve your application from Grants.gov and send you a second confirmation by e-mail that will include a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically, or by

hand delivery. You also may mail your application by following the mailing instructions as described elsewhere in this notice. If you submit an application after 4:30 p.m., Washington, DC time, on the deadline date. please contact the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT**, and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number (if available). We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: Extensions referred to in this section apply only to the unavailability of or technical problems with the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system;

and

- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Vera Messina, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E258, Washington, DC 20202–6450. FAX: (202) 205–5722.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier), your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.184N),400 Maryland Avenue, SW., Washington, DC 20202–4260,

or

By mail through a commercial carrier: U.S. Department of Education, Application Control Center—Stop 4260, Attention: (CFDA Number 84.184N), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark,

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service,

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.184N), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of the Application for Federal Education Assistance (SF 424) the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this program are from 34 CFR 75.210 and are listed in the application package for this competition.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial

expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* The Secretary may choose to develop performance measures for the Alcohol and Other Drug Prevention Models on College Campuses Program in accordance with the Government Performance and Results Act (GPRA). If indicators are developed, grantees will be asked to provide information that relates to participant outcomes and project management.

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Vera Messina, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E258, Washington, DC 20202–6450. Telephone: (202) 260–8273 or by e-mail: *vera.messina@ed.gov* or Ruth Tringo, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E338, Washington, DC 20202–6450. Telephone: (202) 260–2838 or by e-mail: *ruth.tringo@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–888–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the program contact persons listed in this section.

VIII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Dated: February 3, 2006.

Deborah A. Price,

Assistant Deputy Secretary for Safe and Drug-Free Schools.

[FR Doc. E6–1812 Filed 2–9–06; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services

Overview Information

Personnel Development to Improve Services and Results for Children with Disabilities—Principal Leadership Professional Development Center to Support School Improvement to Ensure Access to, and Participation and Progress in the General Education Curriculum in the Least Restrictive Environment.

Notice inviting applications for new awards for fiscal year (FY) 2006.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.325P.

Dates:

Applications Available: February 9, 2006.

Deadline for Transmittal of Applications: March 24, 2006.

Deadline for Intergovernmental Review: May 23, 2006.

Eligible Applicants: Institutions of higher education (IHEs).

Estimated Available Funds: $285,000.

Maximum Award: We will reject any application that proposes a budget exceeding $285,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of this program are to (1) help address State-identified needs for highly qualified personnel—in special education, related services, early intervention, and regular education—to work with infants or toddlers with disabilities, or children with disabilities; and (2) ensure that those personnel have the skills and knowledge—derived from practices that have been determined through research and experience to be successful—that are needed to serve those children.

Priority: In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified in the statute (see sections 662(d) and 681(d) of the Individuals with Disabilities Education Act (IDEA)).

Absolute Priority: For FY 2006 this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Principal Leadership Professional Development Center to Support School Improvement to Ensure Access to, and Participation and Progress in the General Education Curriculum in the Least Restrictive Environment

Background

Principal leadership is an essential element of school improvement that entails simultaneous attention to effective and efficient service delivery, use of resources, and academic performance. Successful principals use a variety of strategies and tools to leverage improvement on a school-wide basis, for all students including students with disabilities. For example, effective principals often build partnerships with families, business leaders, and community organizations, and establish and mobilize leadership teams to assess community resources, align initiatives, and design and implement coherent strategic plans to support student success. Principal leadership guides students, families, school personnel, and community partners through the development, design, implementation, and evaluation of coherent and evidence-based systemic school improvement strategies. Effective principals also mentor and coach teachers to build school capacity to ensure that all students have access to a content-rich general education curriculum and instructional supports to achieve academic success.

Unfortunately, there is a gap between evidence-based best practice and current practice in principal leadership and implementation of school improvement activities. This gap is particularly evident in providing access to the general education curriculum in the least restrictive environment for students with disabilities.

Many principals have difficulty with the logistics of establishing inclusive classrooms due to the small number of highly qualified special education teachers who have full schedules and caseloads, causing many schools to group special education students together rather than assign them general education classrooms with supplementary supports. According to the Special Education Elementary Longitudinal Study (2004), 45 percent of elementary and middle school students with disabilities receive their primary language arts instruction in special education settings—resource rooms, self-contained special education classes, or one-to-one instruction rather than in the general education classroom. According to the National Longitudinal Transition Study 2 (2003), even when

physically present in the general education classroom, students with disabilities consistently participate less actively than their classmates in their general education academic classes. In 2005, of the students with disabilities included in the sample for the National Assessment of Educational Progress, 35 percent were excluded from the fourth-grade reading assessment and 19 percent were excluded from fourth-grade math assessment because of their disability. Furthermore, according to the 22nd Annual Report to Congress, 31 percent of special education students ages 14 to 21 drop out of school. These statistics demonstrate that there is a compelling need for principals to implement school improvement activities that ensure that students with disabilities have access to, and participate and progress in the general education curriculum in the least restrictive environment.

Priority

The Assistant Secretary establishes an absolute priority for the establishment of a Principal Leadership Professional Development Center to Support School Improvement to Ensure Access to, and Participation and Progress in the General Education Curriculum in the Least Restrictive Environment (PD Center). The purpose of the PD Center is to support principals in their efforts to implement unified school improvement initiatives that are designed to ensure students with disabilities have access to, and participate and progress in the general education curriculum in the least restrictive environment.

The PD Center must:

- Assist a cadre of principals in the development, implementation, and continuous improvement of school improvement efforts using evidence-based practices to ensure that students with disabilities have access to, and participate and progress in the general education curriculum in the least restrictive environment;
- Support networks of principals engaged in school improvement efforts that include students with disabilities;
- Create partnerships among principal professional associations, school and university personnel, and business leaders to promote and support principal leadership for school improvement and inclusion of students with disabilities across the Nation; and
- Use existing principal professional organization networks to inform the PD Center's activities and serve as dissemination vehicles.

To meet this priority, the PD Center must:

(a) Build the capacity of principals to use evidence-based school improvement practices to ensure access to, and participation and progress in the general education curriculum in the least restrictive environment for students with disabilities at the kindergarten through grade 12 levels;

(b) Provide training and onsite professional development to principals in partnership with at least 30 schools to lead school improvement initiatives that focus on enhancing access to, and participation and progress in the general education curriculum in the least restrictive environment for students with disabilities;

(c) Identify and widely disseminate the most successful evidence-based school systemic improvement practices available to principals throughout the United States for school improvement activities that ensure access to, and participation and progress in the general education curriculum in the least restrictive environment for students with disabilities. To the extent possible, the Center should use criteria from the What Works Clearinghouse (WWC) and other rigorous sources in determining what is "evidenced-based";

(d) Complete a synthesis of available research literature within the first six months of the project start date. To the extent possible, the PD Center will consult with sources such as the WWC, the Access Center: Improving Outcomes for All Students K–9 that is funded by the Department's Office of Special Education Programs (OSEP), and the review board of OSEP's Dissemination Center. The synthesis must include: (1) A summary of the research literature describing promising evidence-based school improvement instruction and progress-monitoring practices in elementary, middle, and secondary schools that ensure access to, and participation and progress in the general education curriculum in the least restrictive environment for students with disabilities to ensure schools meet adequate yearly progress indicators; (2) a conceptual framework using evidence-based research practices within a coherent decision-making model to support the adoption, implementation, evaluation, sustainability, and scaling up of school improvement strategies that ensure access to, and participation and progress in the general education curriculum in the least restrictive environment for students with disabilities; (3) a description of evidence-based practices that may be used to foster and maintain partnerships between schools and families to support school improvement activities; (4) a description of effective approaches to professional development and capacity-building within schools that ensure access to, and participation and progress in the general education curriculum in the least restrictive environment for students with disabilities; and (5) a description of how effective principal leaders integrate assessment, curriculum and instruction with learning standards, teaching design and practicum, and family participation in teaching and learning, in a comprehensive aligned professional development model to guide systemic implementation at classroom and school levels;

(e) In years 1 through 3 of the project period, identify, implement, and evaluate strategies that support effective principals in partnership with at least 30 schools to provide examples of effective school improvement implementation of evidence-based and promising practices that ensure access to, and participation and progress in the general education curriculum in the least restrictive environment for students with disabilities. At a minimum, the PD Center must work with these 30 partner schools to: (1) Identify and define the scope and sequence of ongoing professional development training content as well as strategies to measure the acquisition, fidelity, and fluency of implementation at the classroom and school levels; (2) establish classroom and school structures to increase school improvement capacity for ongoing professional development and training; and (3) describe how principals work with school and district leaders to incorporate these strategies into ongoing district policy and practice;

(f) Based on lessons learned with principal leaders and school improvement efforts in years 1 through 3 of the project period, replicate and scale up the PD Center's implementation with an additional 200 schools in year 4 of the project period;

(g) Establish, maintain, and meet at least annually with a national advisory group of principal leaders from urban, suburban, and rural schools to provide feedback on the plans, activities, and accomplishments of the PD Center in collaboration with the OSEP Project Officer;

(h) Use external and internal evaluators to measure and report to OSEP on the progress of the PD Center activities included in paragraphs (a) through (f) in this priority;

(i) Meet with the OSEP Project Officer and appropriate OSEP staff within the first month of the project start date;

(j) Budget for the PD Center's project director to attend a three-day Project Director's Meeting in Washington, DC

and an additional two-day trip annually to Washington, DC to attend an additional Project Director's meeting and to meet and collaborate with the OSEP Project Officer and other funded projects for purposes of cross-project collaboration and information exchange; and

(k) If a Web site is maintained, ensure that the information and documents available on the Web site are in a format that meets a government or industry-recognized standard for accessibility.

Fourth and Fifth Years of the Project

In deciding whether to continue funding the PD Center for the fourth and fifth years, the Secretary, will consider the requirements of 34 CFR 75.253(a), and in addition:

(a) The recommendation of a review team consisting of experts selected by the Secretary, which review will be conducted during the last half of the project's second year in Washington, DC. Projects must budget for the travel associated with this review;

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the project; and

(c) The degree to which the project's design and methodology demonstrate the potential for advancing significant new knowledge.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on a proposed priority. However, section 681(d) of IDEA makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1462 and 1481(d).

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $285,000.

Maximum Award: We will reject any application that proposes a budget exceeding $285,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs.

2. *Cost Sharing or Matching:* This competition does not involve cost sharing or matching.

3. *Other: General Requirements*— (a) The projects funded under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Applicants and grant recipients funded under this competition must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the projects (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.325P.

Individuals with disabilities may obtain a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 70 pages, using the following standards:

• A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.

• Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the references, or the letters of support. However, you must include all of the application narrative in Part III.

We will reject your application if:

• You apply these standards and exceed the page limit; or

• You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: February 9, 2006.

Deadline for Transmittal of Applications: March 24, 2006.

Applications for grants under this competition may be submitted electronically using the Grants.gov Apply site (Grants.gov), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or by mail or hand delivery, please refer to section IV.6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Deadline for Intergovernmental Review: May 23, 2006.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

We have been accepting applications electronically through the Department's e-Application system since FY 2000. In order to expand on those efforts and comply with the President's Management Agenda, we are continuing to participate as a partner in the new government wide Grants.gov Apply site in FY 2006. Principal Leadership Professional Development Center to

Support School Improvement to Ensure Access to, and Participation and Progress in the General Education Curriculum in the Least Restrictive Environment—CFDA Number 84.325P is one of the competitions included in this project. We request your participation in Grants.gov.

If you choose to submit your application electronically, you must use the Grants.gov Apply site at *http://www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

You may access the electronic grant application for the Principal Leadership Professional Development Center to Support School Improvement to Ensure Access to, and Participation and Progress in the General Education Curriculum in the Least Restrictive Environment—CFDA Number 84.325P competition at: *http://www.grants.gov*. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search.

Please note the following:

- Your participation in Grants.gov is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are time and date stamped. Your application must be fully uploaded and submitted, and must be date/time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not consider your application if it is date/time stamped by the Grants.gov system later than 4:30 p.m., Washington, DC time, on the application deadline date. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date/time stamped by the Grants.gov system after 4:30 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf*.
- To submit your application via Grants.gov, you must complete all of the steps in the Grants.gov registration process (see *http://www.Grants.gov/GetStarted)*. These steps include (1) registering your organization, (2) registering yourself as an Authorized Organization Representative (AOR), and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/assets/GrantsgovCoBrandBrochure8X11.pdf)*. You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to successfully submit an application via Grants.gov.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- You may submit all documents electronically, including all information typically included on the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. If you choose to submit your application electronically, you must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text) or .PDF (Portable Document) format. If you upload a file type other than the three file types specified above or submit a password protected file, we will not review that material.
- Your electronic application must comply with any page limit requirements described in this notice.
- After you electronically submit your application, you will receive an automatic acknowledgment from Grants.gov that contains a Grants.gov tracking number. The Department will retrieve your application from Grants.gov and send you a second confirmation by e-mail that will include a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of System Unavailability

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically, or by hand delivery. You also may mail your application by following the mailing instructions as described elsewhere in this notice. If you submit an application after 4:30 p.m., Washington, DC time, on the deadline date, please contact the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT**, and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number (if available). We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: Extensions referred to in this section apply only to the unavailability of or technical problems with the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.325P), 400 Maryland Avenue, SW., Washington, DC 20202–4260; or

By mail through a commercial carrier: U.S. Department of Education, Application Control Center—Stop 4260,

Attention: (CFDA Number 84.325P), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.325P), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of ED 424 the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* Under the Government Performance and Results Act (GPRA), the Department has developed measures that will yield information on various aspects of the technical assistance and dissemination activities currently being supported under IDEA Part D. These measures will be used for the Principal Leadership Professional Development Center to Support School Improvement to Ensure Access to, and Participation and Progress in the General Education Curriculum in the Least Restrictive Environment competition, and they focus on: The extent to which projects provide high quality products and services, the relevance of project products and services to educational and early intervention policy and practice, and the use of products and services to improve educational and early intervention policy and practice.

We will notify grantees if they will be required to provide any information related to these measures.

Grantees will also be required to report information on their projects' performance in annual reports to the Department (34 CFR 75.590).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Anne Smith, U.S. Department of Education, 400 Maryland Avenue, SW., room 4086, Potomac Center Plaza, Washington, DC 20202–2600. Telephone: (202) 245–7529.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request by contacting the following office: The Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 245–7363.

VIII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: February 6, 2006.

John H. Hager,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E6–1805 Filed 2–8–06; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8030–5]

National Advisory Council for Environmental Policy and Technology Environmental Technology Subcommittee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of Public Advisory Committee Teleconference Meeting.

SUMMARY: Under the Federal Advisory Committee Act, Public Law 92–463, EPA gives notice of a public teleconference of the National Advisory Council for Environmental Policy and Technology (NACEPT) Environmental Technology Subcommittee. The Environmental Technology Subcommittee was formed to assist EPA in evaluating its current and potential role in the development and commercialization of environmental technologies by suggesting how to optimize existing EPA programs to facilitate the development of sustainable private sector technologies, and by suggesting alternative approaches to achieving these goals. The teleconference is being held to discuss any final revisions to the Subcommittee's first report before it is forwarded to the NACEPT Council for review. Due to extending circumstances, this meeting is being scheduled on short notice.

DATES: The NACEPT Environmental Technology Subcommittee will hold a public teleconference on Wednesday, February 15 from 1–3 p.m.

ADDRESSES: The teleconference will be held in the U.S. EPA Office of Cooperative Environmental Management at 655 15th Street, NW., Suite 800, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Mark Joyce, Designated Federal Officer, *joyce.mark@epa.gov,* 202–233–0068, U.S. EPA, Office of Cooperative Environmental Management (1601E), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: Requests to make oral comments or provide written comments to the Subcommittee should be sent to Mark Joyce, Designated Federal Officer, at the contact information above by February 10, 2005. The public is welcome to attend all portions of the meeting, but seating is limited and is allocated on a first-come, first-served basis. Members of the public wishing to gain access to the conference room on the day of the meeting must contact Mark Joyce at 202–233–0068 or *joyce.mark@epa.gov* by Tuesday, February 14.

Meeting Access: For information on access or services for individuals with disabilities, please contact Mark Joyce at 202–233–0068 or *joyce.mark@epa.gov.* To request accommodation of a disability, please contact Mark Joyce, preferably by February 10 at the latest, to give EPA as much time as possible to process your request.

Dated: January 31, 2006.

Mark Joyce,

Designated Federal Officer.

[FR Doc. 06–1223 Filed 2–8–06; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8030–2]

Science Advisory Board Staff Office; Clean Air Scientific Advisory Committee (CASAC); Notification of Advisory Committee Meeting of the CASAC Lead Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public meeting of the Clean Air Scientific Advisory Committee's (CASAC) Lead Review Panel (Panel) to conduct a peer review of the Air Quality Criteria for Lead (First External Review Draft), Volumes I and II (EPA/600/R–05/144aA–bA, December 2005).

DATES: The meeting will be held from 9 a.m. (eastern time) on Tuesday, February 28, 2006, through 3 p.m. (eastern time) on Wednesday, March 1, 2006.

Location: The meeting will take place at the Hilton Durham near Duke University, 3800 Hillsborough Road, Durham, NC 27705, Phone: (919) 383–8033.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wishes to submit written or brief oral comments (five minutes or less) or wants further information concerning this meeting must contact Mr. Fred Butterfield, Designated Federal Officer (DFO), EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via telephone/voice mail: (202) 343–9994; fax: (202) 233–0643; or e-mail at: *butterfield.fred@epa.gov.* General information concerning the CASAC or the EPA Science Advisory Board can be found on the EPA Web Site *at: http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: EPA is in the process of updating, and revising where appropriate, the air quality criteria document (AQCD) for lead. Section 109(d)(1) of the Clean Air Act (CAA) requires that EPA carry out a periodic review and revision, as appropriate, of the air quality criteria and the national ambient air quality standards (NAAQS) for the six "criteria" air pollutants including lead. On December 1, 2005, EPA's National Center for Environmental Assessment National, Research Triangle Park (NCEA–RTP), within the Agency's Office of Research and Development (ORD), made available for public review and comment a revised draft document, Air Quality Criteria for Lead (First External Review Draft), Volumes I and II (EPA/600/R–05/144aA–bA). This first draft Lead air quality criteria document (AQCD) represents a revision to the previous EPA document, Air Quality Criteria for Lead, EPA–600/8–83/028aF–dF (published in June 1986) and an associated supplement (EPA–600/8–89/049F) published in 1990. Under CAA sections 108 and 109, the purpose of the revised AQCD is to provide an assessment of the latest scientific information on the effects of ambient lead on the public health and welfare, for use in EPA's current review of the NAAQS for lead. Detailed summary information on the revised draft AQCD for lead is contained in a recent EPA **Federal Register** notice (70 FR 72300, December 2, 2005).

EPA is soliciting advice and recommendations from the CASAC by means of a peer review of the first draft Lead AQCD. The CASAC, which is comprised of seven members appointed by the EPA Administrator, was established under section 109(d)(2) of the Clean Air Act (CAA or Act) (42 U.S.C. 7409) as an independent scientific advisory committee, in part to provide advice, information and recommendations on the scientific and technical aspects of issues related to air quality criteria and NAAQS under sections 108 and 109 of the Act. The CASAC is a Federal advisory committee chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. The SAB Staff Office has established a CASAC Lead Review Panel to provide EPA with advice and recommendations concerning lead in ambient air. On September 6, 2005 the SAB Staff Office announced the formation of the CASAC Lead Review Panel in the **Federal Register** (70 FR 53001) and solicited nominations for experts to supplement the statutory CASAC. The Panel will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. This meeting is the CASAC Lead Review Panel's initial peer review of the first draft Lead AQCD.

Technical Contact: Any questions concerning the first draft Lead AQCD should be directed to Dr. Lori White,

NCEA–RTP, at phone: (919) 541–3146, or e-mail: *white.lori@epa.gov.*

Availability of Meeting Materials: The Air Quality Criteria for Lead (First External Review Draft), Volumes I and II (December 2005) can be accessed via the Agency's NCEA Web site at: *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=141779.* In addition, a copy of the draft agenda for this meeting will be posted on the SAB Web Site at: *http://www.epa.gov/sab* (under the "Agendas" subheading) in advance of this CASAC Lead Review Panel meeting. Other meeting materials, including the charge to the CASAC Lead Review Panel, will be posted on the SAB Web Site at: *http://www.epa.gov/sab/panels/casac_lead_review_panel.htm* prior to this meeting.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the CASAC Lead Review Panel to consider during the advisory process. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public meeting will be limited to five minutes per speaker, with no more than a total of one hour for all speakers. Interested parties should contact Mr. Butterfield, DFO (preferably via e-mail) at the contact information noted above, by February 21, 2006, to be placed on the public speaker list for this meeting. *Written Statements:* Written statements should be received in the SAB Staff Office by February 24, 2006, so that the information may be made available to the Panel for their consideration prior to this meeting. Written statements should be supplied to the DFO in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format).

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Butterfield at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: February 3, 2006.

Vanessa Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. E6–1801 Filed 2–8–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2005–0562; FRL–8029–9]

Board of Scientific Counselors, Science To Achieve Results (STAR)/ Greater Research Opportunities (GRO) Fellowship Subcommittee Meeting—March 2006

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of one meeting of the Board of Scientific Counselors (BOSC) Science to Achieve Results (STAR)/Greater Research Opportunities (GRO) Fellowship Subcommittee.

DATES: The meeting will be held on Thursday, March 2, 2006 from 8:30 a.m. to 5:30 p.m., and will continue on Friday, March 3, 2006 from 8:30 a.m. to 2 p.m. All times noted are eastern time. The meeting may adjourn early if all business is finished. Requests for the draft agenda or for making oral presentations at the meeting will be accepted up to 1 business day before the meeting date.

ADDRESSES: The meeting will be held at the Doubletree Hotel, 1515 Rhode Island Avenue, NW., Washington, DC 20005. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2005–0562, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* Send comments by electronic mail (e-mail) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2005–0562.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2005–0562.
- *Mail:* Send comments by mail to: Board of Scientific Counselors, Science to Achieve Results (STAR)/Greater Research Opportunities (GRO) Fellowship Subcommittee—Winter/Spring 2006 Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–ORD–2005–0562.
- *Hand Delivery or Courier.* Deliver comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2005–0562. Note: this is not a mailing address. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2005–0562. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The www.regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Board of Scientific Counselors, Science to Achieve Results (STAR)/Greater Research Opportunities (GRO) Fellowship Subcommittee—Winter/Spring 2006 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone

number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Lorelei Kowalski, Mail Code 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via phone/voice mail at: (202) 564–3408; via fax at: (202) 565–2911; or via e-mail at: *kowalski.lorelei@epa.gov*.

SUPPLEMENTARY INFORMATION:

General Information

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting may contact Lorelei Kowalski, the Designated Federal Officer, via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. In general, each individual making an oral presentation will be limited to a total of three minutes.

Proposed agenda items for the meeting include, but are not limited to: presentations and poster sessions on ORD's STAR and undergraduate/graduate GRO fellowship programs; presentations and a poster session on diversity, programmatic, and administrative issues related to the STAR and undergraduate/graduate GRO fellowship programs; and subcommittee working time. The meeting is open to the public.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Lorelei Kowalski at (202) 564–3408 or *kowalski.lorelei@epa.gov*. To request accommodation of a disability, please contact Lorelei Kowalski, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: February 2, 2006.

Kevin Y. Teichman,

Director, Office of Science Policy.

[FR Doc. E6–1804 Filed 2–8–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2005–0504; FRL–8030–8]

Notice of Extension of Comment Period on the Nanotechnology White Paper External Review Draft

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of Public Comment Period.

SUMMARY: EPA issued a notice in the **Federal Register** of December 21, 2005 (70 FR 75812) concerning the availability of the Nanotechnology White Paper External Review Draft and requested comments on the draft be received by January 31, 2006 in order to be shared with an external review panel. This notice is extending the period for comments received from the public to be shared with the external review panel for their consideration from January 31, 2006 to March 1, 2006. Comments received beyond that time will be considered by EPA.

The U.S. Environmental Protection Agency is submitting the Nanotechnology White Paper External Review Draft for independent external peer review, which will be conducted in the March timeframe. Following the expert review, EPA will issue a final white paper on nanotechnology in early 2006. Members of the public may obtain the draft white paper from *http://www.regulations.gov;* or *http://www.epa.gov/osa/nanotech.htm;* or from Dr. Kathryn Gallagher via the contact information below.

DATES: All comments received by March 1. 2006 will be shared with the external peer review panel for their consideration. Comments received beyond that time will be considered by EPA.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2005–0504, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *ORD.Docket@epa.gov*.
- Mail: ORD Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- Hand Delivery: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–ORD–2005–0504. Deliveries are only accepted from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2005–0504. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the ORD Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Dr. Kathryn Gallagher, Office of the Science Advisor, Mail Code 8105–R, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–1398; fax number: (202) 564–2070, E-mail: *Gallagher.kathryn@epa.gov*.

Dated: February 6, 2006.

William H. Farland,

Chief Scientist, Office of the Science Advisor.

[FR Doc. E6–1802 Filed 2–8–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8029–5]

Guidance on Selecting Age Groups for Monitoring and Assessing Childhood Exposures to Environmental Contaminants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: The U.S. Environmental Protection Agency's (EPA) Risk Assessment Forum (RAF) announces the availability of a final report, "Guidance on Selecting Age Groups for Monitoring and Assessing Childhood Exposures to Environmental Contaminants" (EPA/630/P–03/003F, November 2005). The purpose of this document is to complement existing EPA guidance and experience to assist Agency risk assessors in improving the accuracy and consistency of children's exposure assessments. The document describes a set of age groupings that can be used and, when necessary, adapted for purposes of designing monitoring studies and conducting risk assessments focused on children.

ADDRESSES: The document is available electronically through the Risk Assessment Forum's Web site (*http://cfpub.epa.gov/ncea/raf/recordisplay.cfm?deid=55887*). A limited number of paper copies will be available from EPA's National Service Center for Environmental Publications (NSCEP), P.O. Box 42419, Cincinnati, OH 45242; telephone 1–800–490–9198 or 513–489–8190; facsimile: 513–489–8695. Please provide your name and mailing address and the title and EPA number of the requested publication.

FOR FURTHER INFORMATION CONTACT: Gary Bangs, U.S. Environmental Protection Agency, National Center for Environmental Assessment, Risk Assessment Forum Staff, telephone 202–564–6667; facsimile 202–565–0062; e-mail: *bangs.gary@epa.gov*.

SUPPLEMENTARY INFORMATION: This document provides a set of early-life age groups for EPA scientists to consider when assessing children's exposure to environmental contaminants and the resultant potential dose. These recommended age groups are based on current understanding of differences in behavior and physiology which may impact exposures in children. A consistent set of early-life age groups, supported by an underlying scientific rationale, is expected to improve Agency exposure and risk assessments for children by increasing the consistency and comparability of risk assessments across the Agency; by improving accuracy and transparency in assessments for those cases where current practice might too broadly combine behaviorally and physiologically disparate age groups; and by fostering a consistent approach to future exposure surveys and data gathering efforts to generate improved exposure factors for children.

An external review draft of the document was made available for public comment in September 2003, and a meeting, to which the public was invited as observers, was held in January 2004 to provide independent expert peer review on the draft document. The document was revised based on input received during the peer review process, and from public review and comment. See Federal Docket Management System docket ID No. EPA–HQ–ORD–2004–0001 on the Internet at *www.regulations.gov*.

Dated: January 30, 2006.

Peter W. Preuss,

Director, National Center for Environmental Assessment.

[FR Doc. E6–1803 Filed 2–8–06; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank of the United States has received an application to finance the export of eight refurbished U.S. locomotives valued at approximately $14 million to Kenya. These locomotives will be dedicated to transport soda ash from the production facility to the Kenyan coast. Five of the eight locomotives will replace existing 1970 vintage locomotives. The remaining three locomotives will be used to meet the buyer's need for increased transport capacity resulting from a recent 365,000 metric ton per year production expansion, which is scheduled to be commissioned in March 2006. Available information indicates that this new production will be consumed in India, Southeast Asia, Africa and the Middle East. Interested parties may submit comments on this transaction by e-mail to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue, NW., Room 1238, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

Helene S. Walsh,

Director, Policy Oversight and Review.

[FR Doc. E6–1734 Filed 2–8–06; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *http://www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 24, 2006.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. FNB Corp., Asheboro, North Carolina; to acquire 100 percent of Integrity Financial Corporation, Hickory, North Carolina, and thereby indirectly acquire First Gaston Bank of North Carolina, Gastonia, North Carolina.

In connection with this proposal, Applicant has applied to acquire Integrity Securities, Inc., Hickory, North Carolina, and thereby engage in securities brokerage activities pursuant to section 225.28(b)(7)(i) of Regulation Y.

Board of Governors of the Federal Reserve System, February 3, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–1741 Filed 2–8–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 6, 2006.

A. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Mainsource Financial Group, Inc., Greensburg, Indiana; to acquire 100 percent of the voting shares of HFS Bank, F.S.B., Hobart, Indiana, and thereby operate a savings association pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, February 3, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.E6–1742 Filed 2–8–06; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator; American Health Information Community Consumer Empowerment Workgroup Meeting

ACTION: Announcing of meeting.

SUMMARY: This notice announces the second meeting of the American Health Information Community Empowerment Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

DATES: February 21, 2006 from 1 p.m. to 5 p.m.

ADDRESSES: Hubert H. Humphrey Building (200 Independence Ave., SW., Washington, DC 20201), conference room 705A.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit.*

SUPPLEMENTARY INFORMATION: A Web address for the meeting will be available at *http://www.hhs.gov/healthit.*

Dated: February 1, 2006.

Dana Haza,

Office of Programs and Coordination, Office of the National Coordinator.

[FR Doc. 06–1177 Filed 2–8–06; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator; American Health Information Community Electronic Health Record Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the second meeting of the American Health Information Community Electronic Health Record Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

DATES: February 22, 2006 from 1 p.m. to 5 p.m.

ADDRESSES: Hubert H. Humphrey Building (200 Independence Ave., SW., Washington, DC 20201), conference room 425A.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit.*

SUPPLEMENTARY INFORMATION: A Web address for the meeting will be available at: *http://www.hhs.gov/healthit.*

Dated: February 1, 2006.

Dana Haza,

Office of Programs and Coordination, Office of the National Coordinator.

[FR Doc. 06–1178 Filed 2–8–06; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator; American Health Information Community Chronic Care Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the second meeting of the American Health Information Community Chronic Care Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

DATES: February 23, 2006 from 1 p.m. to 5 p.m.

ADDRESSES: Cohen Building (330 Independence Ave., SW., Washington, DC 20201), Conference Room 5051.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit.*

SUPPLEMENTARY INFORMATION: A Web address for the meeting will be available at: *http://www.hhs.gov/healthit.*

Dated: February 1, 2006.

Dana Haza,

Office of Programs and Coordination, Office of the National Coordinator.

[FR Doc. 06–1179 Filed 2–8–06; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator; American Health Information Community Biosurveillance Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the second meeting of the American Health Information Community Biosurveillance Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.)

DATES: February 24, 2006 from 1 p.m. to 5 p.m.

ADDRESSES: Cohen Building (330 Independence Ave., SW., Washington, DC 20201), Conference Room 5051.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit.*

SUPPLEMENTARY INFORMATION: A Web address for the meeting will be available at: *http://www.hhs.gov/healthit.*

Dated: February 1, 2006.

Dana Haza,

Office of Programs and Coordination, Office of the National Coordinator.

[FR Doc. 06–1180 Filed 2–8–06; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 70 FR 72842–72843, dated December 7, 2005) is amended to reflect the title change for the Division of Injury and Disability Outcomes. National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the title for the *Division of Injury and Disability Outcomes (CE6)* and insert the *Division of Injury Response (CTCE).*

Dated: January 27, 2006

William H. Gimson,

Chief Operating Officer, Centers for Disease Control and Prevention (CDC).

[FR Doc. 06–1199 Filed 2–8–06; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Advisory Committee on Special Studies Relating to the Possible Long-Term Health Effects of Phenoxy Herbicides and Contaminants (Ranch Hand Advisory Committee); Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Advisory Committee on Special Studies Relating to the Possible Long-Term Health Effects of Phenoxy Herbicides and Contaminants (Ranch Hand Advisory Committee).

General Function of the Committee: To advise the Secretary of Health and Human Services (the Secretary) and the Assistant Secretary for Health concerning its oversight of the conduct of the Ranch Hand study by the U.S. Air Force and provide scientific oversight of the Department of Veterans Affairs Army Chemical Corps Vietnam Veterans Health Study, and other studies in which the Secretary or the Assistant Secretary for Health believes involvement by the committee is desirable.

Date and Time: The meeting will be held on February 27, 2006, from 8:30 a.m. to 4 p.m.

Location: Food and Drug Administration, 5630 Fishers Lane, rm. 1066, Rockville, MD.

Contact Person: Leonard Schechtman, National Center for Toxicological Research (HFT–10), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–6696, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512560. Please call the Information Line for up-to-date information on this meeting.

Agenda: The committee will discuss the following items: (1) Update on the Institute of Medicine's Air Force Health Study Disposition Study and related closure activities; (2) updates from the Air Force on the Viability Study, Compliance Study, Comprehensive Study, Mortality Update, Technical Reports, and External Collaborations.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by February 17, 2006. Oral presentations from the public will be scheduled on February 27, 2006, between approximately 11:30 a.m. and 12:30 p.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before February 17, 2006, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Leonard Schechtman at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: February 2, 2006.

Jason Brodsky,

Acting Associate Commissioner for External Relations.

[FR Doc. E6–1737 Filed2–8–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004D–0385]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document; Hepatitis A Virus Serological Assays; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance document entitled "Guidance for Industry and FDA Staff: Class II Special Controls Guidance Document: Hepatitis A Virus Serological Assays." The guidance document describes a means by which these in vitro diagnostic devices for the laboratory diagnosis of hepatitis A virus (HAV) may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule reclassifying these devices from class III (premarket approval) into class II (special controls). HAV serological assays are in vitro diagnostic devices used to test for specific antibodies to support the clinical laboratory diagnosis of HAV.

DATES: Submit written or electronic comments on this guidance at any time. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies on a 3.5″ diskette of the guidance document entitled "Guidance for Industry and FDA Staff: Class II Special Controls Guidance Document: Hepatitis A Virus Serological Assays" to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for

electronic access to the guidance document.

Submit written comments concerning this guidance to the Division of Dockets Management (HFZ–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Sally Hojvat, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 240–276–0496.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 30, 2004 (69 FR 58371), FDA published a proposed rule to reclassify HAV serological assays from class III (premarket approval) into class II (special controls). FDA proposed this action after reviewing information contained in a reclassification petition submitted by Beckman Coulter Inc. In addition, FDA issued a draft class II special controls guidance document entitled "Class II Special Controls Guidance Document: Hepatitis A Serological Assays for the Clinical Laboratory Diagnosis of Hepatitis A Virus" to support the proposed reclassification. HAV serological assays are in vitro diagnostic devices that test for specific antibodies. In conjunction with other clinical laboratory findings, the detection of these HAV-specific antibodies aids in the clinical laboratory diagnosis of an acute or past infection by HAV. The comments FDA received were supportive of the proposed reclassification, but made some suggestions on the guidance's content. FDA considered the suggestions and made appropriate revisions. FDA is now identifying the guidance document entitled "Guidance for Industry and FDA Staff: Class II Special Controls Guidance Document: Hepatitis A Virus Serological Assays" as the guidance document that will serve as the special control for these devices.

The guidance document provides a means by which HAV serological assays may comply with the requirement of special controls for class II devices. Following the effective date of the final reclassification rule, any firm submitting a premarket notification (510(k)) for HAV serological assays will need to address the issues covered in the special controls guidance document. However, the firm need only show that its device meets the recommendation of the guidance document or in some other way provides equivalent assurances of safety and effectiveness.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on HAV serological assays. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the applicable statute and regulations.

III. Electronic Access

To receive "Guidance for Industry and FDA Staff: Class II Special Controls Guidance Document: Hepatitis A Virus Serological Assays" by fax, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt, press 1 to order a document. Enter the document number (1536) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the guidance may also do so using the Internet. The Center for Devices and Radiological Health (CDRH) maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts. **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturers' assistance, information on video conferencing and electronic submission, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

IV. Paperwork Reduction Act

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collection of information in part three of this guidance document has been submitted to OMB for review and was approved under OMB control number 0910–0120. The collection of information in part ten of this guidance document has been submitted to OMB for review and was approved under OMB control number 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 1, 2006.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 06–1207 Filed 2–8–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2006D–0020]

Draft Guidance for Industry and Food and Drug Administration Staff; Draft Class II Special Controls Guidance Document: Intervertebral Body Fusion Device; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled "Class II Special Controls Guidance Document: Intervertebral Body Fusion Device." It was developed as a special control to support the reclassification of intervertebral body fusion devices that contain bone grafting material from class III (premarket approval) into class II (special controls). This draft guidance document describes a means by which these intervertebral body fusion devices may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a proposed rule to reclassify the intervertebral body fusion device that contains bone grafting material from class III into class II (special

controls) and retain those that contain any therapeutic biologic (e.g., bone morphogenic protein) in class III. This draft guidance is not final, nor is it in effect at this time.

DATES: Submit written or electronic comments on this draft guidance by May 10, 2006.

ADDRESSES: Submit written requests for single copies on a 3.5″ diskette of the draft guidance document entitled "Class II Special Controls Guidance Document: Intervertebral Body Fusion Device" to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section of this document for information on electronic access to the draft guidance.

Submit written comments concerning this draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jodi N. Anderson, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2036, ext. 186.

SUPPLEMENTARY INFORMATION:

I. Background

On December 11, 2003, the Orthopedic and Restorative Devices Panel (the panel) recommended that intervertebral body fusion devices that contain bone grafting material be reclassified from class III into class II. The panel also provided recommendations on the types of information the agency should include in a class II special controls guidance document for these devices. This document announces the draft guidance that is based on these recommendations. Elsewhere in this issue of the **Federal Register**, FDA is publishing a proposed rule to reclassify these devices.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on intervertebral body fusion devices. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

To receive "Class II Special Controls Guidance Document: Intervertebral Body Fusion Device" by fax, call the Center for Devices and Radiological Health (CDRH) Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt, press 1 to order a document. Enter the document number (1540) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the draft guidance may also do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

IV. Paperwork Reduction Act of 1995

This draft guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collections of information addressed in the draft guidance document have been approved by OMB in accordance with the PRA under the regulations governing premarket notification submissions (21 CFR part 807, subpart E, OMB control number 0910–0120). The labeling provisions addressed in the draft guidance have been approved by OMB under OMB control number 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 1, 2006.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. E6–1735 Filed 2–8–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2006D–0012]

Draft Guidance for Industry and Food and Drug Administration Staff; Pharmacogenetic Tests and Genetic Tests for Heritable Markers; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled "Pharmacogenetic Tests and Genetic Tests for Heritable Markers." This draft guidance document is intended to provide guidance on preparing and reviewing premarket approval applications (PMAs) and 510(k) submissions for pharmacogenetic and other genetic tests, whether testing is for single markers or for multiple markers simultaneously (multiplex tests).

DATES: Submit written or electronic comments on this draft guidance by May 10, 2006.

ADDRESSES: Submit written requests for single copies on a 3.5″ diskette of the draft guidance document entitled "Pharmacogenetic Tests and Genetic Tests for Heritable Markers" to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850 or submit written requests for single copies of the

guidance to the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

Robert Becker, Center for Devices and Radiological Health (CDRH) (HFZ–440), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–0493, ext. 212.

For use of the guidance in relation to applications to CBER, contact: Stephen M. Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210.

For use of the guidance in relation to applications to the Center for Drug Evaluation and Research (CDER), contact: Allen Rudman, Office of Clinical Pharmacology and Biopharmaceutics (HFD–850), Food and Drug Administration, 10903 New Hampshire Ave., W021, rm. 3666, Silver Spring, MD 20993–0002, 301–796–1597.

SUPPLEMENTARY INFORMATION:

I. Background

This draft guidance document provides recommendations on preparing and reviewing PMAs and 510(k) submissions for pharmacogenetic and other human genetic tests, whether testing is for single markers or for multiple markers simultaneously (multiplex tests). Tests of gene expression and tests for non-heritable (somatic) mutations are not specifically addressed, although many of the same principles may apply. Likewise, this draft guidance specifically addresses only nucleic-acid based analysis, but some of the principles may be applied to other matrices (e.g., protein), when the purpose is to provide genetic information.

FDA issued an earlier version of this draft guidance on February 27, 2003, entitled "Draft Guidance for Industry and FDA Reviewers; Multiplex Tests for Heritable DNA Markers, Mutations and Expression Patterns." The notice of availability for the February 27, 2003, draft guidance was published in the **Federal Register** of April 21, 2003 (68 FR 19549) and the comment period closed on July 21, 2003. As explained in the February 27, 2003, draft guidance and April 21, 2003, document, we recognized that discussions on this topic had been introductory. Because of this, we explained that the February 2003 draft guidance would be followed by another draft guidance that would provide an opportunity for additional discussion. As stated in the April 2003 document, we believe the public health will benefit from this dialogue with industry about appropriate ways to review this technology.

We received several comments on the 2003 draft guidance, which included comments suggesting that the draft guidance was too broad in scope. The 2003 draft guidance document addressed both gene expression and genetic tests. The draft guidance announced in this **Federal Register** document, "Pharmacogenetic Tests and Genetic Tests for Heritable Markers," instead focuses on genetic tests.

In developing the draft guidance announced in this document, FDA considered the comments received on the 2003 draft guidance and also information we received through our participation at seminars and workshops with representatives from the drug and device industries, professional societies, laboratory professionals, healthcare providers, and other stakeholders. These seminars and workshops included discussions of the criteria that are important in the analytical and clinical validation of multiplex tests, including pharmacogenetic and genetic assays. These discussions also explored the kind of information the industry might submit to the agency to achieve the least burdensome means of demonstrating substantial equivalence or evaluating safety and effectiveness.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on "Pharmacogenetic Tests and Genetic Tests for Heritable Markers." It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

To receive "Pharmacogenetic Tests and Genetic Tests for Heritable Markers" by fax machine, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt, press 1 to order a document. Enter the document number (1549) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the draft guidance may also do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. CBER's guidance documents are available at *http://www.fda.gov/cber/guidelines.htm*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807 subpart E have been approved under OMB Control No. 0910–0120; 21 CFR part 814 have been approved under OMB Control No. 0910–0231; 21 CFR part 801 and 21 CFR part 809 have been approved under OMB Control No. 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments received may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 1, 2006.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. E6–1787 Filed 2–8–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Commission on Childhood Vaccines; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Commission on Childhood Vaccines (ACCV).

Date and Time: March 9, 2006, 9 a.m.–3:30 p.m., EST.

Place: Audio Conference Call and Parklawn Building, Conference Rooms G & H, 5600 Fishers Lane, Rockville, MD 20857.

The ACCV will meet on Thursday, March 9, from 9 a.m. to 3:30 p.m. The public can join the meeting in person at the address listed above or by audio conference call by dialing 1–800–369–6048 on March 9 and providing the following information:

Leader's Name: Dr. Geoffrey Evans.

Password: ACCV.

Agenda: The agenda items for the March meeting will include, but are not limited to: An overview of compensation programs in other countries; results of the National Vaccine Injury Compensation Program's (VICP) Program Assessment Rating Tool; a discussion of the Division of Vaccine Injury Compensation's (DVIC) communication strategies; a report from the ACCV Workgroup looking at proposed guidelines for future changes to the Vaccine Injury Table; and updates from DVIC, Department of Justice, National Vaccine Program Office, Immunization Safety Office (Centers for Disease Control and Prevention), National Institute of Allergy and Infectious Diseases (National Institutes of Health), and Center for Biologics and Evaluation Research (Food and Drug Administration). Agenda items are subject to change as priorities dictate.

Public Comments: Persons interested in providing an oral presentation should submit a written request, along with a copy of their presentation to: Ms. Cheryl Lee, Principal Staff Liaison, DVIC, Healthcare Systems Bureau (HSB), Health Resources and Services Administration (HRSA), Room 11C–26, 5600 Fishers Lane, Rockville, Maryland 20857 or e-mail *clee@hrsa.gov*. Requests should contain the name, address, telephone number, and any business or professional affiliation of the person desiring to make an oral presentation. Groups having similar interests are requested to combine their comments and present them through a single representative. The allocation of time may be adjusted to accommodate the level of expressed interest. DVIC will notify each presenter by mail or telephone of their assigned presentation time. Persons who do not file an advance request for a presentation, but desire to make an oral statement, may announce it at the time of the comment period. These persons will be allocated time as it permits.

For Further Information Contact: Anyone requiring information regarding the ACCV should contact Ms. Cheryl Lee, Principal Staff Liaison, DVIC, HSB, HRSA, Room 11C–26, 5600 Fishers Lane, Rockville, MD 20857; telephone (301) 443–2124 or e-mail *clee@hrsa.gov*.

Dated: February 2, 2006.

Tina M. Cheatham,

Director, Division of Policy Review and Coordination.

[FR Doc. E6–1733 Filed 2–8–06; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Privacy Act System of Records Notice 09–17–0001, "Medical, Health and Billing Records": Correction

AGENCY: Indian Health Service (IHS), HHS.

ACTION: Notice: correction.

SUMMARY: The Indian Health Service published a document in the **Federal Register** on December 30, 2005. The document contained an error.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Patricia Gowan, IHS Lead Health Information Management (HIM) Consultant (Acting), Office of Health Programs, Phoenix Area Office IHS, Two Renaissance Square, Suite 606, 40 North Central Avenue, Phoenix, AZ 85004 or via the Internet at *Patricia.Gowan@ihs.gov*.

Correction

In the **Federal Register** of December 30, 2005, in FR Doc 05–24644, on page 77407, in the second column, correct number 5 to read: "Records may be disclosed to the Bureau of Indian Affairs (BIA) or its contractors under an agreement between IHS and the BIA relating to disabled AI/AN children for the purposes of carrying out its functions under the Individuals with Disabilities Education Act (IDEAS), 20 U.S.C. 1400, *et seq.*"

Re-number 5 to number 6 and so forth for a total of twenty-four routine uses instead of twenty-three.

Dated: February 2, 2006.

Robert G. McSwain,

Deputy Director, Indian Health Service.

[FR Doc. 06–1188 Filed 2–8–06; 8:45 am]

BILLING CODE 4165–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

Program Exclusions: January 2006

AGENCY: Office of Inspector General, HHS.

ACTION: Notice of program exclusions.

During the month of January 2006, the HHS Office of Inspector General imposed exclusions in the cases set forth below. When an exclusion is imposed, no program payment is made to anyone for any items or services (other than an emergency item or service not provided in a hospital emergency room) furnished, ordered or prescribed by an excluded party under the Medicare, Medicaid, and all Federal Health Care programs. In addition, no program payment is made to any business or facility, *e.g.*, a hospital, that submits bills for payment for items or services provided by an excluded party. Program beneficiaries remain free to decide for themselves whether they will continue to use the services of an excluded party even though no program payments will be made for items and services provided by that excluded party. The exclusions have national effect and also apply to all Executive Branch procurement and non-procurement programs and activities.

Subject name, address	Effective date
PROGRAM-RELATED CONVICTIONS	
ALEXANDERIAN, HARRY, WEST PITTSTON, PA	2/20/2006
BERMUDEZ, ROBERTO, MIAMI, FL	2/20/2006
CANO, ORLANDO, NORCROSS, GA	2/20/2006
CHALA, ARAYMA, MIRAMAR, FL	2/20/2006
CHANG, MAY, SAN DIEGO, CA	2/20/2006
CLEMENTS, NICOLE, SHERWOOD, OR	2/20/2006
CONNER, CHERRY, CLAYTON, AL	2/20/2006
CYR, MELISSA, TOPEKA, KS	2/20/2006
DEL POZZO, ZOILA, SPRINGHILL, FL	2/20/2006
DEMORALES, OSVALDO, MIAMI, FL	2/20/2006
DURBEN, CARYN, PLAINVIEW, TX	2/20/2006
ELAMIN, SALAH, RICHMOND, VA	2/20/2006
ELBASHER, ABDELSHAKOOR, GLEN ALLEN, PA	2/20/2006
ELDICK, MAHMOUD, CRESCENT CITY, FL	2/20/2006
ELLIOTT, JOSEPH, MIAMI, FL	2/20/2006
ENGLEBERT, BARBARA, BROOKLYN, NY	2/20/2006
EXPOSITO, JUAN, PENSACOLA, FL	2/20/2006
FALESBORK, RAQUEL, HYDE PARK, MA	2/20/2006
FANTASIA, ROBERT, GREENVILLE, OH	2/20/2006
FORCADA, JORGE, LEXINGTON, KY	2/20/2006
GOGGANS, CHRISTA, TACOMA, WA	2/20/2006
GRATE, ROCHELLE, GEORGETOWN, SC	2/20/2006
HENRY, MARK, DUPONT, WA	2/20/2006
HEU, DANG, KANSAS CITY, KS	2/20/2006
JACK A KAUFMAN. D P M, P C, FARMINGTON HILLS, MI	2/20/2006
JOHNSON, CYNTHIA, VICTORIA, TX	2/20/2006
JOHNSON, KEVIN, MILWAUKEE, WI	2/20/2006
JONES, DEBRA, FRESNO, CA	2/20/2006
JORGENSON, MARJORY, WAUPUN, WI	2/20/2006
KALUNTA, COSMAS, CHINO HILLS, CA	2/20/2006
LANCASTER, EDWARD, LANCASTER, PA	2/20/2006
LEWIS, TENISHA, EDMOND, OK	2/20/2006
LOFLING, KASANDRA, LONG BEACH, WA	2/20/2006
MARTINEZ, ELIEZER, BRIDGETON, NJ	2/20/2006
MEJIAS, MARGARITA, MIAMI, FL	2/20/2006
MESA. DAFNE, COLEMAN, FL	2/20/2006
MITCHELL, CLARK, PENSACOLA, FL	2/20/2006
MOSES, PAMELA, ROCKFORD, IL	2/20/2006
PRITZ, NICOLE, TOPEKA. KS	2/20/2006
RAMIREZ, MARUJA, MIAMI, FL	2/20/2006
SANCHEZ, ELAYNE, DANBURY, CT	2/20/2006
SARAIVA, WILLIAMS, IRVINE, CA	2/20/2006
SLATON, MARION, BATON ROUGE, LA	2/20/2006
TANSLEY, MARGARET, NEWARK, DE	2/20/2006
TATE, RISHELL, ARDMORE, OK	2/20/2006
WANG, JIING, EL MONTE, CA	2/20/2006
WILLIAMS, FLORA, HOMINY, OK	2/20/2006
FELONY CONVICTION FOR HEALTH CARE FRAUD	
AMONTOS, BONIFACIO, PASADENA, CA	2/20/2006
BAYDOUN, ROBIA, DEARBORN HEIGHTS, MI	2/20/2006
BRETON, STEPHANIE, FAIRFIELD, ME	2/20/2006
CAMPBELL, JOHN, NASHPORT, OH	2/20/2006
CANET, FRANCISCO, RANCHO PALOS VERDES, CA	2/20/2006
CARCHIA, ETTORE, MANAHAWKIN, NJ	2/20/2006
CARTOZIAN, ANNETTE, TIGARD, OR	2/20/2006
CHAVEZ, RACHEL, REEDLEY, CA	2/20/2006
DEARBORN PHARMACY, INC, DEARBORN, MI	2/20/2006
FERRO, LOUIE, INDEPENDENCE, MO	2/20/2006
GIBSON, JULIE, LANCASTER, KY	2/20/2006
GROOTHAND, KIMBERLY, SANFORD, ME	2/20/2006
HAROLD F FARBER, MD, PC, ELKINS PLACE, PA	2/20/2006
KING, MICHAEL, MANTECA, CA	2/20/2006
LEININGER. VANESSA, WILSONVILLE, OR	2/20/2006
LEWIS, VICTORIA, LOUISVILLE, KY	2/20/2006
LU, HONG, ALBUQUERQUE, NM	2/20/2006
MOLMENTI, LUIS, PLYMOUTH, MA	2/20/2006
MORENO, ELGEN, LOS ANGELES, CA	2/20/2006
NOURSE, MATTHEW, LUCASVILLE, OH	2/20/2006
PARROTT, LISA. BENTON, KY	2/20/2006

Subject name, address	Effective date
SHEADE, ROBERT, BUCKEYE, AZ	2/20/2006
SMITH, MICHELLE, CLEVELAND, OH	2/20/2006
SNOW, WARD, BREWER, ME	2/20/2006
TUTTLE, LISA, GORHAM, ME	2/20/2006
FELONY CONTROL SUBSTANCE CONVICTION	
BAILEY, PATRICIA, COVINGTON, LA	2/20/2006
BAXLEY, LISA, BARTOW, FL	2/20/2006
BEHRENDT, MICHELLE, SEGUIN, TX	2/20/2006
BOWERS, DIONNA, ROCKLIN, CA	2/20/2006
DECKER, LORY, LOUISVILLE, KY	2/20/2006
FERST, KENNETH, VALLEY STREAM, NY	2/20/2006
KATO, JENNIFER, CAPE CORAL, FL	2/20/2006
LOERA. ROSE, SAN ANTONIO, TX	2/20/2006
LUKEE, TRACEY, LOUISVILLE, KY	2/20/2006
MARCINAK, LESLIE, JACKSONVILLE, FL	2/20/2006
MCKELLAR, MONICA, FT WORTH, TX	2/20/2006
MITUNIEWICZ, CHRISTINA, PORTLAND, OR	2/20/2006
RICE, JOLEEN, PHOENIX, AZ	2/20/2006
ROBERTS, ALVIN, HOMINY, OK	2/20/2006
SHANER, BRENDA, NICHOLASVILLE, KY	2/20/2006
VILLALPANDO, SHEILA, COTTONWOOD, AZ	2/20/2006
WILSON, JUDITH, KEOSAUQUA, IA	2/20/2006
PATIENT ABUSE/NEGLECT CONVICTIONS	
APHAYVONG, VIVA, FRESNO, CA	2/20/2006
BEALS, JAIME, DERBY, NY	2/20/2006
BRAKEBILL, DOROTHY, CONWAY, AR	2/20/2006
CARDONA, CELIA, FONTANA, CA	2/20/2006
HARPER, SHARON, TULSA, OK	2/20/2006
LANDRIGAN, VICTOR, ORLANDO, FL	2/20/2006
MATSUOKA, SHIZUO, ALAMEDA, CA	2/20/2006
MCKENNA, PETER, ESSEX JUNCTION, VT	2/20/2006
OCHOA, MIRIAM, YUMA, AZ	2/20/2006
ONSTINE, CHARLES, FLORENCE, AZ	2/20/2006
ORTEGA, RAFAEL, ESCONDIDO, CA	2/20/2006
PETTIS, DONNA, THOMASVILLE, GA	2/20/2006
PRO, VICKI, CLUNE, PA	2/20/2006
ROBINSON, ANTHONY, SYRACUSE, NY	2/20/2006
SIBAL, ROMMEL, NORCO, CA	2/20/2006
SMITH, HEATHER, BARRE, VT	2/20/2006
SOLOWAY, JUDI, SAYRE, PA	2/20/2006
STEVENSON, DEBBIE, BATON ROUGE, LA	2/20/2006
STEVENSON, GERALDINE, COLORADO SPRINGS, CO	2/20/2006
SYKES, BOYD, BENTON, AR	2/20/2006
CONVICTION FOR HEALTH CARE FRAUD	
BURR-MCCANN, CAROLINE, ALBANY, NY	2/20/2006
LICENSE REVOCATION/SUSPENSION/SURRENDERED	
ADKINS, BARBARA, HEIDRICK, KY	2/20/2006
AGOSTINACCHIO, JOSEPH, DELTONA, FL	2/20/2006
ALEMAN, ADRIANA, BRANDON, FL	2/20/2006
ALMODOVA, OLGA, YUMA, AZ	2/20/2006
ANDERSON, ELIZABETH, TEMPE, AZ	2/20/2006
ANSHUTZ, INGRID, MODESTO, CA	2/20/2006
AYERS, GEORGE, CUMBERLAND, MD	2/20/2006
BANNON, BARBARA, BOCA RATON, FL	2/20/2006
BERLING, KITTY, CHARLOTTE, NC	2/20/2006
BERTOLDO, JILL, MORGAN HILL, CA	2/20/2006
BLASS, CLAIRE, DAYTONA BEACH, FL	2/20/2006
BOLLES, LENORE, MABANK, TX	2/20/2006
BONTEMPI, BARBARA, GOODYEAR, AZ	2/20/2006
BOSWELL, DONNA, HOUSTON, TX	2/20/2006
BOWE, GREGORY, DORCHESTER CENTER, MA	2/20/2006
BOWMAN, LEWIS, SALT LAKE CITY, UT	2/20/2006
BRADY, ANDREA, VINE GROVE, KY	2/20/2006
BRANCH, HEATHERLY, BOYNTON BEACH, FL	2/20/2006
BRAUER, JOANN, WILDER, VT	2/20/2006
BRIDGES, GAIL, SAN BERNARDINO, CA	2/20/2006

Subject name, address	Effective date
BROWN, ADRIENNE, CLARKSDALE, MS	2/20/2006
BROWN, SARI, BEAUMONT, TX	2/20/2006
BUCHANAN, BENJAMIN, PENSACOLA, FL	2/20/2006
CAMERON. LINETTE, ST AUGUSTINE, FL	2/20/2006
CATAPANO, SANDRA, THOUSAND OAKS, CA	2/20/2006
CHISHOLM, TAMMY, NEW SMYRNA BEACH, FL	2/20/2006
CLAUSEN, AUTUMN, YUMA, AZ	2/20/2006
CLEUSMAN, PATRICIA, WISE. VA	2/20/2006
COLEMAN, JESSICA, PORTLAND, ME	2/20/2006
COLEMAN, SUSANNAH, BURLEY, ID	2/20/2006
CORDOVA, LETICIA, ALAMEDA, CA	2/20/2006
CORREA, ELTON, GLENDALE. AZ	2/20/2006
CYPERT, SUNNY, SEARCY, AR	2/20/2006
DADE, PAMELA, QUINCY, IL	2/20/2006
DAY, PAMELA, WOOTON, KY	2/20/2006
DEVORSS. JENNIFER, VALRICO, FL	2/20/2006
DILLON, JULIE, SWEETWATER, TX	2/20/2006
DOYLE, BRENDA, CHURCHVILLE, NY	2/20/2006
DUENAS, CATHERINE, ALOHA, OR	2/20/2006
DURBIN, DAVID, TUCSON, AZ	2/20/2006
DYKE, BARBARA, CLAREMONT, NH	2/20/2006
ELLIS, BETH, GLENDALE, AZ	2/20/2006
ESTEP, RHONDA, MANCHESTER. KY	2/20/2006
ESTES, SHELIA, BLUE MOUNTAIN. MS	2/20/2006
ETTARI, KATHLEEN, ESSEX JUNCTION, VT	2/20/2006
FELKINS, SUNDAE, OROVILLE, CA	2/20/2006
FENNER-HALET, THERESA, JACKSONVILLE, FL	2/20/2006
FERGUSON, RHONDA, CARTHAGE, MS	2/20/2006
FERNANDO, ROLANDO, RANCHO PALOS VERDES, CA	2/20/2006
FINCHUM, RACHEL, NEWBURGH, IN	2/20/2006
GANN, SHARON, MAYFIELD, KY	2/20/2006
GARCIA, ALBERTO, DOUGLAS, AZ	2/20/2006
GILBRIDE, ANNETTE, KANSAS CITY, MO	2/20/2006
GONSHERY, DENISE, BURLINGTON, NJ	2/20/2006
GONZALES, SHONNA, PHOENIX, AZ	2/20/2006
GRANT, SHANNON, POST FALLS, ID	2/20/2006
GRAY, BERTHA, MESA, AZ	2/20/2006
HARE, GEORGE, CHARLOTTE, NC	2/20/2006
HARTSOCK, PATRICIA, RICHMOND, VA	2/20/2006
HAURY, NICOLE, NEW HAVEN, VT	2/20/2006
HAYDEN, MARILYN, LEBANON, KY	2/20/2006
HAYNES, CATHYRN, LAKESIDE, CA	2/20/2006
HERNANDEZ, ANNETTE, TUCSON, AZ	2/20/2006
HETTINGER, DIANA, LOUISVILLE, KY	2/20/2006
HILL, CHARLENE, PALM DESERT, CA	2/20/2006
HOLCOMB, ROBERT, WINTHROP, ME	2/20/2006
HOLETS, THOMAS, WALKER, MN	2/20/2006
HONG, MARILYN, FAIRFAX, VA	2/20/2006
HOOD, MICHAEL, BOWLING GREEN, KY	2/20/2006
HOUSTON, SHARON, FREMONT, CA	2/20/2006
HUNZICKER, GLENDA, COVINGTON, KY	2/20/2006
IRVING, NORMA, AVONDALE, AZ	2/20/2006
JONES, CAROLE, COMPTON, CA	2/20/2006
KERN, KAREN, BETHEL PARK, PA	2/20/2006
KETCHUM, WAYNE, ELK RIVER, ID	2/20/2006
LANGLEY, CARLEATHA, BYLAS, AZ	2/20/2006
LEAL, DAVID, HIALEAH, FL	2/20/2006
LEPSCH, LINDA, SANTA FE, NM	2/20/2006
LIBBY, PAMELA, HUNTINGTON BEACH, CA	2/20/2006
LOCKLEAR, MOON, SHANNON, NC	2/20/2006
MADDIX, DOUGLAS, UTICA, MI	2/20/2006
MANHEIMER, ELVIRA, KAIBITO, AZ	2/20/2006
MARKS, KIMBERLY, COBDEN, IL	2/20/2006
MATHEWS, JOHN, CHICAGO, IL	2/20/2006
MATT, LEIGH, PORT ARTHUR, TX	2/20/2006
MCNALLY, JEAN, RIALTO, CA	2/20/2006
MEDINA, MARIA, SCOTTSDALE, AZ	2/20/2006
MESA, DAVID, MESA, CA	2/20/2006
MILLIKAN, KIMBERLY, PROVIDENCE, KY	2/20/2006
MILLORA, CHARISMA, VALLEJO, CA	2/20/2006
MITCHELL, LISA, TUPPER LAKE, NY	2/20/2006
MORGAN, BREE, PITTSFIELD, MA	2/20/2006
MOULDER, LARRY, TAVARES, FL	2/20/2006

Subject name, address	Effective date
MUSICK, ROY, ENGLEWOOD, FL	2/20/2006
NAVAL, DURENOA, NORTH FORT MYERS, FL	2/20/2006
NEIDERT, KATHLEEN, STOW, OH	2/20/2006
ORNELAS, RHONDA, LAS VEGAS, NV	2/20/2006
PAQUETTE, MARK, PALM SPRINGS, CA	2/20/2006
PARKER, LOIS, PHOENIX, AZ	2/20/2006
PEGUES, MARY, VERONA, MS	2/20/2006
PHELPS, MARCIA, HOOKS, TX	2/20/2006
PHILLIPS, KAREN, CHARLOTTE, NC	2/20/2006
PIERRE-PAUL, MARIE, OAKLAND PARK, FL	2/20/2006
PONTO, DENNIS, LANESVILLE, IN	2/20/2006
PORTER, CHRISTINE, CALAIS, ME	2/20/2006
POYNTER, KATRINA, GLASGOW, KY	2/20/2006
PROCTOR, LISA, KINGMAN, AZ	2/20/2006
PROUDFOOT, THOMAS, BOULDER, CO	2/20/2006
QUIJANO, MANOLITO, LA PALMA, CA	2/20/2006
RAINWATER, BELINDA, ALEXANDER CITY, AL	2/20/2006
RASMUSSEN, ELIZABETH, WHITE STONE, VA	2/20/2006
REESE, MAXINE, TAMPA, FL	2/20/2006
REID, SHERRI, NEWPORT, NC	2/20/2006
RICKER, KYLIE, SHAPLEIGH, ME	2/20/2006
ROARABAUGH, ROBERT, ENGLEWOOD, FL	2/20/2006
RODE, CYNTHIA, NAPA, CA	2/20/2006
ROSENBLATT, PEDRITA, SAINT PETERSBURG, FL	2/20/2006
ROZAS, ROLAND, MIAMI, FL	2/20/2006
RUCKER, SHERWIN, BLACKEY, KY	2/20/2006
SCHACHT, RACHEL, TUCSON, AZ	2/20/2006
SHARP, ANDREW, MANDEVILLE, LA	2/20/2006
SHEA, STEVEN, CASSELBERRY, FL	2/20/2006
SMITH, ALISA, CORONA, CA	2/20/2006
SMITH, KATHLEEN, ONTARIO, CA	2/20/2006
SOBCZAK, DEBORAH, VALPARAISO, IN	2/20/2006
SPITZ, ROBERT, HANOVER, MA	2/20/2006
STEPHENS, SAUNDRA, WINCHESTER, KY	2/20/2006
STONE, CHRISTINA, INDIAN TRAIL, NC	2/20/2006
TAYLOR, AMY, CLINTON, MS	2/20/2006
THELEN, CAROL, EDGEWOOD, KY	2/20/2006
THOMAS, CAROLYN, LOS ANGELES, CA	2/20/2006
TISCHLER, TOBBY, MERIDIAN, TX	2/20/2006
TRAUDT, MARK, CHINO, CA	2/20/2006
TRAVIS, SHANNA, LAKE CITY, FL	2/20/2006
TROTTIER, MARIANNE, NAPLES, FL	2/20/2006
TRUJILLO, MANUEL, HIALEAH, FL	2/20/2006
VALDEZ, DELLA, THORNTON, CO	2/20/2006
VARELAS, MARIA, TUCSON, AZ	2/20/2006
VEATCH, SHELLY, COLORADO SPRINGS, CO	2/20/2006
VERDUGO, ADRIANA, CHANDLER, AZ	2/20/2006
VILLAFUERTE, VICTOR, GILROY, CA	2/20/2006
WALKER, JERRY, DEL CITY, OK	2/20/2006
WALLACE, KENT, FLINT, MI	2/20/2006
WESCOTT, DANA, AURORA, CO	2/20/2006
WEZA, KIMBERLEY, WESTFORD, MA	2/20/2006
WILLIAMS, AMY, NAMPA, ID	2/20/2006
WILLIS, LA VONNE, BEVERLY HILLS, CA	2/20/2006
WILLIS, SUSIE, BURKESVILLE, KY	2/20/2006
WITTKOPP, GEORGE, WEST LINN, OR	2/20/2006
WOOD, DAVID, FORT BRAGG, CA	2/20/2006
WOOD, RHONDA, FREEPORT, FL	2/20/2006
WRIGHT, JOYCE, JOYCE, WA	2/20/2006
FEDERAL/STATE EXCLUSION/SUSPENSION	
JONESVILLE FAMILY COUNSELING, JONESVILLE, LA	2/20/2006
MIRIAM C JONES & ASSOCIATES, NEW ORLEANS, LA	2/20/2006
OWNED/CONTROLLED BY CONVICTED/ENTITIES	
CLARK C MITCHELL, MD, PA, MIAMI BEACH, FL	2/20/2006
EAST HARRIS COUNTY ORTHOPEDICS ASSOCIATES, PA, HOUSTON, TX	2/20/2006
GARY BLUMBERG, D O, P L C, DEERFIELD BEACH, FL	2/20/2006
HOSPITALITY CARE TRANSPORTATION, MILWAUKEE, WI	2/20/2006
MEADOWREED, INC, MANZANITA, OR	2/20/2006
MOORE HEARING PC, KALISPELL, MT	2/20/2006

Subject name, address	Effective date
DEFAULT ON HEAL LOAN	
DIEL, TIMOTHY, ORLANDO, FL	2/20/2006
ORAZIO-VENIZELOS, KAREN, ACTION, MA	2/20/2006
PHAM, HAU, WALTHAM, MA	2/20/2006
PHILLIPS, BRIAN, PROSPECT, KY	2/20/2006
PITMAN, JEFFERY, HARDIN, KY	2/20/2006
SARRELL, LELAND, JASPER, GA	2/20/2006
SHANKMAN, RICHARD, OAKLAND GARDENS, NY	2/20/2006

Dated: February 1, 2006.

Maureen Byer,

Acting Director, Exclusions Staff, Office of Inspector General.

[FR Doc. E6–1763 Filed 2–8–06; 8:45 am]

BILLING CODE 4152–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Currituck National Wildlife Refugee

AGENCY: Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of availability of the Draft Comprehensive Conservation Plan and Environmental Assessment for Currituck National Wildlife Refuge in Currituck County, North Carolina.

SUMMARY: This notice announces that a Draft Comprehensive Conservation Plan and Environmental Assessment for Currituck National Wildlife Refuge are available for review and comment. The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, requires the Service to develop a comprehensive conservation plan for each national wildlife refuge. The purpose in developing a comprehensive conservation plan is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and Service policies. In addition to outlining broad management direction on conserving wildlife and their habitats, plans identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation.

DATES: Individuals wishing to comment on the Draft Comprehensive Conservation Plan and Environmental Assessment for Currituck National Wildlife Refuge should do so no later than March 13, 2006. Public comments were requested, considered, and incorporated throughout the planning process in numerous ways. Public outreach has included scoping meetings, a review of the biological program, an ecosystem planning newsletter, and a **Federal Register** notice.

ADDRESSES: Requests for copies of the Draft Comprehensive Conservation Plan and Environmental Assessment should be addressed to Tim Cooper, Refuge Manager, Mackay Island National Wildlife Refuge, P.O. Box 39, Knotts Island, North Carolina 27950; Telephone (252) 429–3100; Fax (252) 429–3186. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowed by law.

SUPPLEMENTARY INFORMATION: The Service analyzed three alternatives for future management of the refuge and chose Alternative 2, an alternative that addresses the refuge's highest priorities.

Proposed goals for the refuge include:

- Conserve, protect, and maintain healthy and viable populations of migratory birds, wildlife, fish, and plants, including Federal and State endangered species and trust species.
- Restore, enhance, and maintain the health and biodiversity of beach and dune systems, maritime forests, and marsh habitats to ensure optimum ecological productivity and protect the water quality of Currituck Sound.
- Provide the public with safe, quality wildlife-dependent recreational and educational opportunities that focus on the wildlife and habitats of the refuge and the National Wildlife Refuge System.
- Protect refuge resources by limiting the adverse impacts of human activities and development.
- Acquire and manage adequate funding, human resources, facilities, equipment, and infrastructure to accomplish the other refuge goals.

Also available for review are draft compatibility determinations for recreational hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation.

Alternatives

Alternative 1 maintains the status quo. The refuge would manage very intensively the water levels of the impoundments and the vegetation to create 50 parent good vegetation for migrating waterfowl, but would not manage for mudflats for shorebirds. It would also manage marshes with prescribed fire. The staff would survey waterfowl on a routine basis. The refuge would allow the six priority public use activities: hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. The staff would conduct environmental education and interpretation on a request basis only. There would be no staff stationed at Currituck National Wildlife Refuge. Seven staff members would serve the refuge and be stationed at Mackay Island National Wildlife Refuge. They would spend 2.85 staff years at Currituck Refuge and 4.15 full time equivalent staff years at Mackay Island National Wildlife Refuge.

Alternative 2 proposes moderate program increases. The refuge would develop a habitat management plan and manage all habitats on the refuge. The refuge would manage very intensively the water levels of the impoundments and the vegetation to create 60 percent good vegetation for migrating waterfowl and 20 percent mudflats in the spring for shorebirds when feasible. The Service would add new impoundments. The staff would monitor vegetation in the marshes before and after prescribed burns and inventory vegetation in the maritime swamp forest. They would survey a wide range of wildlife on the refuge. The refuge would continue to allow the six priority public use activities, but would have the capacity

to increase the number of opportunities. The staff would conduct regularly schedule environmental education and interpretation programs. The Service would partner with the North Carolina Wildlife Resources Commission to use the environmental education center being built by the Commission in corolla. There would be fifteen staff members, four of whom would be stationed at Currituck Refuge and eleven of whom would be stationed at Mackay Island Refuge. They would spend 7.2 full time equivalent staff years at Currituck Refuge and 7.8 full time equivalent staff years at Mackay Island Refuge. The staff would include a biologist, public use specialist, refuge operations specialist, and law enforcement officer.

Alternative 3 proposes substantial program increases. The refuge would develop a habitat management plan and manage all habitats on the refuge. The refuge would manage very intensively the water levels of the impoundments and the vegetation to create 70 percent good vegetation for migrating waterfowl, and 20 percent mudflats in the spring and 10 percent in the fall for shorebirds. The Service would add new impoundments. The staff would survey invertebrates in the mudflats to determine the effects of management. The staff would monitor vegetation in the marshes before and after prescribed burns, adapt the burn plan to the monitoring results, and inventory vegetation in the maritime swamp forest. The staff would survey all wildlife on the refuge. The refuge would increase further the number of public use opportunities. The Service would use the environmental education center being built by the North Carolina Wildlife Resources Commission. There would be twenty-four staff members, seven of whom would be stationed at Currituck Refuge and seventeen of whom would be stationed at Mackay Island Refuge. They would spend 12.75 full time equivalent staff years at Currituck Refuge and 11.25 full time equivalent staff years at Mackay Island Refuge. The staff would include separate law enforcement officers and public use specialists for each refuge.

Actions Common to All Alternatives

All three alternatives share the following concepts and techniques for achieving the goals of the refuge:

- Cooperating with local, State, and Federal agencies, as well as non-government organizations, to administer refuge programs;
- Utilizing volunteers to execute the public use, biological, and maintenance programs on the refuge;
- Monitoring populations of waterfowl, shorebirds, and wading birds, and vegetation in the refuge impoundments;
- Maintaining vegetation in the marsh with prescribed fire; and
- Encouraging scientific research on the refuge.

Currituck National Wildlife Refuge, in northeastern North Carolina, consists of 4,570 acres of fee simple land and 3,931 acres of conservation easements. Of the fee simple land, 2,202 acres are brackish marsh, 778 acres are brackish shrub, 637 acres are maritime forest, 202 acres are dune, and 143 acres are managed wetlands (impoundments). These habitats support a variety of wildlife species, including waterfowl, shorebirds, wading birds, marsh birds, and neotropical migratory songbirds.

The refuge hosts more than nineteen thousand visitors annually, who participate in hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: April 29, 2005.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. 06–1200 Filed 2–8–06; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1320–EL]

Powder River Regional Coal Team Activities: Notice of Public Meeting in Casper, WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: The Powder River Regional Coal Team (RCT) has scheduled a public meeting for April 19, 2006, to review current and proposed activities in the Powder River Coal Region and to review pending coal lease applications (LBA).

DATES: The RCT meeting will begin at 9 a.m. MDT on April 19, 2006. The meeting is open to the public.

ADDRESSES: The meeting will be held at the Wyoming Oil and Gas Conservation Commission, 2211 King Boulevard, Casper, Wyoming.

FOR FURTHER INFORMATION CONTACT: Robert Janssen, Regional Coal Coordinator, BLM Wyoming State Office, Division of Minerals and Lands, 5353 Yellowstone Road, Cheyenne, Wyoming 82009; telephone 307–775–6206 or Rebecca Spurgin, Regional Coal Coordinator, BLM Montana State Office, Division of Resources, 5001 Southgate Drive, Billings, Montana 59101; telephone 406–896–5080.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to discuss pending coal lease by applications (LBAs) in the Powder River Basin as well as other federal coal related actions in the region. Specific coal lease applications and other matters for the RCT to consider include:

1. The Hilight Field LBA, a new lease application filed by Arkland Co. on October 7, 2005, is adjacent to both the Black Thunder and the Jacobs Ranch mines. Approximately 4590.19 acres and 588.2 million tons of Federal coal are involved. More details will be presented at the meeting. The RCT needs to consider the BLM processing schedule for the Hilight Field LBA.

2. The West Hilight Field LBA, a new lease application filed by Arkland Co. on January 17, 2006, is adjacent to the Black Thunder mine. Approximately 2,370 acres and 428 million tons of Federal coal are involved. More details will be presented at the meeting. The RCT needs to consider the BLM processing schedule for the West Hilight Field LBA.

3. The BLM received an application from Peabody Energy Company for a coal lease exchange for leased federal coal in the Gold Mine Draw Alluvial Valley Floor area. This exchange application was initially discussed at the RCT meeting held on April 29, 2005. The RCT will be updated on the progress of this exchange.

4. The BLM is doing a coal review study in the Powder River Basin. This study includes coal development forecasts, and an evaluation of cumulative effects. The results of this review will be used in the preparation of coal related NEPA documents in the Powder River coal region. The RCT will be updated on the progress and results of this study.

5. The RCT will hear a discussion from representatives of both Montana and Wyoming on coal conversion technologies and projects.

6. Update on BLM land use planning efforts in the Powder River Basin of Wyoming and Montana.

7. Other Coal Lease Applications and issues that may arise prior to the meeting. The RCT may generate recommendation(s) for any or all of these topics and other topics that may arise prior to the meeting date.

The meeting will serve as a forum for public discussion on Federal coal

management issues of concern in the Powder River Basin region. Any party interested in providing comments or data related to the above pending applications, or any party proposing other issues to be considered by the RCT, may either do so in writing to the State Director (922), BLM Wyoming State Office, P.O. Box 1828, Cheyenne, WY 82003, no later than April 3, 2006, or by addressing the RCT with his/her concerns at the meeting on April 19, 2006.

The draft agenda for the meeting follows:

1. Introduction of RCT Members and guests.
2. Approval of the Minutes of the April 29, 2005 Regional Coal Team meeting held in Gillette, Wyoming.
3. Coal activity since last RCT meeting.
4. Industry Presentations on Lease Applications:—Arch Minerals, Hilight Field LBA
5. BLM presentation on Gold Mine Draw lease exchange.
6. BLM presentation on Powder River Basin coal review study.
7. Presentation by Wyoming and Montana on coal conversion projects.
8. BLM land use planning efforts.
9. Other pending coal actions and other discussion items that may arise
10. Discussion of the next meeting.
11. Adjourn.

Donald A. Simpson,

Acting Associate State Director.

[FR Doc. E6–1732 Filed 2–8–06; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ–910–0777–XP–241A]

State of Arizona Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Arizona Resource Advisory Council meeting notice.

SUMMARY: This notice announces a meeting of the Arizona Resource Advisory Council (RAC).

The business meeting will be held on March 2, 2006, in Tucson, Arizona, at the Doubletree Hotel—Tucson Reid Park located at 445 South Alvernon Way. It will begin at 9:30 a.m. and conclude at 4:30 p.m. The agenda items to be covered include: Review of the December 6, 2005 Meeting Minutes; BLM State Director's Update on Statewide Issues; Presentation on Geo-Tourism—National Geographic and Sonoran Institute Partnership, Updates on the Recreation Resource Advisory Committees, Recreation Use Fees, Saginaw Hill, and Arizona Land Use Planning; RAC Questions on Written Reports from BLM Field Managers; Field Office Rangeland Resource Team Proposals; RAC Discussion on the Annual Work Plan Review; Reports by the Standards and Guidelines, Recreation, Off-Highway Vehicle Use, Public Relations, Land Use Planning and Tenure, and Wild Horse and Burro Working Groups; Reports from RAC members; and Discussion of future meetings. A public comment period will be provided at 11:30 a.m. on March 2, 2006, for any interested publics who wish to address the Council.

FOR FURTHER INFORMATION CONTACT: Deborah Stevens, Bureau of Land Management, Arizona State Office, One North Central Avenue, Suite 800, Phoenix, Arizona 85004–4427, (602) 417–9215.

Elaine Y. Zielinski,

Arizona State Director.

[FR Doc. 06–1201 Filed 2–8–06; 8:45 am]

BILLING CODE 4310–32–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–200–0777–XZ–241A]

Notice of Meeting, Front Range Resource Advisory Council (Colorado)

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Front Range Resource Advisory Council (RAC), will meet as indicated below.

DATES: The meeting will be held March 15, 2006 from 9:15 a.m. to 4 p.m.

ADDRESSES: Holy Cross Abbey Community Center, 2951 E. Highway 50, Canon City, Colorado 81212.

FOR FURTHER INFORMATION CONTACT: Ken Smith, (719) 269–8500.

SUPPLEMENTARY INFORMATION: The 15 member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in the Royal Gorge Field Office and San Luis Valley, Colorado. Planned agenda topics include: Manager updates on current land management issues; a briefing on water issues; Millsap Gulch reclamation project; and Royal Gorge Field Office and San Luis Valley travel management planning. All meetings are open to the public. The public is encouraged to make oral comments to the Council at 9:30 a.m. or written statements may be submitted for the Councils consideration. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Summary minutes for the Council Meeting will be maintained in the Royal Gorge Field Office and will be available for public inspection and reproduction during regular business hours within thirty (30) days following the meeting. Meeting Minutes and agenda (10 days prior to each meeting) are also available at: *http://www.blm.gov/rac/co/frrac/co_fr.htm.*

Dated: February 2, 2006.

Roy L. Masinton,

Royal Gorge Field Manager.

[FR Doc. E6–1772 Filed 2–8–06; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

National Park Service

Environmental Statements; Notice of Intent: Roosevelt-Vanderbilt National Historic Sites, NY; General Management Plan

AGENCY: National Park Service, Interior.

ACTION: Notice of intent to prepare a General Management Plan/Environmental Impact Statement for Roosevelt-Vanderbilt National Historic Sites.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (Pub. L. 91–190 section 102(3)(c)), the National Park Service (NPS) is preparing a General Management Plan/Environmental Impact Statement (GMP/EIS) for the Roosevelt-Vanderbilt National Historic Sites located in the town of Hyde Park, Dutchess County, New York. Roosevelt-Vanderbilt National Historic Sites is an administrative entity formed by the National Park Service to manage three separately established national historic sites: Home of Franklin D. Roosevelt National Historic Site, Eleanor Roosevelt National Historic Site, and Vanderbilt Mansion National Historic Site. Together the sites embrace 777 acres of federally owned land along the east bank of the Hudson River.

Planners in the National Park Service Northeast Region will prepare the GMP/

EIS with assistance from advisors and consultants. The GMP/EIS will propose a long-term approach (15 to 20 years) to managing Roosevelt-Vanderbilt National Historic Sites that is consistent with the sites' mission, NPS policy, and other laws and regulations. As required by law and policy, during the planning process, the team will formulate a range of alternatives for natural and cultural resource protection, visitor use and interpretation, and operations. The EIS will assess the impacts of the alternative management strategies to be described in the plan. The team will invite the public to share their thoughts and ideas related to the management of the national historic sites early in the planning process and throughout the preparation of the GMP/EIS through public meetings, the Internet, and other media. Specifically, the team will seek public comment at the draft GMP/EIS phase. Following public review processes outlined under National Environmental Protection Act, the final plan will become official through the approval of a Record of Decision, which will authorize implementation of the preferred alternative. The Record of Decision is expected to be completed in 2008.

Dated: December 5, 2005.

Mary A. Bomar,

Regional Director, Northeast Region.

[FR Doc. 06–1215 Filed 2–8–06; 8:45 am]

BILLING CODE 4310–21–M

DEPARTMENT OF THE INTERIOR

National Park Service

Flight 93 National Memorial Advisory Commission

AGENCY: National Park Service.

ACTION: Notice of February 18, 2006 meeting.

SUMMARY: This notice sets forth the date of the February 18, 2006 meeting of the Flight 93 Advisory Commission.

DATES: The public meeting of the Advisory Commission will be held on February 18, 2006 from 3 p.m. to 4:30 p.m. Additionally, the Commission will attend the Flight 93 Memorial Task Force meeting the same day from 1 p.m. to 2:30 p.m., which is also open to the public.

Location: The meeting will be held at the Somerset County Courthouse, Courtroom #1; 2nd floor; 111 East Union Street, Somerset, Pennsylvania 15501. The Flight 93 Memorial Task Force meeting will be held in the same location.

Agenda

The February 18, 2006 meeting will consist of:

(1) Opening of Meeting and Pledge of Allegiance.

(2) Review and Approval of Minutes from September 7, 2005.

(3) Reports from the Flight 93 Memorial Task Force and National Park Service. Comments from the public will be received after each report and/or at the end of the meeting.

(4) Old Business.

(5) New Business.

(6) Public Comments.

(7) Closing Remarks.

FOR FURTHER INFORMATION CONTACT: Joanne M. Hanley, Superintendent, Flight 93 National Memorial, 109 West Main Street, Somerset, PA 15501. 814.443.4557.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning agenda items. The statement should be addressed to the Flight 93 Advisory Commission, 109 West Main Street, Somerset, PA 15501.

Dated: January 8, 2006.

Joanne M. Hanley,

Superintendent, Flight 93 National Memorial.

[FR Doc. 06–1214 Filed 2–8–06; 8:45 am]

BILLING CODE 4312–25–M

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–530]

In the Matter of Certain Electric Robots and Component Parts Thereof; Notice of Commission Determination Not To Review a Final Initial Determination Finding No Violation of Section 337; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on December 19, 2005, finding no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in the above-captioned investigation. Accordingly, the Commission has terminated the investigation with a finding of no violation of section 337.

FOR FURTHER INFORMATION CONTACT: Timothy P. Monaghan, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3152. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: This investigation was instituted by the Commission based on a complaint filed by FANUC Robotics America, Inc. ("FANUC") of Rochester Hills, Michigan. 70 FR 2881 (January 18, 2005). The complainant alleged violations of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337 ("section 337") in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electric robots and component parts thereof by reason of infringement of claims 1–24 of U.S. Patent No. 6,477,913 ("the '913 patent"). The complaint and notice of investigation named Behr Systems, Inc. of Auburn Hills, Michigan, Dürr AG of Stuttgart, Germany (collectively "Dürr"), Motoman, Inc. of West Carrollton, Ohio, and Yaskawa Electric Corporation of Kitakyushu, Fukuoka, Japan ("Yaskawa") as respondents.

On April 26, 2005, the ALJ issued an ID, Order No. 6, which terminated the investigation as to claims 3, 5, and 16 of the '913 patent against respondents Dürr and Behr and terminated the investigation as to claim 6 of the '913 patent against all respondents. On May 15, 2005, the Commission determined not to review Order No. 6.

On May 2, 2005, the ALJ issued an ID, Order No. 7, which granted complainant's motion to amend the complaint to add Dürr Systems, Inc., Dürr Systems GmbH, and Dürr Special Material Handling GmbH as respondents and clarified complainant's claims of contributory and induced infringement. On May 20, 2005, the Commission determined not to review Order No. 7.

On May 31, 2005, the ALJ issued an ID, Order No. 9, which terminated the

investigation as to claims 1–5, 7–9, and 15–17 of the '913 patent against respondents Motoman and Yaskawa, claims 1–2, 4, 7–9, 15, and 17 against respondents Behr and Dürr, and claims 1–9 and 15–17 against newly added respondents Dürr Systems, Inc., Dürr Systems GmbH, and Dürr Special Material Handling GmbH. On June 16, 2005, the Commission determined not to review Order No. 9.

On August 23, 2005, the ALJ issued an ID, Order No. 15, which granted complainant's motion for summary determination regarding the economic prong of the domestic industry requirement of section 337. On September 12, the Commission determined not to review Order No. 15.

An evidentiary hearing was held from September 16–23, 2005.

The claims remaining at issue are claims 10–14 and 18–24 of the '913 patent, which claims are asserted against all respondents.

On December 19, 2005, the ALJ issued his final ID and recommended determinations on remedy and bonding. The ALJ found no violation of section 337 based on his findings that respondents' accused products do not infringe any of the asserted claims of the '913 patent; that the asserted claims of the '913 patent are not invalid; that the '913 patent is enforceable; and that a domestic industry exists.

On December 28, 2005, the Commission investigative attorney ("IA"), filed a request for a two-day extension of time to file his response to the petitions for review, and that request was granted by the Chairman.

On December 30, 2005, complainant FANUC filed a petition for review of the final ID, and a separate conditional petition for review of the ID. Additionally, on the same date, respondents Yaskawa, Dürr, and the IA filed petitions for review of the ID. On January 9, 2006, Yaskawa and Dürr filed responses to complainant FANUC's petitions for review, and complainant FANUC filed a response to Yaskawa, Dürr, and the IA's petitions for review. On January 11, 2006, the IA filed a response to complainant FANUC's petition for review.

On January 17, 2006, Yaskawa filed a motion to strike untimely and previously stricken arguments in the response brief of complainant FANUC regarding motor purge tests conducted by Yaskawa. The IA concurs with this motion. On January 27, 2006, FANUC filed a response to Yaskawa's motion to strike. Having considered the motion to strike and the response thereto, the Commission has determined to grant Yaskawa's motion.

Having reviewed the record in this investigation, including the parties' written submissions, the Commission has determined not to review the ALJ's final ID, thereby allowing it to become the Commission's final determination. The Commission has terminated the investigation with a finding of no violation.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and section 210.42 of the Commission's Rules of Practice and Procedure, 19 CFR 210.42.

Issued: February 3, 2006.

By order of the Commission.

Marilyn R. Abbott,

Secretary of the Commission.

[FR Doc. E6–1795 Filed 2–8–06; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Office on Violence Against Women; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Semi-annual Progress Report for the Transitional Housing Assistance Grant Program.

The Department of Justice (DOJ), Office on Violence Against Women (OVW) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 70, Number 114, page 34797 on June 15, 2005, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until March 13, 2006. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Comments may be submitted to OMB by facsimile on (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this Information Collection

(1) Type of Information Collection: New Collection.

(2) Title of the Form/Collection: Semi-annual progress report for the Transitional Housing Assistance Grant Program.

(3) Agency form number, if any, and the applicable component of the Department sponsoring the collection: Form Number: None. Office of Justice Programs, Office on Violence Against Women.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Not-for-profit institutions. Other: State, Local, or Tribal Government. The affected public includes the approximately 120 grantees from the Transitional Housing Assistance Grant Program. These grants will provide funds to States, units of local government, Indian tribes, and other organizations, to carry out programs to provide transitional housing assistance and support services to minors, adults, and their dependents who are homeless, or in need of transitional housing or other housing assistance, as a result of fleeing a situation of domestic violence and for whom emergency shelter services or other crisis intervention services are unavailable or insufficient. 42 U.S.C. 13975.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: It is estimated that it will take the approximately 120 respondents (grantees) approximately one hour to

complete the Semi-Annual Progress Report. The report is divided into sections that pertain to the different types of activities that grantees may engage in with grant funds. Grantees must complete only those sections that are relevant to their activities.

(6) An estimate of the total public burden (in hours) associated with the collection: The estimated public burden associated with this collection is 240 hours.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: February 6, 2006.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. E6–1788 Filed 2–8–06; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States* v. *Air Products and Chemicals, Inc., et al.*, Civil Action No. 1:06–cv–38, was lodged with the United States Court for the District of Maryland on January 17, 2006.

In a complaint filed with the consent decree, the United States seeks reimbursement and a declaratory judgment for costs incurred and to be incurred in connection with the Spectron, Inc. Superfund Site ("Site"), located in Elkton, Maryland, from 48 *de minimis* defendants pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9607. These 48 *de minimis* defendants have agreed to the settlement memorialized in the consent decree. In the settlement, the settling *de minimis* defendants agree to pay approximately $356,391 to EPA and $409,198 to the Spectron PRP Site Group (SSG).

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decrees. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, P.O. Box 7611, Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Air Products and Chemicals, Inc., et al.*, DOJ Ref. #90–11–2–482/4.

The proposed consent decree may be examined at the office of the United States Attorney, District of Maryland, 36 S. Charles Street, Fourth Floor, Baltimore, MD 21201, and at U.S. EPA Region III, 1650 Arch St., Philadelphia, PA 19103. A copy of the consent decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html*. A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy of the consent decree without signatures and appendices, please enclose a check in the amount of $19.00 (25 cents per page reproduction cost) payable to the U.S. Treasury. To request a complete copy of the consent decree with appendices, please enclose a check in the amount of $36.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 06–1187 Filed 2–8–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States and State of Oklahoma* v. *City of Okmulgee and Okmulgee Public Works Authority*, Civ. No. 06–009–SH, DOJ #90–5–1–1–07445, was lodged in the United States District Court for the Eastern District of Oklahoma on January 9, 2006. The Consent Decree resolves the liability of the named defendants to the United States and the State of Oklahoma for violations of Section 301 and 311 of the Clean Water Act, 33 U.S.C. 1311 and 1321 ("Act"), and state law, and for related damages to natural resources within the Deep Fork River, within the Deep Fork National Wildlife Refuge, from the discharge of pollutants from the City's publicly owned treatment works and sanitary sewer collection system in violation of the Act, National Pollutant Discharge Elimination System ("NPDES") and Oklahoma Pollutant Discharge Elimination System ("OPDES") permits, and Title 27A of the Oklahoma Statutes.

Under the proposed Consent Decree, Defendants are required to upgrade the Okmulgee facility and sanitary sewer collection system in accordance with schedules specified in the Consent Decree at a cost of approximately $18.5 million. Defendants also must abide by operation and maintenance requirements set forth in the Decree. Additionally, Defendants will pay a civil penalty totaling $470,000 and will pay the sum of $430,000 to the U.S. Department of the Interior for natural resource damages.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States and State of Oklahoma* v. *City of Okmulgee and Okmulgee Public Works Authority*, DOJ #90–5–1–1–07445.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Eastern District of Oklahoma, 1200 West Okmulgee, Muskogee, Oklahoma 74401, and at U.S. EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html*. A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $17.00 for the Consent Decree, or $131.50 for the Consent Decree with appendices (25 cents per page reproduction cost) payable to the U.S. Treasury.

Thomas A. Mariani, Jr.,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 06–1185 Filed 2–8–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Between the United States of America and RSR Corp., Quemetco, Inc., and Quemetco Realty, Inc., Under the Comprehensive Environmental Response, Compensation, and Liability Act

Under 28 CFR 50.7, notice is hereby given that on January 31, 2006, a proposed Consent Decree ("Consent Decree") in the case of *United States* v. *RSR Corp. et al.* Civil Action No. 00–890–JLR (W.D. Wash.), has been lodged with the United States District Court for the Western District of Washington.

The Complaint sought the recovery of costs incurred in connection with response actions taken by the United States Environmental Protection Agency at the Soil and Groundwater Operable Unit of the Harbor Island Superfund Site ("the Site") in Seattle, Washington. Under the terms of the Consent Decree, Defendants will pay the United States $8,500,000.00. In exchange, the United States will provide a covenant not to sue and contribution protection to all of the Defendants.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *RSR Corp., et al.*, Civil Action No. 00–890–JLR (W.D. Wash.), D.J. Ref. 90–11–2–970B.

The Consent Decree may be examined at the Office of the United States Attorney, Western District of Washington, 601 Union Street, Suite 5100, Seattle, Washington, and at U.S. EPA Region 10, 1200 6th Avenue, Seattle, WA. During the public comment period, the Consent Decree may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $3.25 (25 cents per page reproduction cost, without attachments) payable to the United States Treasury for payment.

Robert E. Maher, Jr.

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 06–1184 Filed 2–8–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act and the Clean Water Act

Notice is hereby given that on January 30, 2006, a proposed consent decree in *United States et al.* v. *Schlumberger Technology Corporation*, Case No. 8:06–cv–00308–GRA, was lodged with the United States District Court for the District of South Carolina.

In this action, the United States, the Office of the Governor of the State of South Carolina, the Director of the South Carolina Department of Natural Resources, the Commissioner of the South Carolina Department of Health and Environmental Control, and the Commissioner of the Georgia Department of Natural Resources filed claims for natural resource damages against Schlumberger Technology Corporation ("Schlumberger") arising from the release of polychlorinated biphenyls at and from the Sangamo Weston/Twelvemile Creek/Lake Hartwell PCB Contamination Superfund Site under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9607(a)(1), (2) and (4), and the Clean Water Act, 33 U.S.C. 1321(f). The consent decree requires Schlumberger to: (1) Pay $11,960,000 into the Department of the Interior's Natural Resource Damage Assessment and Restoration Fund to be used by the natural resource trustees for projects to compensate the public for injuries to natural resources; (2) to pay $537,501 to reimburse the trustees for past costs and to pay for certain future costs to be incurred by the trustees; and (3) to complete a restoration project consisting of the removal of two dams on Twelvemile Creek.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, with a copy to Ann Hurley, U.S. Department of Justice, 301 Howard Street, Suite 1050, San Francisco, CA 94105, and should refer to *United States et al.* v. *Schlumberger Technology Corporation*, D.J. Ref. #90–11–2–696/1.

During the public comment period, the consent decree may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/open.html.* A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $12.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ellen M. Mahan,

Deputy Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 06–1183 Filed 2–8–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States* v. *Zidell Marine Corporation*, Civil Action No. C06–cv–5437RJB was lodged on January 20, 2006 with the United States District Court for the Western District of Washington. This consent decree requires the defendants to perform injunctive relief, requiring the cleanup of the Head of the Hylebos Waterway Problem Area of the Commencement Bay/Nearshore Tideflats Superfund Site.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environmental and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Zidell Marine Corporation*, DOJ Ref. 90–11–2–726/3.

The proposed consent decree may be examined at the office of the United States Attorney, 601 Union Street, Suite 5100, Seattle, WA 98101 and at U.S. EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101. During the comment

period, the consent decree may be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html*. Copies of the consent decree also may be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy, please enclose a check in the amount of $6.00 for *United States* v. *Zidell Marine Corporation*, (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert Maher,

Assistant Section Chief, Environmental Enforcement Section.

[FR Doc. 06–1186 Filed 2–8–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—IMS Global Learning Consortium, Inc.

Notice is hereby given that, on January 18, 2006, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), IMS Global Learning Consortium, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Brownstone Research Group, Rome, GA; IBM, Durham, NC; and Ministry of Education (New Zealand), Thorndon, Wellington, New Zealand have been added as parties to this venture. Also, Question Mark, London, United Kingdom; NHSU, London, United Kingdom; Cisco Learning Institute, Phoenix, AZ; Scottish Ufi, Glasgow, United Kingdom; and Virginia Tech, Blacksburg, VA have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and IMS Global Learning Consortium, Inc. intends to file additional written notification disclosing all changes in membership.

On April 7, 2000, IMS Global Learning Consortium, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on September 13, 2000 (65 FR 55283).

The last notification was filed with the Department on October 28, 2005. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 28, 2005 (70 FR 71332).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 06–1216 Filed 2–8–06; 8:45 am]

BILLING CODE 4410–11–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Council on the Humanities; Meeting

February 3, 2006.

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended) notice is hereby given the National Council on the Humanities will meet in Washington, DC on February 23–24, 2006.

The purpose of the meeting is to advise the Chairman of the National Endowment for the Humanities with respect to policies, programs, and procedures for carrying out his functions, and to review applications for financial support from and gifts offered to the Endowment and to make recommendations thereon to the Chairman.

The meeting will be held in the Old Post Office Building, 1100 Pennsylvania Avenue, NW., Washington, DC. A portion of the morning and afternoon sessions on February 23–24, 2006, will not be open to the public pursuant to subsections (c)(4), (c)(6) and (c)(9)(B) of section 552b of Title 5, United States Code because the Council will consider information that may disclose: Trade secrets and commercial or financial information obtained from a person and privileged or confidential; information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and information the premature disclosure of which would be likely to significantly frustrate implementation of proposed agency action. I have made this determination under the authority granted me by the Chairman's Delegation of Authority dated July 19, 1993.

The agenda for the session on February 23, 2006 will be as follows:

Committee Meetings

(Open to the Public)

Policy Discussion

9–10:30 a.m.

Education Programs—Room M–07
Federal/State Partnership—Room 507
Preservation and Access—Room 415
Public Programs—Room 420
Research Programs—Room 315

(Closed to the Public)

Discussion of specific grant applications and programs before the Council.

10:30 a.m. until Adjourned

Education Programs—Room M–07
Federal/State Partnership—Room 507
Preservation and Access—Room 415
Public Programs—Room 420
Research Programs—Room 315

2–3:30 p.m.

Jefferson Lecture—Room 527

The agenda for the session on February 24, 2006 will be as follows: The morning session will convene at 9 a.m., in Room M–09, and will be open to the public, as set out below.

A. Minutes of the Previous Meeting
B. Reports
1. Introductory Remarks
2. Staff Report
3. Congressional Report
4. Budget Report
5. Reports on Policy and General Matters
a. Education Programs
b. Federal/State Partnership
c. Preservation and Access
d. Public Programs
e. Research Programs
f. Jefferson Lecture

The remainder of the session on February 24, 2006 will be given to the consideration of specific applications and will be closed to the public for the reasons stated above.

Further information about this meeting can be obtained from Mr. Michael P. McDonald, Advisory Committee Management Officer, National Endowment for the Humanities, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, or by calling (202) 606–8322, TDD (202) 606–8282. Advance notice of any special needs or accommodations is appreciated.

Michael P. McDonald,

Advisory Committee Management Officer.

[FR Doc. E6–1771 Filed 2–8–06; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Extend an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the National Science Foundation (NSF) will publish periodic summaries of proposed projects.

Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Written comments on this notice must be received by April 10, 2006, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone (703) 292–7556; or send e-mail to *splimpto@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 9 a.m. and 9 p.m., Eastern time, Monday through Friday. You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

SUPPLEMENTARY INFORMATION:

Title of Collection: Request for Proposals.

OMB Approval Number: 3145–0080.

Expiration Date of Approval: May 31, 2006.

Type of Request: Intent to seek approval to extend an information collection for three years.

Proposed Project: The Federal Acquisition Regulations (FAR) Subpart 15.2—"Solicitation and Receipt of Proposals and Information" prescribes policies and procedures for preparing and issuing Requests for Proposals. The FAR System has been developed in accordance with the requirement of the Office of Federal Procurement Policy Act of 1974, as amended. The NSF Act of 1950, as amended, 42 U.S.C. 1870, Section II, states that NSF has the authority to:

(c) Enter into contracts or other arrangements, or modifications thereof, for the carrying on, by organizations or individuals in the United States and foreign countries, including other government agencies of the United States and of foreign countries, of such scientific or engineering activities as the Foundation deems necessary to carry out the purposes of this Act, and, at the request of the Secretary of Defense, specific scientific or engineering activities in connection with matters relating to international cooperation or national security, and, when deemed appropriate by the Foundation, such contracts or other arrangements or modifications thereof, may be entered into without legal consideration, without performance or other bonds and without regard to section 5 of title 41, U.S.C.

Use of the Information: Request for Proposals (RFP) is used to competitively solicit proposals in response to NSF need for services. Impact will be on those individuals or organizations who elect to submit proposals in response to the RFP. Information gathered will be evaluated in light of NSF procurement requirements to determine who will be awarded a contract.

Estimate of Burden: The Foundation estimates that, on average, 558 hours per respondent will be required to complete the RFP.

Respondents: Individuals; business or other for-profit; not-for-profit institutions; Federal government; state, local, or tribal governments.

Estimated Number of Responses: 75.

Estimated Total Annual Burden on Respondents: 41,850 hours.

Dated: February 3, 2006.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 06–1192 Filed 2–8–06; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Regulatory Guide: Issuance, Availability

The U.S. Nuclear Regulatory Commission (NRC) has issued a new guide in the agency's Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Regulatory Guide 1.203, "Transient and Accident Analysis Methods," provides guidance for NRC licensees and applicants to use in developing and assessing evaluation models that may be used to analyze transient and accident behavior that is within the design basis of a nuclear power plant. Evaluation models that the NRC has previously approved will remain acceptable and need not be revised to conform with the guidance given in this regulatory guide.

Chapter 15 of the NRC's "Standard Review Plan (SRP) for the Review of Safety Analysis Reports for Nuclear Power Plants" (NUREG–0800) and the "Standard Format and Content of Safety Analysis Reports for Nuclear Power Plants" (Regulatory Guide 1.70) describe a subset of the transient and accident events that must be considered in the safety analyses required by Title 10, part 50, of the *Code of Federal Regulations* (10 CFR part 50), "Domestic Licensing of Production and Utilization Facilities," section 50.34, "Contents of Applications; Technical Information" (10 CFR 50.34). In particular, 10 CFR 50.34 specifies the following requirements regarding applications for construction permits and/or licenses to operate a facility:

(1) Safety analysis reports must analyze the design and performance of structures, systems, and components, and their adequacy for the prevention of accidents and mitigation of the consequences of accidents.

(2) Analysis and evaluation of emergency core cooling system (ECCS) cooling performance following postulated loss-of-coolant accidents (LOCAs) must be performed in accordance with the requirements of 10 CFR 50.46.

(3) The technical specifications for the facility must be based on the safety analysis and prepared in accordance with the requirements of 10 CFR 50.36.

An additional benefit is that evaluation models that are developed using the guidelines provided in Regulatory Guide 1.203 will provide a more reliable framework for risk-informed regulation and a basis for estimating the uncertainty in understanding transient and accident behavior.

In addition, the NRC is issuing section 15.0.2 of the SRP, which covers the same subject material as Regulatory Guide 1.203, and is intended to complement the guide. Specifically, section 15.0.2 provides guidance to NRC reviewers of transient and accident

analysis methods, while Regulatory Guide 1.203 provides practices and principles for the benefit of method developers. Chapter 15 of the SRP recommends using approved evaluation models or codes for the analysis of most identified events. The SRP also suggests that evaluation model reviews should be initiated whenever an approved model does not exist for a specified plant event. If the applicant or licensee proposes to use an unapproved model, an evaluation model review should be initiated.

The NRC previously solicited public comment on this guide by publishing a **Federal Register** notice (65 FR 77934) concerning Draft Regulatory Guide DG–1096 on December 13, 2000, followed by a **Federal Register** notice (68 FR 4524) concerning Draft Regulatory Guide DG–1120 on January 29, 2003. Following the closure of the latest public comment period on March 24, 2003, the staff considered all stakeholder comments in the course of preparing the new Regulatory Guide 1.203.

The NRC staff encourages and welcomes comments and suggestions in connection with improvements to published regulatory guides, as well as items for inclusion in regulatory guides that are currently being developed. You may submit comments by any of the following methods.

Mail comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Hand-deliver comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Fax comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, at (301) 415–5144.

Requests for technical information about Regulatory Guide 1.203 may be directed to Shawn O. Marshall at (301) 415–5861 or via e-mail to *SOM@nrc.gov*.

Regulatory guides are available for inspection or downloading through the NRC's public Web site in the Regulatory Guides document collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections*. Electronic copies of Regulatory Guide 1.203 and SRP section 15.0.2 are also available in the NRC's Agencywide Documents Access and Management System (ADAMS) at *http://www.nrc.gov/reading-rm/adams.html*, under Accession Nos. ML053500170 and ML053550265, respectively.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland; the PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by email to *PDR@nrc.gov*. Requests for single copies of draft or final guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Reproduction and Distribution Services Section; by e-mail to *DISTRIBUTION@nrc.gov*; or by fax to (301) 415–2289. Telephone requests cannot be accommodated.

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

Dated at Rockville, Maryland, this 29th day of December, 2005.

For the U.S. Nuclear Regulatory Commission.

James T. Wiggins,

Deputy Director, Office of Nuclear Regulatory Research.

[FR Doc. E6–1774 Filed 2–8–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Regulatory Guide: Issuance, Availability

The U.S. Nuclear Regulatory Commission (NRC) has issued a new guide in the agency's Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Regulatory Guide 1.201, "Guidelines for Categorizing Structures, Systems, and Components in Nuclear Power Plants According to Their Safety Significance," which is being issued for trial use, provides guidance for use in developing and assessing evaluation models for accident and transient analyses. An additional benefit is that evaluation models that are developed using these guidelines will provide a more reliable framework for risk-informed regulation and a basis for estimating the uncertainty in understanding transient and accident behavior.

The NRC has promulgated regulations to permit power reactor licensees and license applicants to implement an alternative regulatory framework with respect to "special treatment," where special treatment refers to those requirements that provide increased assurance beyond normal industrial practices that structures, systems, and components (SSCs) perform their design-basis functions. Under this framework, licensees using a risk-informed process for categorizing SSCs according to their safety significance can remove SSCs of low safety significance from the scope of certain identified special treatment requirements.

The genesis of this framework stems from Option 2 of SECY–98–300, "Options for Risk-Informed Revisions to 10 CFR part 50, 'Domestic Licensing of Production and Utilization Facilities'," dated December 23, 1998.[1] In that Commission paper, the NRC staff recommended developing risk-informed approaches to the application of special treatment requirements to reduce unnecessary regulatory burden related to SSCs of low safety significance by removing such SSCs from the scope of special treatment requirements. The Commission subsequently approved the NRC staff's rulemaking plan and issuance of an Advanced Notice of Proposed Rulemaking (ANPR) as outlined in SECY–99–256, "Rulemaking Plan for Risk-Informing Special Treatment Requirements," dated October 29, 1999.

The Commission published the ANPR in the **Federal Register** (65 FR 11488) on March 3, 2000, and subsequently published a proposed rule for public comment (68 FR 26511) on May 16, 2003. Then, on November 22, 2004, the Commission adopted a new section, referred to as § 50.69, within Title 10, part 50, of the Code of Federal Regulations, on risk-informed categorization and treatment of SSCs for nuclear power plants (69 FR 68008).

This trial regulatory guide describes a method that the NRC staff considers acceptable for use in complying with the Commission's requirements in § 50.69 with respect to the

[1] Commission papers cited in this notice are available through the NRC's public Web site at *http://www.nrc.gov/reading-rm/doc-collections/commission/secys/*, and the related **Federal Register** notices are available through the Federal Register Web site sponsored by the Government Printing Office (GPO) at *http://www.gpoaccess.gov/fr/index.html*.

categorization of SSCs that are considered in risk-informing special treatment requirements. This categorization method uses the process that the Nuclear Energy Institute (NEI) described in Revision 0 of its guidance document NEI 00–04, "10 CFR 50.69 SSC Categorization Guideline," dated July 2005.[2] Specifically, this process determines the safety significance of SSCs and categorizes them into one of four risk-informed safety class (RISC) categories.

The NRC issued a draft of this guide, Draft Regulatory Guide DG–1121, as part of the § 50.69 rulemaking package in May 2003, and solicited public comments specifically concerning the draft guide by publishing related **Federal Register** notices (68 FR 34012 and 68 FR 41408) on June 6 and July 11, 2003. Following the closure of the public comment period on August 1, 2003, the staff considered all stakeholder comments in the course of preparing the new Regulatory Guide 1.201. However, a few issues of technical interpretation and implementation still remain, with respect to specific aspects of the guidance. Because the staff believes these issues will be best resolved by testing the guide against actual applications, the NRC decided to issue this guide for trial use. This trial regulatory guide does not establish any final staff positions, and may be revised in response to experience with its use. As such, this trial guide does not establish a staff position for purposes of the Backfit Rule, 10 CFR 50.109, and any changes to this trial guide prior to staff adoption in final form will not be considered to be backfits as defined in 10 CFR 50.109(a)(1). This will ensure that the lessons learned from regulatory review of pilot and follow-on applications are adequately addressed in the final regulatory guide, and that the guidance is sufficient to enhance regulatory stability in the review, approval, and implementation of probabilistic risk assessments (PRAs) and their results in the risk-informed categorization process required by § 50.69.

The NRC staff encourages and welcomes comments and suggestions in connection with improvements to published regulatory guides, as well as items for inclusion in regulatory guides that are currently being developed. You may submit comments by any of the following methods.

Mail comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Hand-deliver comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Fax comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, at (301) 415–5144.

Requests for technical information about Regulatory Guide 1.201 may be directed to Donald G. Harrison at (301) 415–3587 or via e-mail to *DGH@nrc.gov*.

Regulatory guides are available for inspection or downloading through the NRC's public Web site in the Regulatory Guides document collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections*. Electronic copies of Regulatory Guide 1.201 are also available in the NRC's Agencywide Documents Access and Management System (ADAMS) at *http://www.nrc.gov/reading-rm/adams.html*, under Accession No. ML060260164.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland; the PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *PDR@nrc.gov*. Requests for single copies of draft or final guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Reproduction and Distribution Services Section; by e-mail to *DISTRIBUTION@nrc.gov*; or by fax to (301) 415–2289. Telephone requests cannot be accommodated.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

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

Dated at Rockville, Maryland, this 27th day of January, 2006.

For the U.S. Nuclear Regulatory Commission.

Carl J. Paperiello,

Director, Office of Nuclear Regulatory Research.

[FR Doc. E6–1775 Filed 2–8–06; 8:45 am]

BILLING CODE 7590–01–P

[2] NEI 00–04, "10 CFR 50.69 SSC Categorization Guideline," is available through the NRC's public Web site at *http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?ID=052910091:&LogonId=2b2cbc48fd7897510347535dd7c30495*, and through the NRC's Agencywide Documents Access and Management System (ADAMS), *http://www.nrc.gov/reading-rm/adams/web-based.html*, under Accession #ML052910035.

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Form ADV–E; Sec File No. 270–318; OMB Control No. 3235–0361.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (the "Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Form ADV–E is the cover sheet for accountant examination certificates filed pursuant to rule 206(4)–2 under the Investment Advisers Act of 1940 by certain investment advisers retaining custody of client securities or funds. Respondents each spend approximately three minutes, annually, complying with the requirements of the form.

The estimate of burden hours set forth above is made solely for the purposes of the Paperwork Reduction Act and is not derived from a comprehensive or representative survey or study of the cost of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

January 31, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. E6–1780 Filed 2–8–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Form N–54A; SEC File No. 270–182; OMB Control No. 3235–0237.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 [44 U.S.C. 3501 *et seq.*] (the "PRA"), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information discussed below.

• Form N–54A under the Investment Company Act of 1940; Notification of Election to be Subject to Sections 55 through 65 of the Investment Company Act of 1940 Filed Pursuant to Section 54(a) of the Act.

· Form N–54A [17 CFR 274.53] is the notification to the Commission of election to be regulated as a business development company. A company making such an election only has to file a Form N–54A once.

It is estimated that approximately 46 respondents per year file with the Commission a Form N–54A. Form N–54A requires approximately 0.5 burden hours per response resulting from creating and filing the information required by the Form. The total burden hours for Form N–54A would be 23.0 hours per year in the aggregate. The estimated annual burden of 23.0 hours represents an increase of 21.0 hours over the prior estimate of 2.0 hours. The increase in burden hours is attributable to an increase in the number of respondents from 4 to 46.

The estimate of average burden hours for Form N–54A is made solely for the purposes of the PRA and is not derived from a comprehensive or even representative survey or study of the cost of Commission rules and forms.

The collection of information under Form N–54A is mandatory. The information provided by the Form is not kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or e-mail to: *David_Rostker@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

January 30, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. E6–1781 Filed 2–8–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Form N–PX; SEC File No. 270–524; OMB Control No. 3235–0582.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information discussed below.

The title of the collection of information is "Form N–PX under the Investment Company Act of 1940, Annual Report of Proxy Voting Record." Rule 30b1–4 under the Investment Company Act of 1940 ("Investment Company Act") requires every registered management investment company, other than a small business investment company ("Fund"), to file Form N–PX not later than August 31 of each year. Funds use Form N–PX to file annual reports with the Commission containing their complete proxy voting record for the most recent twelve-month period ended June 30. Funds also use Form N–PX to inform the Commission that certain of their portfolios do not hold any equity securities and have no proxy record to file.

The Commission requires the dissemination of this information in order to meet the filing and disclosure requirements of the Investment Company Act and to enable Funds to provide investors with the information necessary to evaluate an investment in the Fund. The information filed with the Commission also permits the verification of compliance with securities law requirements and assures the public availability and dissemination of the information. Requiring a Fund to file its annual reports on Form N–PX has the advantages of making each Fund's proxy voting record available within a relatively short period of time after the proxy voting season, and of providing disclosure of all Funds' proxy voting records over a uniform period of time.

There are approximately 3,700 Funds registered with the Commission, representing 7,900 Fund portfolios, which are required to file one Form N–PX each year. Those 7,900 portfolios are comprised of 5,000 portfolios holding equity securities and 2,900 portfolios holding no equity securities. The staff estimates that filing a response that states that the portfolio does not hold equity securities will require a 10 minute burden per response. The burden for portfolios holding equity securities is estimated to be 14.4 hours per response. The total annual reporting and recordkeeping burden is estimated to be approximately 72,483 hours ((5,000 responses × 14.4 hours per response for equity-holding portfolios) + (2,900 × 10 minutes per response for portfolio holding no equity securities)).

Form N–PX does not involve any recordkeeping requirements. Providing the information required by the rule is mandatory and information provided under the rule will not be kept confidential.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number.

General comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102,

New Executive Office Building, Washington, DC 20503 or e-mail to: *David_Rostker@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

January 31, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. E6–1782 Filed 2–8–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 15g–5; SEC File No. 270–348; OMB Control No. 3235–0394.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is publishing the following summary of collection for public comment.

Rule 15g–5 under the Securities Exchange Act of 1934 requires brokers and dealers to disclose to customers the amount of compensation to be received by their sales agents in connection with penny stock transactions. This rule was adopted by the Commission to increase the level of disclosure to investors concerning penny stocks generally and specific penny stock transactions. It is estimated that approximately 240 respondents incur an average burden of 100 hours annually to comply with the rule. The total annual reporting and recordkeeping burden will be 24,000 burden hours.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

January 31, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. E6–1783 Filed 2–8–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 19d–2; SEC File No. 270–204; OMB Control No. 3235–0205.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44-U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 19d–2 under the Securities Exchange Act of 1934 (the "Act") prescribes the form and content of applications to the Commission by persons desiring stays of final disciplinary sanctions and summary action of self-regulatory organizations ("SROs") for which the Commission is the appropriate regulatory agency.

It is estimated that approximately 30 respondents will utilize this application procedure annually, with a total burden of 90 hours, based upon past submissions. The staff estimates that the average number of hours necessary to comply with the requirements of Rule 19d–2 is 3 hours.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

Dated: January 31, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. E6–1784 Filed 2–8–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 30b2–1; SEC File No. 270–213; OMB Control No. 3235–0220.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 [44 U.S.C. 3501 *et seq.*], the Securities and Exchange Commission (the "Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Rule 30b2–1 under the Investment Company Act of 1940 [17 CFR 270.30b2–1] requires the filing of four copies of every periodic or interim report transmitted by or on behalf of any registered investment company to its stockholders.[1] This requirement ensures that the Commission has information in its files to perform its regulatory functions and to apprise investors of the operational and financial condition of registered investment companies.[2]

[1] Most filings are made via the Commission's electronic filing system; therefore, paper filings under Rule 30b2–1 occur only in exceptional circumstances. Electronic filing eliminates the need for multiple copies of filings.

[2] Annual and periodic reports to the Commission become part of its public files and, therefore, are available for use by prospective investors and stockholders.

Registered management investment companies are required to send reports to stockholders at least twice annually. In addition, under the recently adopted amendments to rule 30b2–1, each registered investment company is required to file with the Commission new form N–CSR, certifying the financial statements.[3] The annual burden of filing the reports is included in the burden estimate for Form N–CSR; however, we are requesting one burden hour remain in inventory for administrative purposes.

The burden estimate for rule 30b2–1 is made solely for the purposes of the Act and is not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC, 20549.

Dated: January 26, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. E6–1785 Filed 2–8–06; 8:45 am]

BILLING CODE 8010–01–P

[3] See Release No. 34–47262, IC–25914, Jan. 27, 2003 (68 FR 5384 [Feb. 3, 2003]). (Amending rule 30b2–1(a) under the Investment Company Act; adopting Form N–CSR). In addition, the Commission amended new rule 30a–2 to require both Forms N–CSR and N–SAR to include the certification required by section 302 of the Sarbanes-Oxley Act. No certified shareholder report on Form N–CSR is required with respect to a report to shareholders that is not required under rule 30e–1 under the Investment Company Act [17 CFR 270.30e–1], *e.g.*, voluntary quarterly reports. These reports to shareholders continue to be filed with the Commission as they were prior to the 2003 amendments. Rule 30b2–1(b) [17 CFR 270.30b2–1(b)].

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 34b–1; File No. 270–305; OMB Control No. 3235–0346.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information discussed below.

- Rule 34b–1 (17 CFR 270.34b–1) under the Investment Company Act of 1940, Sales Literature Deemed to be Misleading.

Rule 34b–1 under the Investment Company Act governs sales material that accompanies or follows the delivery of a statutory prospectus ("sales literature"). Rule 34b–1 deems to be materially misleading any investment company sales literature, required to be filed with the Commission by section 24(b) of the Investment Company Act [15 U.S.C. 80a–24(b)],[1] that includes performance data unless it also includes the appropriate uniformly computed data and the legend disclosure required in advertisements by rule 482 under the Securities Act of 1933 [17 CFR 230.482]. Requiring the inclusion of such standardized performance data in sales literature is designed to prevent misleading performance claims by funds and to enable investors to make meaningful comparisons among fund performance claims.

The Commission estimates that 4,500 respondents file approximately 37,000 responses with the Commission, which include the information required by rule 34b–1. The burden from rule 34b–1 requires slightly more than 2.4 hours per response resulting from creating the information required under rule 34b–1.[2] The total burden hours for rule 34b–1 are 89,143 per year in the aggregate (37,000 responses × 2.4092702 hours per response). Estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

The collection of information under rule 34b–1 is mandatory. The information provided under rule 34b–1 is not kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or e-mail to: *David_Rostker@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 30, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. E6–1786 Filed 2–8–06; 8:45 am]

BILLING CODE 8010–01–P

[1] Sales literature addressed to or intended for distribution to prospective investors shall be deemed filed with the Commission for purposes of section 24(b) of the Investment Company Act upon filing with a national securities association registered under section 15A of the Securities Exchange Act of 1934 that has adopted rules providing standards for the investment company advertising practices of its members and has established and implemented procedures to review that advertising. *See* Rule 24b–3 under the Investment Company Act [17 CFR 270.24b–3].

[2] The estimated burden per response is 2.9 hours for 686 responses and 2.4 hours for the remaining, giving a more exact weighted average burden per response of approximately 2.4092702.

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings Notice

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of February 13, 2006:

An Open Meeting will be held on Monday, February 13, 2006 at 10 a.m. in the Auditorium, Room L–002, and a Closed Meeting will be held on Wednesday, February 15, 2006 at 10 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c), (3), (4), (5), (7), (9)(B), and (10) and 17 CFR 200.402(a), (3), (4), (5), (7), 9(ii) and (10) permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Glassman, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the Open Meeting scheduled for Monday, February 13, 2006 will be:

The Commission will hear oral argument on an appeal by Eagletech Communications, Inc. ("Eagletech") from the decision of an administrative law judge. The Division of Enforcement will argue in support of the law judge's decision. The law judge found that Eagletech had failed to file with the Commission Eagletech's mandatory quarterly reports for any period after December 31, 2001 and its mandatory annual reports for any period after March 31, 2001. The law judge found that, by failing to file its reports, Eagletech willfully violated Section 13(a) of the Securities Exchange Act of 1934 and Rules 13a–1 and 13a–13 thereunder. The law judge revoked the registration of Eagletech's securities.

Among the issues likely to be argued is whether Eagletech violated the Exchange Act and rules thereunder as found by the law judge.

The subject matter of the Closed Meeting scheduled for Wednesday, February 15, 2006 will be:

Formal orders of investigations;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature;

Regulatory matters regarding financial institutions; and

Report on an investigation.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: February 6, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. 06–1234 Filed 2–7–06; 10:59 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53219; File No. SR–DTC–2005–21]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Proposed Rule Change To Implement and Revise Fees Related to Non-Participant Services

February 3, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on December 20, 2005, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") and on December 20, 2005, January 23, 2006, and January 25, 2006,[2] amended the proposed rule change as described in Items I, II, and III below, which items have been prepared by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change as amended from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

DTC is seeking to (1) Revise fees for special requests for Security Position Reports ("SPRs") and for weekly, monthly, and quarterly dividend record date SPR subscriptions,[3] (2) revise existing fees for audit confirmations provided to issuers and their agents, and (3) implement new fees for (a) audit confirmations for certificates of deposit ("CDs") provided to issuers and their agents and (b) access by transfer agents to DTC's imaging database.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[4]

[1] 15 U.S.C. 78s(b)(1).

[2] The proposed rule change filing was amended twice on January 25, 2006.

[3] Weekly reports, monthly reports, and quarterly dividend record date reports are available by annual subscription only.

[4] The Commission has modified the text of the summaries prepared by DTC.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Fees for Issuance of Security Position Reports

Several types of SPRs are available through DTC. These include: (1) Weekly reports showing daily closing positions during that week; (2) monthly reports showing closing positions on the last business day of the month; (3) quarterly dividend record date reports showing closing positions on the dividend record date; and (4) special requests showing closing positions for the date specified.

DTC charges a fee for SPRs. Currently, the fee charged to issuers or trustees for weekly, monthly, and quarterly dividend record date SPR subscriptions is $1,950, $450, $150, respectively. The fee charged to issuers or trustees for special requests is $85. Under this filing, DTC formally seeks Commission approval of these fees. DTC incurs significantly higher costs for the production of special request SPRs relative to the costs of producing reports by subscription and because DTC has determined that a fee increase is necessary to more fully recover costs associated with such production, DTC proposes to increase the fee charged to issuers or trustees for special request SPRs to $120. The proposed increase will become effective on a date in the first quarter of 2006 to be announced by DTC upon the Commission's approval of this proposed rule change. The fees for weekly, monthly, and quarterly dividend record date SPR subscriptions will remain unchanged.

Fees Charged to Issuers/Agents

1. Audit Confirmations

DTC receives frequent requests from issuers and/or their agents for confirmations of audit information relating to securities held by DTC. In connection with the processing of such requests for audit confirmations, DTC currently charges a fee of $10.00 per request containing up to and including five CUSIPs and $2.13 for each CUSIP beyond the fifth CUSIP. DTC also receives requests from issuers and/or their agents for confirmations relating to information concerning CDs deposited at DTC. A fee is not currently charged to process these CD audit confirmation requests. Providing issuers and/or their agents with audit confirmation information requires the allocation of significant resources to process the requests resulting in considerable cost to DTC. To more fully recover the costs associated with such audit confirmation

processing, DTC proposes to (1) Increase fees relating to processing of audit confirmations to $22 per request for requests of up to and including five CUSIPs and an additional $5.00 per item for each CUSIP beyond the fifth CUSIP and (2) implement fees for CD confirmation requests that are identical to those proposed for audit confirmation requests relating to securities. The proposed audit confirmation fees will be effective upon approval by the Commission.

2. Imaging

DTC frequently receives requests from transfer agents for access to DTC's security image database to obtain copies of certificates deposited at DTC. DTC incurs significant costs to maintain the database but currently does not charge transfer agents for access to the database. Therefore, in order to recover costs associated with this function, DTC proposes to implement a new subscription fee of $350 per month for access to the DTC security image database. This fee will be effective upon approval by the Commission.[5]

DTC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[6] and the rules and regulations thereunder applicable to DTC because it should provide for the equitable allocation of reasonable dues, fees, and other charges among the users of DTC's services.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments have not been solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR-DTC-2005-21 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-DTC-2005-21. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of DTC and on DTC's Web site at *https://login.dtcc.com/dtcorg/*. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-DTC-2005-21 and should be submitted on or before March 2, 2006.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Nancy M. Morris,

Secretary.

[FR Doc. E6-1779 Filed 2-8-06; 8:45 am]

BILLING CODE 8010-01-P

[5] DTC has separately filed a proposed rule change (File No. SR-DTC-2005-22) with the Commission to impose a subscription fee in the same amount on participants who subscribe for access to the DTC security image database.

[6] 15 U.S.C. 28q-1.

[7] 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53211; File No. SR-ISE-2006-08]

Self-Regulatory Organizations; International Securities Exchange, Inc.; Notice of Filing of Proposed Rule Change Establishing Fees for Historical Options Tick Market Data for Non-Members

February 2, 2006.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on February 1, 2006, the International Securities Exchange, Inc. ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the ISE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend its Schedule of Fees to establish non-member fees for historical options tick market data.[3] The text of the proposed rule change is available at the Exchange, at the Commission's Public Reference Room and at the Exchange's Web site: *http://www.iseoptions.com/legal/proposed_rule_changes.asp*.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Historical options tick market data is Options Price Reporting Authority ("OPRA") tick data, a complete file, tick-by-tick, of all quote and transaction data of all instruments disseminated by OPRA during a trading day. OPRA tick data includes data from all six options exchanges. On any given trading day, OPRA tick data is publicly available and may be stored. The OPRA tick data collected and stored by ISE is neither exclusive nor proprietary to the Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the ISE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, the ISE creates market data that consists of options quotes and orders that are generated by ISE members and all trades that are executed on the Exchange. The ISE also produces a Best Bid/Offer, or "BBO," with the aggregate size from all outstanding quotes and orders at the top price level, or the "top of the book." This data is formatted according to OPRA specification and sent to OPRA for redistribution. OPRA processes ISE data along with the same data sets from the other five options exchanges and creates a National BBO, or "NBBO," from all six options exchanges.

The ISE also captures the OPRA tick data[4] and will make it available as an "end of day" file[5] or as a "historical" file[6] for ISE members and non-ISE members alike. The instant proposed rule change proposes to establish a fee for non-ISE members only. The Exchange has also filed a separate proposed rule change, SR–ISE–2006–07,[7] that established fees for ISE members. The proposed fees for both ISE members and non-ISE members are the same.

The Exchange conducted extensive market research to conclude that OPRA tick data is primarily used by market participants in the financial services industry for back-testing trading models, post-trade analysis, compliance purposes and analyzing time and sales information. By this proposed rule change (if approved), and proposed rule change SR–ISE–2006–07,[8] both non-ISE members and ISE members will have the choice to subscribe to a service that provides a daily file on an on-going basis (end of day file), or simply request data on an ad-hoc basis for a pre-determined date range (historical file).

2. Statutory Basis

The ISE believes the basis under the Act for this proposed rule change is the requirement under section 6(b)(4)[9] that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange developed and conducted a comprehensive survey of a cross-section of participants in the financial services industry regarding their level of interest in a number of market data offerings. Based on the results of that survey, the Exchange developed a business plan to create and offer a number of market data products targeted to potential user groups, *e.g.*, individual investors, institutional investors, broker-dealers, etc. The Exchange also retained a consultant to validate the business plan and to provide advice on the structure and amount of fees to charge for these products. Based on all of this information, the Exchange established a pricing structure for historical options tick data that is based on both a subscription and a non-subscription basis. With an annual subscription, non-ISE members would pay a flat monthly fee to subscribe to a daily file of OPRA tick data. Alternatively, non-ISE members that want a limited amount of data and do not want an annual subscription would have the ability to submit ad-hoc requests for the limited amount of data that they require based on daily periods. Under the ad-hoc structure, non-ISE members would pay a fixed amount per day plus a processing fee for the hardware and shipping costs associated with these requests. Further, the Exchange believes that these pricing levels for the proposed market data offering would provide non-ISE members with an ability to choose a plan that best suits their needs. The Exchange believes the proposed rule filing would provide market participants with an opportunity to obtain historical options tick data in furtherance of their investment decisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change. The ISE has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

The ISE has requested accelerated approval of the proposed rule change. While the Commission will not grant accelerated approval at this time, the Commission will consider granting accelerated approval of the proposal at the close of the abbreviated comment period of 15 days from the date of publication of the proposal in the **Federal Register**.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2006–08 on the subject line.

[4] The Exchange collects this data throughout each trading day, and by way of this proposed rule change, intends to market this offering to both ISE members and the investing public. At the end of each trading day, the Exchange compresses the data collected throughout the day and uploads it onto a server. Once the data is loaded onto the server, it will then be made available to subscribers.

[5] An end of day file refers to OPRA tick data for a trading day that is distributed prior to the opening of the next trading day. An end of day file will be made available to subscribers as soon as practicable at the end of each trading day on an on-going basis pursuant to an annual subscription or through an ad-hoc request.

[6] An end of day file that is distributed after the start of the next trading day is called a historical file. A historical file will be available to customers for a pre-determined date range by ad-hoc requests only.

[7] Securities Exchange Act Release No. 53212 (February 2, 2006).

[8] *See id.*

[9] 15 U.S.C. 78f(b)(4).

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2006–08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2006–08 and should be submitted on or before February 24, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Nancy M. Morris,

Secretary.

[FR Doc. E6–1752 Filed 2–8–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53212; File No. SR–ISE–2006–07]

Self-Regulatory Organizations; International Securities Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing Fees for Historical Options Tick Market Data

February 2, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 1, 2006, the International Securities Exchange, Inc. ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the ISE. The ISE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by a self-regulatory organization pursuant to Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend its Schedule of Fees to establish fees for historical options tick market data.[5] The text of the proposed rule change is available at the Exchange, at the Commission's Public Reference Room and at the Exchange's Web site: *http://www.iseoptions.com/legal/proposed_rule_changes.asp.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the ISE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, the ISE creates market data that consists of options quotes and orders that are generated by ISE members and all trades that are executed on the Exchange. The ISE also produces a Best Bid/Offer, or "BBO," with the aggregate size from all outstanding quotes and orders at the top price level, or the "top of the book." This data is formatted according to OPRA specification and sent to OPRA for redistribution. OPRA processes ISE data along with the same data sets from the other five options exchanges and creates a National BBO, or "NBBO," from all six options exchanges.

The ISE also captures the OPRA tick data[6] and will make it available as an "end of day" file[7] or as a "historical" file[8] for ISE members and non-ISE members alike. The instant proposed rule change establishes a fee for ISE members only. The Exchange has also filed a separate proposed rule change, SR–ISE–2006–08,[9] to establish fees for non-ISE members. The proposed fees for both ISE members and non-ISE members are the same.

The Exchange conducted extensive market research to conclude that OPRA tick data is primarily used by market participants in the financial services industry for back-testing trading models, post-trade analysis, compliance purposes and analyzing time and sales information. By this proposed rule change, and SR–ISE–2006–08,[10] both ISE members and non-ISE members will have the choice to subscribe to a service that provides a daily file on an on-going basis (end of day file), or simply request

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] Historical options tick market data is Options Price Reporting Authority ("OPRA") tick data, a complete file, tick-by-tick, of all quote and transaction data of all instruments disseminated by OPRA during a trading day. OPRA tick data includes data from all six options exchanges. On any given trading day, OPRA tick data is publicly available and may be stored. The OPRA tick data collected and stored by ISE is neither exclusive nor proprietary to the Exchange.

[6] The Exchange collects this data throughout each trading day, and by way of this proposed rule change, intends to market this offering to both ISE members and the investing public. At the end of each trading day, the Exchange compresses the data collected throughout the day and uploads it onto a server. Once the data is loaded onto the server, it will then be made available to subscribers.

[7] An end of day file refers to OPRA tick data for a trading day that is distributed prior to the opening of the next trading day. An end of day file will be made available to subscribers as soon as practicable at the end of each trading day on an on-going basis pursuant to an annual subscription or through an ad-hoc request.

[8] An end of day file that is distributed after the start of the next trading day is called a historical file. A historical file will be available to customers for a pre-determined date range by ad-hoc requests only.

[9] Securities Exchange Act Release No. 53211 (Feburary 2, 2006).

[10] *See supra*, at n.9.

data on an ad-hoc basis for a pre-determined date range (historical file).

2. Statutory Basis

The ISE believes basis under the Act for this proposed rule change is the requirement under Section 6(b)(4) [11] that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange developed and conducted a comprehensive survey of a cross-section of participants in the financial services industry regarding their level of interest in a number of market data offerings. Based on the results of that survey, the Exchange developed a business plan to create and offer a number of market data products targeted to potential user groups, *e.g.*, individual investors, institutional investors, broker-dealers, etc. The Exchange also retained a consultant to validate the business plan and to provide advice on the structure and amount of fees to charge for these products. Based on all of this information, the Exchange established a pricing structure for historical options tick data that is based on both a subscription and a non-subscription basis. With an annual subscription, ISE members pay a flat monthly fee to subscribe to a daily file of OPRA tick data. Alternatively, ISE members that want a limited amount of data and do not want an annual subscription have the ability to submit ad-hoc requests for the limited amount of data that they require based on daily periods. Under the ad-hoc structure, ISE members pay a fixed amount per day plus a processing fee for the hardware and shipping costs associated with these requests. Further, the Exchange believes that these pricing levels for the proposed market data offering provide ISE members with an ability to choose a plan that best suits their needs. The Exchange believes the proposed rule filing provides market participants with an opportunity to obtain historical options tick data in furtherance of their investment decisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[11] 15 U.S.C. 78f(b)(4).

Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change. The ISE has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[12] and paragraph (f)(2) of Rule 19b–4 thereunder [13] because it establishes or changes a due, fee, or other charge. At any time within 60-days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml)*; or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2006–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2006–07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml)*. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2006–07 and should be submitted on or before March 2, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Nancy M. Morris,

Secretary.

[FR Doc. E6–1759 Filed 2–8–06; 8:45 am]

BILLING CODE 8010–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53208; File No. SR–NYSE–2005–74]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to an Interpretation of Exchange Rule 108(a)

February 2, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NYSE. On January 31, 2006, NYSE filed Amendment No. 1 to the proposed rule change.[3] NYSE has designated the proposed rule change as constituting a

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See Partial Amendment dated January 31, 2006 ("Amendment No. 1"). In Amendment No. 1, the Exchange added additional discussion regarding the history of NYSE Rule 108 to its Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others (Item 5 of Form 19b–4).

stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization pursuant to Section 19(b)(3)(A)(i) of the Act [4] and Rule 19b–4(f)(1) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change is a NYSE Information Memo that reflects the Exchange's longstanding interpretation of NYSE Rule 108(a) to allow brokers to permit specialists who are establishing or increasing positions in their specialty securities to be on parity with the trading crowd. A copy of the Information Memo, titled Specialist and Floor Broker Obligations in Connection with Specialist Parity with Orders Represented in the Crowd Under Rule 108, is appended to this Notice.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In SR–NYSE–2004–05, Amendment No. 7, the Exchange clarified that by including a customer's order in the broker agency interest file, the broker waives his or her objection to the specialist trading on parity with such order, with the result that the specialist may trade on parity in automatic executions.[6] As noted in that filing, the proposed change comports with, and would incorporate into the rule text, the Exchange's longstanding interpretation of NYSE Rule 108(a) as permitting a specialist to be on parity with orders in the trading crowd ("Crowd") when the specialist is establishing or increasing his or her position, provided that the brokers representing orders in the Crowd permit the specialist to trade along with them by not objecting to such participation.

The purpose of this filing is to submit to the Commission an Information Memo concerning NYSE Rule 108(a). The Information Memo reiterates the Exchange's interpretation, and sets forth a procedure for specialists to announce their intention to trade on parity under NYSE Rule 108(a), and for brokers to object to specialist participation. In addition, the Information Memo reminds specialists of their negative obligation and its potential impact on a decision to trade on parity, and reminds Floor brokers of their obligations to disclose to customers that they may permit specialists to trade on parity with a customer order for some or all of the executions associated with that order, seek guidance from their customers with respect to specialists trading on parity, and to conform to that guidance in executing customer orders. The memo also sets forth a documentation requirement that requires brokers to document objections at the time the report of execution is issued in connection with such orders.

The Exchange's interpretation of NYSE Rule 108(a) recognizes that there are situations in which a customer or broker wants a specialist to trade on parity in a transaction. As a general matter, customers often have a strategic desire not to be the sole participant at a particular price, and may instruct the broker as such in connection with working a not-held order. Similarly, in working a not-held order, a broker may determine that the customer's order would benefit from specialist participation on parity, or that the terms of the not-held order do not preclude a specialist from being on parity.

A customer gives a broker a not-held order whenever the customer wants the broker to exercise discretion in how, when, and at what price to execute the order. Even if the customer sets limiting parameters in connection with a not-held order, he is, by virtue of the fact that the order is "not-held," granting the broker discretion in how to execute the order so long as it satisfies those parameters. In contrast, when a broker is handling a held order (an order in which he is "held" to an execution at a particular price, and the broker has no discretion on how to execute the order), a broker could permit the specialist to be on parity where the customer has explicitly granted the broker such authority as a term of the order.

As noted above, a broker may work the order in the Crowd, and permit the specialist to trade on parity if, based on the broker's professional judgment, specialist parity is appropriate. For example, a broker may decide not to object to specialist parity where the broker is handling a go-along order that will benefit from specialist participation because the customer wants some party to trade at the same time; the customer's concern is only that someone trade alongside, and therefore the customer is likely indifferent as to whether that party is the specialist or another broker. Similarly, a broker may decide not to object to the specialist being on parity whenever the broker determines, as fiduciary for the customer, that specialist participation could improve the market for an order. For example, a broker whose customer is interested in participating only on large trades could permit the specialist to be on parity for one trade in order to increase its overall size.

Alternatively, a broker may decide not to object to a specialist being on parity where the order contains instructions that would accommodate the specialist trading on parity, such as where the customer instructs the broker not to trade more than a fixed number of shares on any single trade (and where the total contra interest in the particular trade exceeds that fixed amount), or where a broker holding a large order is nevertheless trading less than the contra-side interest in a given trade because the terms of the customer's order limits the broker to a fixed volume over a particular period of the trading day.

The Exchange's interpretation of NYSE Rule 108(a) is consistent with other rules that permit specialists to trade on parity with the Crowd, such as NYSE Rule 123A.30, which expressly authorizes brokers to permit specialists to go along with the brokers' CAP orders, regardless of whether the specialist is increasing or decreasing his position.[7] The Exchange's interpretation of NYSE Rule 108(a) is also consistent with best execution obligations outlined

[4] 15 U.S.C. 78s(b)(3)(A)(i).

[5] 17 CFR 240.19b–4(f)(1).

[6] *See* Amendment No. 7 to File No. SR–NYSE–2004–05, dated October 10, 2005.

[7] A CAP ("convert and parity") order is a form of percentage order. Like other percentage orders, a CAP order may be elected when a transaction has occurred at its limit price or a better price. In addition, a CAP order instruction from the broker permits the specialist to convert all or part of the unelected portion either only on stabilizing ticks or on any tick (depending on the broker's specific instructions to the specialist). The broker can also instruct that any elected portion of a CAP order is to be executed immediately in whole or in part, and that whatever is not immediately executed does not remain on the book as a limit order, but reverts to its status as an unelected percentage order for future election or conversion.

in NYSE Rules 13.20, 123A.41, 123A.42, and 123A.44.

NYSE Rule 108(a) currently provides that specialists making a bid or offer on an order for their own accounts to establish or increase a position in a stock are not "entitled" to parity with a bid or offer that originates off the Floor. An exception is made for so-called "G" orders, which are orders that originate off the Floor and are executed pursuant to Section 11(a)(1)(G)[8] of the Act and Rule 11a1–1(T)[9] thereunder. But, because the rule only speaks to specialists not being "entitled" (*i.e.*, not having an unconditional right) to be on parity rather than flatly prohibiting them from being on parity, the rule, by its terms, does not preclude specialists from trading on parity when establishing or increasing their positions if brokers in the Crowd raise no objections.

The Exchange believes that its interpretation of NYSE Rule 108(a), while potentially increasing the instances in which specialists can trade along with the Crowd, benefits the market by encouraging specialists to add depth and liquidity by initiating proprietary transactions on the Floor of the Exchange. Notably, however, the interpretation does not give specialists the unfettered ability to trade for their proprietary accounts, since, in effecting such transactions, they remain bound by the reasonable necessity considerations contained in NYSE Rule 104, and since their ability to trade on parity in any event always remains subject to the Crowd's objection.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[10] that an Exchange have rules that are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited written comments on the proposed rule change. The Commission received two comment letters (both from the same commenter) in connection with filing SR–NYSE–2005–74. The Commission staff forwarded those comments to the Exchange and asked the Exchange to respond to them in this filing. The comment letters and the Exchange's response to them are summarized below.

Comment letter from George Rutherfurd, dated October 30, 2005: This letter is non-substantive. It announces that Mr. Rutherfurd intends to file a more detailed letter regarding this filing, and urges the Commission not to take action until such time as Mr. Rutherfurd has had an opportunity to submit such a letter.

Comment letter from George Rutherfurd, dated November 1, 2005: This letter raises four principal objections: (i) The Exchange's interpretation of NYSE Rule 108(a) is at odds with the plain language of the Rule; (ii) the fact that the Exchange has filed its interpretation with the Commission "proves" that the interpretation is not reasonably and fairly implied by an existing rule and therefore is not eligible for immediate effectiveness; (iii) specialist parity trades, at least when they are establishing or increasing their positions, are contrary to the interests of public investors and should be prohibited; and (iv) Floor brokers cannot effectively protect their own or their customers' interests and therefore the specialists must be prevented from trading on parity when they are establishing or increasing their proprietary positions.

The Exchange strongly disagrees with the commenter's arguments. In its response to the comment letters, the Exchange argues that (i) its interpretation of NYSE Rule 108(a) is consistent with the plain language of the rule; (ii) the Exchange appropriately sought immediate effectiveness for the interpretation; (iii) the Exchange's interpretation is consistent with the history of NYSE Rule 108; (iv) Floor brokers can protect customers' interests by objecting where appropriate; and (v) Mr. Rutherfurd fails to explain why brokers cannot protect customers' interests. The Exchange concludes that the Exchange's interpretation of NYSE Rule 108(a) is consistent with customer protection, and that the proposed Information Memo will further clarify the procedures for trading consistent with the interpretation and documenting that trading properly. A copy of the Exchange's response is attached to its filing with the Commission as part of Exhibit 2, and is also set forth below.

None of the commenter's arguments have merit, inasmuch as they rely on sweeping generalizations or incorrect assumptions, are unsupported by any verifiable legal or other authority, and consist largely of meritless accusations. Nevertheless, the Exchange addresses these objections below.

1. The Exchange's Interpretation of Rule 108(a) Is Consistent With the Plain Language of the Rule

Although the commenter dismisses the Exchange's interpretation as "ridiculous word games," the fact is that statutory interpretation must, of necessity, start with the words of the rule or statute to be interpreted.[11] What's more, the words of a statute or rule should be given their plain meaning, wherever possible.[12]

At issue is whether NYSE Rule 108(a) on its face prohibits specialists from trading on parity when they are establishing or increasing their positions. It does not. As the commenter is well aware, the rule states simply that specialists are not "entitled" to trade on parity.

According to the commenter (without citations), "entitled" means "allowed to act"; he interprets that word, when coupled with the word "not," to mean "not allowed to act" or "prohibited." He then concludes that since the specialists are, in his formulation, "not allowed to act" in parity situations, the Exchange's interpretation must be intended to put one over on the Commission.

But perhaps the commenter should consult a dictionary before accusing others of being "intellectually overmatched." The Exchange consulted two, the *American Heritage Dictionary of the English Language*[13] and *Black's Law Dictionary*,[14] both of which confirmed the Exchange's understanding of the meaning of the word, and did not support his. To wit,

[8] 15 U.S.C. 78k(a)(1)(G).

[9] 17 CFR 240.11a–1(T).

[10] 15 U.S.C. 78f(b)(5).

[11] *See United States* v. *Kinzler*, 55 F.3d 70, 72 (2d Cir. 1995) ("Statutory interpretation starts with the language of the statute itself * * *").

[12] *See Perrin* v. *United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, *common* meaning.") (emphasis added).

[13] 4th Ed. (Hougton Mifflin 2000).

[14] 6th Ed. (West 1991).

the *American Heritage Dictionary* defines "entitle" to mean "to furnish with a right or claim to something," while Black's Law Dictionary defines "entitle" as follows: "In its usual sense, to entitle is to give a right or legal title to."

Applying these definitions, it's clear that the Exchange's interpretation is neither "ridiculous" nor "intellectually bankrupt." It is merely a plain reading of the English language. Simply put, the rule says only that a member does not have an unfettered or automatic right to trade on parity when establishing or increasing his position. Tellingly, there is nothing in the plain language of the rule about a specialist being "prohibited" from trading in that situation.

The logic of this interpretation is further supported by the well-accepted canon of statutory construction that rule-writers are presumed in any rule to have said what they meant, and meant what they said.[15] In particular, where Exchange rules mean to prescribe or proscribe specific conduct, the rules use terms such as "shall" or "must" or similar words of obligation.[16]

Notably, NYSE Rule 108(a) does not use such obligatory language, but rather, uses the conditional term "entitled." It would be illogical to conclude that the Exchange meant something other than what it said; if it had meant to categorically exclude specialists from trading on parity in situations in which they are establishing or increasing a position, the numerous rules where "shall" or "must" appear certainly demonstrate that the Exchange knew how to write such a rule. The fact that the rule is not written that way is evidence of the Exchange's different intent with respect to the rule and its scope.

In the absence of a prohibition on specialist parity when establishing or increasing a position, it is entirely consistent with the rule, as well as Commission precedent, to state that even if they are not entitled, specialists nevertheless may trade on parity under certain circumstances.[17] And what are these circumstances? Exactly the ones enunciated in the Information Memo that is the subject of the rule filing: the specialist may trade on parity while establishing or increasing his position as long as he or she clearly announces an intention to trade on parity, and no brokers in the Trading Crowd object.

2. The Exchange Appropriately Sought Immediate Effectiveness for the Interpretation

The commenter further argues that the Exchange's filing is not properly designated for immediate effectiveness because it is not an "interpretation" that is "reasonably and fairly implied" by the rule text. But as described above, the Exchange's interpretation of NYSE Rule 108(a) is not, as the commenter contends, "absolutely at odds with the rule's plain language"; to the contrary, it is entirely consistent with that language. Nevertheless, the commenter claims that by filing the interpretation, the Exchange is "acknowledging the obvious," namely that the interpretation is not reasonably and fairly implied from the existing language. Otherwise, he reasons, why would the Exchange have filed it?

Section 19(b)(3)(A) of the Act[18] provides that a "rule change may take effect upon filing with the Commission" if the proposed change constitutes a "stated policy, practice or interpretation" with respect to the meaning of an existing rule. As described more fully below, the Exchange has been interpreting NYSE 108(a) since its adoption as limiting, but not eliminating, the ability of specialists to trade on parity when establishing or increasing their positions. In response to inquiries from the Commission, the Exchange has now filed that interpretation pursuant to Section 19(b)(3)(A) under the Act. We fail to see how this is inconsistent with the underlying scheme of the Act, or how this in any way "proves" that the current practice is illegal; by the commenter's logic, all filings for immediate effectiveness would be either unnecessary or indicative of illegal conduct by the filing exchange. Surely this is not a proper reading of the statute.

In any event, the Exchange strongly disagrees with the commenter's claim. As noted above, we believe that the Exchange's interpretation of NYSE Rule 108(a) is reasonably and fairly implied from the existing language of the rule, since the rule by its terms does not prohibit a specialist from trading on parity when he or she is establishing or increasing a position. At the same time, the Exchange recognizes that the rule does not give specialists carte blanche to trade on parity in those situations. Accordingly, the Information Memo reminds specialists that their proprietary trading must be consistent with maintaining a fair and orderly market, and reminds Floor Brokers that they have an obligation to object to specialist parity if not objecting would result in a less-than-best execution for their customers. We believe that this is also reasonably and fairly implied from the rule, since permission to be on parity could not logically come from anyone but the Floor Brokers who are, after all, representing the customers' interests.

3. The Exchange's Interpretation Is Consistent With the History of NYSE Rule 108

The commenter claims that the Exchange's interpretation of NYSE Rule 108(a) is inconsistent with the history underlying the rule. Again, the Exchange strongly disagrees.

Historically, NYSE Rule 108 was intended to prevent specialists, registered competitive market makers and competitive traders from unduly profiting from their "time-place" trading advantage over other market participants by reason of the members' physical presence on the Floor, which permitted them to respond to trading activity in a particular stock before the transaction appeared on the tape. The issue of the proper role of floor trading has been one of contention since the passage of the Act in 1934. At that time, there was significant pressure to ban floor trading altogether, but Congress tabled the issue and directed the newly-formed SEC to study it and make a recommendation as to appropriate action. The SEC's conclusion, reported in its Segregation Report in 1936,[19] was

[15] *See Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992) ("Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.")

[16] *See, e.g.*, NYSE Rule 63 ("Bids and offers in securities admitted to dealings on a 'when issued' basis shall be made only 'when issued' * * * "); NYSE Rule 72(b) ("A member who is providing a better price to one side of the cross transaction must trade with all other market interest having priority at that price before trading with any part of the cross transaction."); NYSE Rule 78 ("An offer to sell coupled with an offer to buy back at the time or at an advanced price, or the reverse, is a prearranged trade and is prohibited.").

[17] *See* NASD Manual Section 2341 ("*You are not entitled to an extension of time on a margin call.* While an extension of time to meet margin requirements may be available to customers under certain conditions, a customer does not have a right to the extension.") (Emphasis in original), *approved* by Securities Exchange Act Release No. 44223 (May 3, 2001), 66 FR 22274, 22276 (April 26, 2001) (NASD–00–55) ("Some investors believe they are automatically entitled to an extension of time to meet margin calls. While an extension of time to meet initial margin requirements may be available to the customer under certain conditions, it is only granted if the clearing firm chooses to request an extension from its Designated Examining Authority-the customer does not have a right to an automatic extension.").

[18] 15 U.S.C. 78s(b)(3)(A).

[19] "Report on the Feasibility and Advisability of the Complete Segregation of the Functions of Dealer and Broker," Securities and Exchange Commission (1936) ("Segregation Report").

that there was not a clear-cut case for eliminating all floor trading. With respect particularly to specialists trading for their own accounts, the Segregation Report concluded that "[i]mmediate concern for the reduction of this activity is * * * not demanded" and recommended further study.[20]

Over the next nine years, between 1936 and 1945, the Commission and the NYSE (among others) debated whether floor trading was harmful or beneficial to the goals of securities regulation. In January 1945, the SEC's Trading and Exchange Division issued its "Report on Floor Trading" which reported on an extensive study of floor trading.[21] The report recommended the elimination of floor trading by competitive traders altogether and by specialists except where such transactions were reasonably necessary to the maintenance of a fair and orderly market.

In August 1945, in response to the SEC's recommendation, the Exchange adopted the predecessor to NYSE Rule 108. The Exchange's action amounted to a compromise with the SEC, in that the Exchange agreed to restrict floor trading substantially in order to "remove * * * any conceivable advantage which the floor trader may be presumed to have over public customers of our member firms." [22] Significantly, the SEC did not adopt the Floor Trading Report's recommendations,[23] and although the SEC revisited the issue of floor trading several times after 1945, the fundamental principles underlying NYSE Rule 108 have been preserved to date.

Statements in a 1979 rule amendment filing, SR–NYSE–79–2,[24] reinforce the conclusion that the NYSE's interpretation has not substantially changed over the years. That filing was made in response to implementation of Section 11(a)(1)(G) of Act,[25] and expressly entitled specialists to be on parity with members' off-Floor proprietary orders (the so-called "G orders," after the section number). In essence, the amendment permitted a specialist to trade on parity with G orders even if the entering member would have objected to parity.

Notably, the rule filing specifically limited the change to G order situations: "No changes are proposed with respect to priority, parity and precedence based on size vis-à-vis orders of public customers." Also notable is the Exchange's own description in the filing as to the scope of NYSE Rule 108, which is not inconsistent with the interpretation that is the subject of the Information Memo:

> In varying degrees, Exchange Rules 108 and 112 *restrict* bids and offers of specialists * * * from having priority, parity or precedence based on size over orders initiated off the Floor * * * The *restriction* primarily applies when a member is establishing or increasing a position as opposed to liquidating a position. (Emphasis added.) [26]

The use of the terms "restrict" and "restriction" instead of "prohibit" and "prohibition" is significant, as it reinforces the interpretation that NYSE Rule 108 does not, and was not intended to, "prohibit" specialist parity, but merely to "restrict" it in certain situations—namely, where a broker objects to the specialist trading on parity.

Subsequent interpretive guidance on NYSE Rule 108, such as statements contained in the Exchange's annually-published Floor Official Manual, is also not inconsistent with the Exchange's interpretation of NYSE Rule 108. For example, NYSE Floor Official Manuals as far back as 1991 state that specialists "must yield parity" to off-Floor orders when establishing or increasing positions, however, this merely reiterates that the right of specialists to trade on parity is not unfettered—that is, that if a broker objects to specialist parity when the specialist is establishing or increasing a position, then the specialist has no choice but defer to that order. In other words, in the face of an objection, the specialist "must yield" parity. But this language does not prohibit a specialist from being on parity when no broker objects. The specialist may not insert himself unilaterally, but can be given the right-of-way.

While NYSE Rule 108 in its current form preserves the restrictions on on-floor trading by stating that a member's order for his or its own account are not "entitled" to parity with a public order if the member is establishing or increasing a position, the rule does not, and was not meant to, completely eliminate parity trading by specialists when establishing or increasing a position. Instead, the rule was intended only to control it, in order to remove undue advantages that specialists had over the public customer.

Notably, the Exchange's subsequent interpretation of NYSE Rule 108(a) is entirely consistent with that aim, in that it prevents specialists from taking advantage of public customers by requiring them to refrain from trading on parity when any broker representing a public customer's order in that auction objects to the specialist's participation.

4. Objections by Floor Brokers Can Effectively Protect Their Customers' Interests Under Rule 108(a)

a. *Brokers can protect customers' interests by objecting where appropriate.*

The commenter nakedly asserts that Floor brokers cannot be counted on to object to specialist parity trading because they are intimidated by the "retributive powers of specialists" and must "get along by going along." His sweeping conclusion, however, is not supported by meaningful objective data, and the commenter thus leaves the Exchange with the impossible task of disproving an unproven factoid. We also note that this argument is illogical, since, in a competitive marketplace, brokers who failed to adequately execute orders as a result of specialists "bullying" them would quickly lose customer business.

In any event, the Exchange notes that as a result of the issuance of the Information Memo at issue, there should be no doubts among the Floor members either as to the duties of the specialists in potential parity trades or as to the obligations on the brokers to object, if an objection is called for. In addition, there should not be any doubt that the decision to permit the specialist to trade on parity or not is intimately connected with both the specialists' obligations under NYSE Rule 104, and the brokers' best execution obligations under NYSE Rules 13.20, 123A.41, 123A.42, and 123A.43, and will be evaluated by NYSE Regulation on that basis as well.

We also note that because brokers are required to inform their customers about specialist parity and about the brokers' practices in deciding whether to permit the specialists to trade on parity, customers may increase the instances in which they request, as a term of their orders, that the specialist not trade on parity. These notices, and the resulting public awareness of Floor trading practices regarding parity, are likely to increase members' vigilance to ensure that no one, either broker or specialist, trades on parity if it would be inappropriate to do so.

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[20] *Id.* at 111.

[21] *See* Securities Exchange Act Release No. 3640 (January 16, 1945).

[22] Statement of NYSE President Emil Schram, August 28, 1945 (copy maintained in NYSE Archives).

[23] Securities Exchange Act Release No. 3727 (August 28, 1945).

[24] *See* Securities Exchange Act Release No. 15535 (January 29, 1979), 44 FR 6240 (January 31, 1979) (Notice of proposed rule change).

[25] 15 U.S.C. 78k(a)(1)(G).

[26] Securities Exchange Act Release No. 15535, *supra* note 24.

b. *The commenter fails to explain why brokers cannot protect customers' interests.*

The commenter argues that the interpretation is unnecessary, as the Exchange's current rules could accommodate specialist "trade along" participation, and concludes as a result that the Exchange's true motivation in filing the interpretation must have been to provide specialists with additional opportunities to participate as dealer at the expense of customers. The Exchange disagrees with both his supposition and his conclusion.

We note that the commenter cites two examples in which, supposedly, the specialist could provide "trade along" participation without being on parity. Unfortunately, his examples do not comport with existing Exchange rules, approved by the SEC, regarding bidding and offering and therefore are inappropriate. Interestingly, however, they ably demonstrate how the newly-announced procedures in connection with NYSE Rule 108(a) protect the public customers' interests.

In his first example, the commenter poses a scenario in which there is a 2,000 share bid consisting of a single broker, Broker A, who bids for 1,000 shares, and the specialist also bidding for 1,000 shares (on parity) to establish or increase a position. Broker A's customer, Customer A, would prefer not to be 100% of the trading volume. Another broker, Broker B, enters the crowd to sell 1,000 shares to the bid.

Under the Exchange's interpretation, the specialist could trade on parity if Broker A did not object, and therefore the specialist and Broker A would each buy 500 shares, which would satisfy Customer A's preference not to be 100% of the volume. The commenter, however, suggests that instead, Broker A should buy 500 shares in a single trade, and then the specialist could provide "covering volume" in a second trade of 500 shares.

The commenter's example ignores the fact that Broker A has made a firm bid for 1,000 shares, and that as a result, if the specialist is not on parity in the first transaction, Broker A could not buy only 500 shares. Rather, he would be obligated under NYSE Rule 60 and Rule 11Ac1–1 under the Act to buy the entire 1,000 shares—the extent of his bid—from Broker B, who is willing to sell 1,000 shares. Significantly, the commenter also fails to explain how the Exchange's interpretation would permit the specialist to " 'elbow aside' Broker A to the extent of 500 shares that should otherwise go to [Customer A]." Presumably, if Customer A simply wants someone—anyone—else on the trade with him, the specialist's participation on parity should not be problematic. If, on the other hand, Customer A would object to the specialist trading on parity, Customer A could instruct Broker A to object to specialist parity (meaning that Broker A would have to wait until another broker bid as well, in order to satisfy Customer A's concurrent desire not to be 100% of the volume on any trade), or in the absence of a specific parity instruction, Broker A could, in the reasonable exercise of his judgment, object on his own to the specialist trading on parity. In either event, the Exchange's interpretation and associated procedures result in no "elbowing aside," and in fact actually safeguard Customer A's interests.

In the commenter's second example, he poses a situation in which there are four brokers (A through D) each bidding for 2,000 shares, and the specialist bidding for 2,000 shares as well. Another broker, Broker E, enters the crowd to sell 8,000 shares. If the specialist is not permitted to trade on parity, Brokers A, B, C and D would each buy 2,000 shares; if the specialist is permitted to trade on parity, the brokers and the specialist would each buy 1,600 shares. From this, the commenter concludes that Customers A, B, C and D must have been disadvantaged, since they did not get complete fills.

The commenter's proposed solution is, like the first scenario, inconsistent with how Floor trading rules operate—he suggests that the specialist should not participate in the transaction with Brokers A, B, C, and D, but could participate if any of the brokers did not "take an 'equal split.' " But as noted before, given that each broker has bid 2,000 shares, and Broker E is selling 8,000 shares, there could never be an "unequal split"—the four brokers' bids would be hit by Broker E ($4 \times 2{,}000 = 8{,}000$), leaving nothing for the specialist.

His analysis, moreover, also ignores several possibilities that are positive for the customer, such as the possibility that the specialist is buying into a declining market, and that as a result of his trading on parity, Customers A, B, C and D might complete their purchases at one or more lower prices.

And again, ironically, the commenter's second example highlights the utility of the Exchange's interpretation of NYSE Rule 108(a)—if any of the four customers did not want the specialist to trade on parity, that customer or the broker representing that customer would be free to object, thus preventing the specialist from buying 1,600 shares, and getting the ability to complete his or its entire 2,000 share bid. Significantly, the commenter does not explain why this result could not come about, other than to reiterate his familiar canard that brokers are in thrall to the "all-powerful" specialist.

5. Conclusion

In sum, the Exchange's interpretation of NYSE Rule 108(a) is reasonably and fairly implied from the text of the rule and its history and from the history of regulation of floor trading, and therefore is appropriately filed for immediate effectiveness. Moreover, the Exchange believes that it is consistent with customer protection, and that the proposed Information Memo will further clarify the procedures for trading consistent with the interpretation and documenting that trading properly.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(i) of the Act[27] and subparagraph (f)(1) of Rule 19b–4 thereunder.[28] The proposed rule change is a stated policy, practice or interpretation with respect to the meaning, administration or enforcement of existing rules of the Exchange.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[29]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml)*; or

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[27] 15 U.S.C. 78s(b)(3)(A)(i).

[28] 17 CFR 240.19b–4(f)(1).

[29] The effective date of the original proposed rule is December 13, 2005. The effective date of Amendment No. 1 is January 31, 2006. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on January 31, 2006, the date on which NYSE submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

• Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–NYSE–2005–74 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2005–74. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml)*. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2005–74 and should be submitted on or before March 2, 2006.

For the Commission, by the Division of Market Regulation. pursuant to delegated authority.[30]

Nancy M. Morris,

Secretary.

Appendix

Attention: Floor Members, Senior Management, General Counsel and Compliance Personnel'•'='02'≤

TO: All Members and Member Organizations

SUBJECT: Specialist and Floor Broker Obligations in Connection With Specialist Parity With Orders Represented in the Crowd Under Rule 108

The purpose of this Information Memo is to reiterate the New York Stock Exchange's (the "Exchange" or "NYSE") long-standing interpretation of NYSE Rule 108(a) regarding the specialist trading on parity with orders in the Crowd when the specialist is establishing or increasing his or her position.

The Exchange interprets NYSE Rule 108(a) as permitting a specialist to be on parity with orders in the Crowd when the specialist is establishing or increasing his or her position, provided that the brokers representing orders in the Crowd permit the specialist trading along with them by not objecting to such participation. This is consistent with other rules that permit a specialist to trade on parity with the Crowd, such as NYSE Rule 123A.30, which expressly authorizes Floor brokers to permit a specialist to go along with brokers' convert-and-parity ("CAP") orders, regardless of the specialist's proprietary position.

NYSE Rule 108(a) provides that a specialist making a bid or offer on an order for his (or her) own account to establish or increase a position in a stock is not "entitled" to parity with a bid or offer that originates off the Floor. An exception is made for so-called "G" orders, which are orders that originate off the Floor and are executed pursuant to Section 11(a)(1)(G) of the Securities Exchange Act of 1934 (the "SEA") and SEA Rule 11a1–1(T) thereunder. But, because the rule only speaks to the specialist not being "entitled" (*i.e.*, not having an unconditional right) to be on parity rather than flatly prohibiting him from being on parity, NYSE Rule 108(a), by its terms, does not preclude the specialist from trading on parity when establishing or increasing the specialist's position if the brokers in the Crowd raise no objection.

In connection with specialists trading on parity under NYSE Rule 108(a), members and member organizations should adhere to the following procedures:

1. Obligations of *Specialists and Specialist Organizations*

Specialists and specialist organizations are reminded that in order to ensure that brokers in the Crowd are making informed decisions when they permit a specialist who is establishing or increasing his or her position to trade along with the Crowd, the specialist must clearly announce his or her intention to trade on parity, and must give brokers representing orders in the Crowd a reasonable opportunity to object.[1] The obligation set out in this paragraph does not apply when specialists are handling CAP orders.

In the event that a Floor broker objects to the specialist trading on parity under NYSE Rule 108(a), the specialist must honor such request and refrain from trading on parity for that trade. Specialists and specialist organizations are also advised that notwithstanding the Exchange's interpretation, in determining whether to effect transactions under NYSE Rule 108(a), they remain bound by the reasonable necessity requirements of NYSE Rule 104. Thus, even if no Floor broker objects to the specialist trading on parity under NYSE Rule 108(a), such transactions by the specialist may nevertheless be inappropriate if the specialist's participation is not reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, or to minimize the effects of temporary disparities between supply and demand that are immediate or reasonably anticipated.

2. Obligations of *Floor Broker Members and Member Organizations*

Floor brokers who object to the specialist trading on parity under NYSE Rule 108(a) with orders that they are representing must openly and audibly state such objections and document them.[2] If a Floor broker is making a continuing objection for all executions pertaining to the order he or she is representing, the objection should he stated (and subsequently documented as discussed below) when the Floor broker enters the Crowd. If a Floor broker is objecting only in specific auctions (but not for all executions pertaining to the order he or she is representing), the objection should be stated (and subsequently documented as discussed below) when the specialist announces, in connection with a particular auction, that he or she is seeking to trade on parity. Brokers who have not made a firm bid or offer in the particular auction where the specialist expresses an intention to trade on parity would not have standing under NYSE Rule 108(a) to object to the specialist trading on parity in that auction.

The Exchange expects that when a Floor broker objects to the specialist trading on parity in connection with an order he or she is representing, the Floor broker must document his or her objection at the time the report of execution is issued in connection with such order. Floor broker members and member organizations must keep appropriate records of their objections pursuant to Securities Exchange Act Rule 17a-3 and NYSE Rule 440. The Exchange may from time to time revise or supplement the documentation requirements as necessary, and will notify members and member organizations accordingly.

Floor broker members and member organizations must disclose to customers that in executing orders on the Floor, the Floor broker may permit the specialist to trade on parity with the order for some or all of the executions associated with filling that order, where such permission would not be inconsistent with the broker's best execution obligations. Disclosures should be written and reasonably calculated to provide customers with sufficient notice of the Floor broker's practice in this regard. For example, such disclosure could be in the form of an affirmative written notice that is provided to customers in advance of trading.

[30] 17 CFR 200.30–3(a)(12).

[1] Pursuant to NYSE Rule 104.10(6)(i)(C), the specialist must similarly announce that he or she intends to trade on parity, and give brokers a meaningful opportunity to object. Please note that NYSE Rule 104.10(6)(i)(C) applies only when a specialist is liquidating or decreasing a position. Brokers who object to the specialist trading on parity must state as such and must record such objection using the procedures described in this memo in connection with NYSE Rule 108(a). Brokers are reminded that where a customer has specifically requested that the specialist not be on parity with the customer's order under NYSE Rule 104.10(6)(i)(C), such request is a condition of the order and must be documented pursuant to NYSE Rule 123(g).

[2] Upstairs firms must maintain records of customer disapprovals when such is provided.

In deciding whether to permit a specialist to trade on parity with orders that they are representing, Floor brokers must be mindful of their "best execution" obligations under the NYSE Rules 13.20, 123A.41, 123A.42 and 123A.44, including the obligation that they use due diligence to execute the order at the best price available to them under the published market procedures of the Exchange (subject to the customer's limit price, if the order is a limit order). Provided that they have made appropriate disclosures to their customers, Floor brokers are not required to obtain separate customer approval to permit the specialist to trade on parity under NYSE Rule 108(a) for each order or trade, but may rely on the disclosures to customers and any resulting guidance provided by their customers, as described above.

If a broker believes that a specialist has improperly traded on parity with his or her order, the broker should promptly alert any member of the On-Floor Surveillance Unit, located in the Extended Blue Room, or contact Pat Giraldi, Director of the unit, at (212) 656–6804.

3. *All Members and Member Organizations*

Members and member organizations should take steps to inform and educate management and associated persons regarding the information contained in this Information Memo, and are reminded that pursuant to Exchange Rule 342, they must have appropriate systems, procedures and controls for ensuring compliance with the above-referenced policies.

* * * * *

Questions regarding the above may be directed to Patrick Giraldi, Director, Market Surveillance, at (212) 656–6804, Gordon Brown, Manager, On-Floor Surveillance Unit, in the Extended Blue Room or at (212) 656–5321, or Daniel M. Labovitz, Director, Market Surveillance, at (212) 656–2081.

Robert A. Marchman,
Executive Vice President, Market Surveillance.

[FR Doc. E6–1751 Filed 2–8–06; 8:45 am]
BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53221; File No. SR–PCX–2005–102]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Elimination of Obsolete Rules Related to the Pacific Options Exchange Trading System and Order Book Officials

February 3, 2006.

On November 10, 2005, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to eliminate obsolete rules related to the Pacific Options Exchange Trading System ("POETS") and Order Book Officials ("OBOs"). On November 22, 2005, PCX filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change was published for comment in the **Federal Register** on December 21, 2005.[4] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

The proposed rule change, as amended, would modify the PCX Rules to eliminate obsolete rules with respect to POETS and OBOs and make corresponding changes to related rules. As of March 2005, the Exchange completed its rollout of the PCX Plus System.[5] As such, options issues no longer trade on the POETS platform at the Exchange. Therefore, the Exchange proposes to eliminate rules related to POETS, including rules regarding OBOs, and to generally modify the rules as applicable in the current PCX Plus market structure.[6] In connection with the proposed elimination of OBOs, the Exchange proposes to revise the definition of "Trading Official" to no longer permit OTP Holders to serve in this capacity and to clarify the responsibilities of Trading Officials.

The Commission finds that the proposed rule change is consistent with the requirements of the Act[7] and the rules and regulations thereunder applicable to a national securities exchange,[8] particularly Section 6(b)(5) of the Act,[9] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest. The Commission believes that the proposed rule change clarifies the Exchange's rules by eliminating provisions that no longer are necessary in light of the obsolescence of POETS and the elimination of the position of OBO. In addition, by requiring a Trading Official to be an Exchange employee or officer, the proposed rule change is designed to minimize potential conflicts of interest that otherwise may arise when an OTP Holder is called upon to act in the capacity of a Trading Official and to make a decision on a regulatory matter.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–PCX–2005–102), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Nancy M. Morris,
Secretary.

[FR Doc. E6–1778 Filed 2–8–06; 8:45 am]
BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Partial Amendment, submitted by Glenn H. Gsell, Director of Regulation, PCX ("Amendment No. 1"). In Amendment No. 1, PCX corrected a typographical error in the rule text.

[4] *See* Securities Exchange Act Release No. 52955 (December 14, 2005), 70 FR 75851 (December 21, 2005) ("Notice").

[5] *See* Securities Exchange Act Release No. 47838 (May 13, 2003), 68 FR 27129 (May 19, 2003) (Order Approving Proposal for PCX Plus).

[6] A full description of the rules that are being deleted or modified pursuant to this proposal can be found in the Notice, *supra* note 4.

[7] 15 U.S.C. 78f(b).

[8] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10316 and #10317]

Oklahoma Disaster Number OK–00002

AGENCY: Small Business Administration.
ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–1623–DR), dated 01/10/2006.

Incident: Severe Wildfire Threat.

Incident Period: 11/27/2005 and continuing.

Effective Date: 01/27/2006.

Physical Loan Application Deadline Date: 03/13/2006.

EIDL Loan Application Deadline Date: 10/10/2006.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, National Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of Oklahoma, dated 01/10/2006, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties:
Bryan, Carter, Choctaw, Creek, Mcintosh, Murray, Muskogee, Okmulgee, Osage, Payne, Pittsburg, Pontotoc, Tulsa, Wagoner.
Contiguous Counties: Oklahoma:
Atoka, Haskell, Johnston, Kay, Latimer, Love, Marshall, Mccurtain, Pawnee, Pushmataha, Sequoyah, Washington
Kansas:
Chautauqua, Cowley.
Texas:
Fannin, Grayson, Lamar, Red River.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E6–1765 Filed 2–8–06; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 10367]

South Carolina Disaster # SC–00001

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of South Carolina (FEMA–1625–DR), dated 01/20/2006.

Incident: Severe Ice Storm.

Incident Period: 12/15/2005 through 12/16/2005.

Effective Date: 01/20/2006.

Physical Loan Application Deadline Date: 03/21/2006.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, National Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 01/20/2006, applications for Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:
Anderson, Cherokee, Greenville, Laurens, Oconee, Pickens Spartanburg.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10367.

(Catalog of Federal Domestic Assistance Number 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E6–1764 Filed 2–8–06; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 5299]

Culturally Significant Objects Imported for Exhibition Determinations: "Hokusai"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition "Hokusai," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Arthur M. Sackler Gallery of the Smithsonian Institution, from on or about March 4, 2006, until on or about May 14, 2006, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julianne Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8049). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: February 3, 2006.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E6–1790 Filed 2–8–06; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 5300]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: Two Summer Institutes for European Student Leaders

Announcement Type: New Cooperative Agreement.

Funding Opportunity Number: ECA/A/E/EUR–06–06.

Catalog of Federal Domestic Assistance Number: 00.000.

Key Dates: July 6, 2006–March 23, 2007.

Application Deadline: March 23, 2006.

SUMMARY: The Office of Academic Exchange Programs, European and Eurasian Programs Branch (ECA/A/E/EUR) announces an open competition for two separate Summer Institutes for European Student Leaders. Accredited, post-secondary educational institutions in the United States may submit proposals for two six-week summer institutes, which will be similar in content, but differ in terms of the language abilities of the participants. The participants in one institute will have a high fluency level in English, and the participants in the other institute will have mid-level language abilities. Each institute will begin with English language instruction appropriate to the participants and then offer a core program that promotes leadership development and civic engagement through courses that will be valuable to the participants in future academic and work careers. Each institute will host up to 20 participants from Denmark, France, Germany, Netherlands, Spain, and United Kingdom who are either recent high school graduates enrolled in universities for the fall 2006 or first and second year undergraduate students. Participants will be between 17 and 23 years of age. The Bureau of Educational and Cultural Affairs (ECA) anticipates awarding two separate assistance awards to support these two programs. Organizations may submit separate proposals for each program. However, ECA will award no

more than one grant to administer a Summer Institute per U.S. institution.

I. Funding Opportunity Description

Authority: Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * * to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Purpose: The goal of the Summer Institutes for European Student Leaders is to provide young Europeans from non-privileged backgrounds, and from all sectors of the six participating countries, with the opportunity to learn about America, and to participate in coursework that will serve them well in their future academic and work careers as well as provide training that will enhance their leadership abilities for their local communities. At the same time the students will become familiar with U.S. campus life, meet a variety of U.S. citizens and have a valuable cultural experience. American institutions of higher education having experience in hosting international students for special programs may apply to develop, administer and provide follow-up to the six-week summer program.

Guidelines: The program should be designed to support the following specific activities/components:

(a) An intensive English program to strengthen the language skills of those participants with mid-level abilities before undertaking the academic program and/or complementary academic activities including English language studies for participants with high fluency.

(b) An academic program that will include English for specific purposes such as Business English and offer coursework in areas such as public presentation/speaking, writing skills (on the appropriate level), marketing/public relations and computer classes. The academic program should include lectures as well as group discussions and exercises focusing on topics such as the essential attributes of leadership, including "teambuilding," effective communication, and problem-solving skills, and management skills for diverse organizational settings. The knowledge acquired in the academic coursework should be applicable in the academic and business worlds as well as be useful for those involved in leadership roles in student and/or community activities.

(c) Structured cultural activities planned within the six-week program to facilitate interaction among the European participants, American students, faculty, administrators, and the local community, including hands-on community service, to promote mutual understanding between the people of the United States and the people of the six countries.

(d) Four highly qualified U.S. mentors/escorts for each institute who exhibit cultural sensitivity and an understanding of the program's objectives, who should accompany the student participants throughout the entire program. These mentors/escorts will take on the role of cultural interpreters and help the participants to network with other students and the community at large. The mentors/escorts must actively participate in classroom sessions, reside with students in dormitories or other accommodations, direct cultural and recreational activities during weekends, and escort students during the educational travel component.

(e) The creation of a website and a listserv to facilitate follow-on mentoring/participant networking concerning final project implementation and to continue a dialog on ideas developed during the institute.

(f) Assistance to participants while in the U.S. to select, purchase and ship professional materials to use in follow-on activities in their home country.

(g) One post-institute alumni workshop that will take place in Europe in coordination with the six participating Fulbright Commissions.

The beginning of the program should focus on intensive English or special programs for participants not needing concentrated language study. This will be the foundation for the following academic program that should include lectures as well as group discussions and exercises focusing on English for Specific Purposes and areas such as leadership, public presentation/speaking, writing skills (on the appropriate level), marketing/public relations, and computer classes. The institute should incorporate a focus on contemporary American life.

Applicants should take into account that the participants may have limited knowledge of the United States and varying degrees of experience in expressing their opinions in a classroom environment, and should tailor their proposed curriculum and classroom activities accordingly. The language ability will also vary, especially for the institute for the mid-level/less fluent participants. The host institution will be required to develop a program that provides ample time and opportunity for discussion and interaction, not simply standard lectures or broad survey reading assignments. Local site visits to primary and/or secondary schools, other colleges, and research institutions should be part of the academic program.

The program should also include opportunities for participants to meet American citizens from a variety of ethnic, religious, and socio-economic backgrounds. The host institution should make a special effort to provide opportunities for the participants to interact with their peers in the United States on a regular basis, and to speak to appropriate student and civic groups about their experiences and life in their home countries.

Pending availability of FY 2006 funds, the institute activities should begin on or about July 6, 2006 with follow-up activities to end before March 23, 2007.

Programs must comply with J–1 visa regulations. Please refer to the Solicitation Package for further information.

Program Administration: All Summer Institute programming and administrative logistics, management of the intensive English and academic programs, field trips, and on-site arrangements will be the responsibility of the institute grantee. The grantee organization is also responsible for arrangements for lodging, food, maintenance and local travel for participants while in the U.S. The grantee organization should strive to balance cost-effectiveness in accommodations and meal plans with flexibility for differing diets and individual needs of the participants.

The participating Fulbright Commissions in Europe will handle the cost of and ticketing for international travel.

The project will provide each participant with a supplemental book allowance of $200 per person. The grantee organization should plan to assist participants in selection, acquisition and shipment of materials to their home countries. The grantee organization should also arrange for institutional or publishers' discounts for participants, as possible.

Proposals should describe the available health care system and the plan to provide health care access to

institute participants. The Department of State will provide limited health insurance coverage to all participants.

Participant Selection: Participants will be selected by ECA based on nominations from six participating Fulbright Commissions. Minimum qualifications for all participants will be (1) adequate proficiency in English to allow full participation in and benefit from the program, (2) enrollment or plans to enroll in higher education programs in Europe, (3) high level of academic achievement, as indicated by academic grades, awards, and teacher recommendations. and (4) demonstration of a commitment to community and university activities in their home countries. Program participants will be selected on the basis of their demonstrated leadership capacity. Participants will enter the United States on J-visas, using DS–2019 forms issued by ECA.

Orientation: The grantee organization will provide general pre-departure orientation materials for all participants prior to their travel to the United States. This material might include a tentative program outline with suggested goals and objectives, relevant background information about the U.S. institution and individuals involved in the project, and information concerning arrival in the host city, local housing, climate, and available services at the host institution.

Needs Assessment: The U.S. institution should conduct an initial needs assessment of participants upon arrival in the United States and should be prepared to adjust program emphasis as necessary, particularly to respond to participants' language abilities in the institute for less fluent participants.

• *Cooperative Agreement:* In a cooperative agreement, ECA/A/E/EUR is substantially involved in program activities above and beyond routine grant monitoring. ECA/A/E/EUR activities and responsibilities for this program are as follows:

• Participants will be selected by ECA based on nominations from the participating Fulbright Commissions.

• Participants will enter the United States on J-visas, using DS–2019 forms issued by ECA.

• The Fulbright Commissions will arrange participants' international travel.

• ECA/A/E/EUR will facilitate sending pre-arrival orientation materials electronically to participants via the participating Fulbright Commissions.

ECA/A/E/EUR will provide the host institution with participants' curricula vitae and travel itineraries and will be available to offer guidance throughout the duration of the program.

Proposal Contents: Applicants should submit a complete and thorough proposal describing the program in a convincing and comprehensive manner. Applicants may submit separate proposals for each program if they wish. However, ECA will award no more than one grant per institution. Since there is no opportunity for applicants to meet with reviewing officials, the proposal should respond to the criteria set forth in the solicitation and other guidelines as clearly as possible.

The proposal should address succinctly, but completely, the elements described below and must follow all format requirements. The proposal should include the following items:

TAB A—SF–424, "Application for Federal Assistance."

TAB B—Executive Summary.

In one double-space page, provide the following information about the project:

1. Name of organization/participating institutions.

2. Beginning and ending dates of the program.

3. Proposed theme.

4. Nature of activity.

5. Funding level requested from the Bureau, total program cost, total cost sharing from the applicant and other sources.

6. Scope and goals: Include (a) the number and description of participants; (b) describe the wider audience benefiting from the program (overall impact); and (c) anticipated results (short and long term).

TAB C—Narrative and Calendar of activities.

In 20 pages provide a detailed description of the project addressing the areas listed below.

1. Vision (statement of need, objectives, goals, benefits).

2. Participating Organizations.

3. Program Activities (orientation, intensive English, academic component, cultural program, participant monitoring, opening and closing events).

4. Program Evaluation.

5. Follow-on activities and a visit to home work site(s) of selected participants.

6. Project Management.

7. Work Plan/Time Frame.

Please refer to the Proposal Submission Instruction (PSI) document for technical format and instructions.

TAB D—Budget Submission.

The cost to the Bureau for the Summer Institutes for European Student Leaders should not exceed $170,000. The budget should be developed for 20 participants.

Please see section IV.3e and the *Guidelines for Assistance Award Proposals and Budget Guidelines* in Proposal Submission Instructions (PSI) in regard to a Summary Budget and a detailed Line-Item Budget. Use notes where further explanation of line items is required to clarify how the figures were derived.

TAB E—Letters of endorsement and resumés.

Resumés of all program staff should be included in the submission. No resume should exceed two pages.

TAB F.—SF–424B "Assurances-Nonconstruction Programs."

First time applicant organizations and organizations which have not received an assistance award (grant or cooperative agreement) from the Bureau during the past three (3) years, must submit as an attachment to this form the following: (a) One copy of their Charter OR Articles of Incorporation; (b) A list of the current Board of Directors: and (c) current financial statements.

Include other attachments, if applicable.

II. Award Information

Type of Award: Cooperative Agreement. ECA's level of involvement in this program is listed under number I above.

Fiscal Year Funds: 2006.

Approximate Total Funding: $340,000.

Approximate Number of Awards: Two (2)—However, organizations may receive no more than one grant of up to $170,000.

Approximate Average Award: $170,000.

Anticipated Award Date: Pending availability of funds, May 30, 2006.

Anticipated Project Completion Date: March 23, 2007.

III. Eligibility Information

III.1. *Eligible Applicants:* Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. *Cost Sharing or Matching Funds:* There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all

costs that are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. *Other Eligibility Requirements:* Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. ECA anticipates awarding two grants, in an amount up to $170,000 each to support program and administrative costs required to implement this exchange program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition.

IV. Application and Submission Information

Note: Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. *Contact Information To Request an Application Package:* Please contact the Bureau of Educational and Cultural Affairs, ECA/A/E/EUR, Senior Program Manager Ilo-Mai Harding at Room 246, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, Tel: (202) 453–8522; Fax: (202) 453–8520; or E-mail address: *hardingim@state.gov* to request a Solicitation Package. Please specify Ilo-Mai Harding and refer to the Funding Opportunity Number ECA/A/E/EUR–06–06 located at the top of this announcement when making your request.

Alternatively, an electronic application package may be obtained from grants.gov. Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

It also contains the Project Objectives, Goals and Implementation (POGI) document, which provides specific information, award criteria and budget instructions tailored to this competition.

IV.2. *To Download a Solicitation Package Via Internet:* The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/rfgps/menu.htm*, or from the Grants.gov Web site at *http://www.grants.gov*.

Please read all information before downloading.

IV.3. *Content and Form of Submission:* Applicants must follow all instructions in the Solicitation Package. The application should be sent per the instructions under IV.3f. "Application Deadline and Methods of Submission" below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com or call 1–866–705–5711*. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please Refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application. If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. *Adherence to All Regulations Governing the J Visa:* The Bureau of Educational and Cultural Affairs is placing renewed emphasis on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantees and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR part 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements.

ECA will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD—SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547. Telephone: (202) 203–5029. FAX: (202) 453–8640.

Please refer to Solicitation Package for further information.

IV.3d.2. *Diversity, Freedom and Democracy Guidelines:* Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the "Support for Diversity" section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. *Program Monitoring and Evaluation:* Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the

grantee will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program outputs and outcomes. Outputs are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. Outcomes, in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. Participant satisfaction with the program and exchange experience.

2. Participant learning, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.

3. Participant behavior, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. Institutional changes, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (*i.e.*, surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3d.4. *Describe your plans for overall program management, staffing and coordination with ECA/A/E/EUR:* ECA/A/E/EUR considers program management, staffing and coordination with the Department of State essential elements of your program. Please give sufficient attention to these elements in your proposal. Please refer to the Technical Eligibility Requirements in the Solicitation package for specific guidelines.

IV.3e. *Please take the following information into consideration when preparing your budget:*

IV.3e.1. Applicants must submit a comprehensive budget for each program. Awards may not exceed $170,000. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification. Proposals should try to maximize cost sharing in all facets of the program and to stimulate U.S. private sector, including foundation and corporate support. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and availability of U.S. government funding.

IV.3e.2. *Allowable costs for the program include the following:*

1. Instructional costs (for example: instructors' salaries, honoraria for outside speakers, educational course materials);

2. Lodging, meals, and incidentals for participants;

3. Expenses associated with cultural activities planned for the group of participants (for example: tickets, transportation);

4. Administrative costs as necessary;

5. U.S. ground transportation costs to U.S. appointments, meetings and to/from airports.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3e.3. Divide the line-item budget into Program and Administration sections. The line-item budget should include and elaborate on the categories listed below.

Program Costs: The Institution may choose to itemize academic program costs or set a fee per participant. The following may be included as itemized instruction costs:

a. Honoraria and per diem for outside speakers, if any. List names and amounts.

b. Film and video rentals, educational materials, curricular needs (*i.e.* texts, course packs for classes) as needed.

If the institution chooses to budget instruction costs as a fee per participant, please state what services are provided within that fee, and only actual costs incurred are chargeable to the award.

Clearly indicate the unit cost for each item listed below:

1. Lodging. Housing may be in graduate dormitories, faculty residence, or other, as appropriate. Single rooms preferred.

2. Meals. Meals may be provided through cash subsistence payments to participants, cafeteria meal plans, or a combination of both. If using a meal plan exclusively, show clearly how the cost of meals will be covered if participants travel away from campus or campus cafeterias are closed.

3. Incidentals allowance. Include an incidentals allowance of $10 per person per day for full number of days of the Summer Institute at the host institution.

4. Supplemental book allowance of $200 per person.

5. Return shipping allowance $150 per person.

6. Lodging, meals and incidentals allowances for participants who must arrive before the institute formally begins and/or depart after the institute formally ends, due to airline schedules in their home countries.

Note: Per Diem rate for lodging and meals may not exceed published U.S. government allowance rates for the site of the institute. Applicants may use per diem rates that are lower than official government rates.

Cultural activities and other program costs may include the following:

1. Cultural activities: Entrance fees, overnight lodging, and meals not previously listed.

2. Costs for cultural and educational tour: Include participant lodging (double rooms are acceptable); meals for participants.

3. Transportation: Ground transportation for group cultural and educational activities; ground transportation for airport arrivals and departures. **Note:** The Fulbright Commissions will provide round-trip international air tickets (from the home country to the institute site and return to the home country) for participants. The cost of airline travel for participants should not be included in the budget.

4. Per diem (or lodging and subsistence) and travel for grantee escort staff for overnight cultural activities in the institute's home region. **Note:** Per Diem rate for lodging and meals may not exceed published U.S. government allowance rates for the site of the institute. Applicants may use per diem rates that are lower than official government rates.

5. Costs associated with post-institute implementation/ evaluation site visit to Europe.

Administration Costs should include the following:

A. Staff requirements.

B. Benefits.

C. Other directly administrative expenses.

D. Indirect expenses.

Please review carefully the *Guidelines for Assistance Award Proposals and Budget Guidelines* in Proposal Submission Instructions (PSI) for descriptions and limitations for each type of administrative cost.

IV.3f. *Application Deadline and Methods of Submission:*

Application Deadline Date: March 23, 2006.

Reference Number: ECA/A/E/EUR–06–06.

Methods of Submission:

Applications may be submitted in one of two ways:

(1) In hard-copy, via a nationally recognized overnight delivery service (*i.e.*, DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or

(2) Electronically through *http://www.grants.gov.*

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1 Submitting Printed Applications:

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will not notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages may not be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Applicants must follow all instructions in the Solicitation Package.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to "ECA/EX/PM".

Applicants must follow all instructions in the Solicitation Package. The original and eight copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref.: ECA/A/E/EUR–06–06, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

IV.3f.2—*Submitting Electronic Applications:* Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system. Please follow the instructions available in the 'Get Started' portion of the site (*http://www.grants.gov/GetStarted*).

Applicants have until midnight (12 a.m.) of the closing date to ensure that their entire applications have been uploaded to the grants.gov site. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.

Applicants will receive a confirmation e-mail from grants.gov upon the successful submission of an application. ECA will not notify you upon receipt of electronic applications.

IV.3g. *Intergovernmental Review of Applications:* Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. *Review Process:* The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards cooperative agreements resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. Quality of the program conceptualization and planning: Proposals should exhibit originality, substance, precision, and relevance to the Bureau's mission of mutual understanding as well as adherence to all guidelines, goals and objectives described in the RFGP. The proposal should demonstrate effective use of community and regional resources to enhance the cultural and educational experiences of the participants. A relevant work plan and detailed calendar should demonstrate substantive undertakings and logistical capacity.

2. *Institutional Capacity:* Proposed personnel and institutional resources should be adequate and appropriate to achieve a substantive academic program and effective cross-cultural communication with U.S. students. Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full

compliance with all reporting requirements for past Bureau grants. The proposal should show evidence of strong on-site administrative capabilities with specific discussion of how logistical arrangements will be undertaken.

3. *Multiplier effect/impact:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages.

4. *Support of Diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity. Program administrators should strive for diversity among institute staff, university students, the host community who interact with participants, and the cultural component of the program.

5. *Follow-on Activities:* Proposals should provide a plan for continued follow-on activity (without Bureau support) ensuring that Bureau supported programs are not isolated events.

6. *Project Evaluation:* Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. A draft survey questionnaire or other technique plus description of a methodology to use to link outcomes to original project objectives are recommended.

7. *Cost-effectiveness:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate.

8. *Cost-sharing:* Proposals should maximize cost sharing through other private sector support as well as institutional direct funding contributions.

VI. Award Administration Information

VI.1a. *Award Notices:* Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive an Assistance Award Document (AAD) from the Bureau's Grants Office. The AAD and the original grant proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The AAD will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.2. *Administrative and National Policy Requirements:* Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A–21, "Cost Principles for Educational Institutions."

OMB Circular A–87, "Cost Principles for State, Local and Indian Governments".

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information:
http://www.whitehouse.gov/omb/grants.
http://exchanges.state.gov/education/grantsdiv/terms.htm#articleI

VI.3. *Reporting Requirements:* You must provide ECA with a hard copy original plus two copies a final program and financial report no more than 90 days after the expiration of the award.

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VI.4. *Program Data Requirements:* Organizations awarded grants will be required to maintain specific data on program participants and activities in an electronically accessible database format that can be shared with the Bureau as required. As a minimum, the data must include the following:

(1) Name, address, contact information and biographic sketch of all persons who travel internationally on funds provided by the grant or who benefit from the grant funding but do not travel.

(2) Itineraries of international and domestic travel, providing dates of travel and cities in which any exchange experiences take place. Final schedules for in country and U.S. activities must be received by the ECA Program Officer at least three workdays prior to the official opening of the activity.

VII. Agency Contacts

For questions about this announcement, contact: Ilo-Mai Harding, European and Eurasian Programs Branch, ECA/A/E/EUR, Room 246, ECA/A/E/EUR–06–06, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, Tel: (202) 453–8522; Fax: (202) 453–8520; or E-mail address: *hardingim@state.gov.* All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/E/EUR–06–06.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: February 2, 2006.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. E6–1789 Filed 2–8–06; 8:45 am]

BILLING CODE 4710–05–P

TENNESSEE VALLEY AUTHORITY

Meetings; Sunshine Act

AGENCY HOLDING THE MEETING: Tennessee Valley Authority (Meeting No. 1562).

TIME AND DATE: 1 p.m. (EST), February 13, 2006. TVA West Tower Auditorium, 400 West Summit Hill Drive, Knoxville, Tennessee.

STATUS: Open.

AGENDA: Approval of minutes of meeting held on September 28, 2005.

New Business

A—Budget and Financing

A1. Proposed Rate Adjustment and Rate Addendum.

C—Energy

C1. Gibson County Coal LLC—Delegation of authority to the Executive Vice President, Fossil Power Group, to enter into a contract for coal supply to Colbert Fossil Plant Units 1–4.

C2. Cumberland Coal Resources LP—Delegation of authority to the Executive Vice President, Fossil Power Group, to enter into a contract for coal supply to various TVA fossil plants.

E—Real Property Transactions

E1. Knoxville Office Complex East Tower—Approval of the public auction sale of leasehold interests or term easements and reaffirmation of the declaration of surplus and sale at public auction of the fee interest (Tract No. XKOC–4) and conveyance of associated easements (Tract Nos. XKOC–5E and XKOC–6E), affecting approximately 1 acre of land in Knoxville Tennessee.

Information Items

1. Westinghouse Electric Company—Approval of contract for replacement steam generators, with associated equipment, for Sequoyah Nuclear Plant Unit 2.
2. Town of Spring City, Tennessee—Approval of utility agreement with TVA for sanitary sewer disposal and for the grant of a permanent easement and temporary construction easement for a sewer line to extend to the Watts Bar Nuclear Plant.
3. Bartlett Holdings, Inc. (formerly known as Numanco LLC)—Approval of contract supplement for specialty staffing services (health physics technicians and instrument mechanics) for nuclear operations at all TVA nuclear plants and general staffing support at Browns Ferry Unit 1 Restart.
4. ABB, Inc.—Approval of indefinite quantity term contract for the supply of medium voltage power transformers.
5. CSX Transportation—Delegation of authority to the Executive Vice President, Fossil Power Group, to enter into a contract for rail transportation of high-sulfur coal to Paradise Fossil Plant.
6. Burlington Northern Santa Fe Railway Company—Delegation of authority to the Executive Vice President, Fossil Power Group, to extend Contract No. C–12306 for rail transportation of Wyoming coal to various TVA fossil plants through the year 2010.
7. Coalsales LLC and Resource Sales Inc.—Delegation of authority to the Executive Vice President, Fossil Power Group, to enter into contracts for coal supply to TVA's scrubbed plants.
8. CSX Transportation—Delegation of authority to the Executive Vice President, Fossil Power Group, to extend the contract for rail transportation of coal to Bull Run Fossil Plant through the year 2015.
9. Variable Price Interruptible Power (VPI) Exit Fee " Approval of option for customers that would like to switch from VPI to firm power.
10. Two-Part Real Time Pricing Pilot Program—Approval of program modifications.
11. Pilot Seasonal Rates for Large Manufacturing Customers—Approval of program.
12. Seasonal Time of Use Pricing Overlay—Approval of pilot program.
13. Two-Part Real Time Pricing (2-Part RTP) Pilot Program—Approval of arrangements with a directly served customer and other proposed actions relating to the program.
14. Competitive Index Rate (CIR)—Approval of arrangements with a directly served customer.
15. Long-Term Power Supply—Approval of arrangements with a directly served customer.
16. Market Days Option for Flat Price Interruptible Power Program—Approval to add market days option.
17. Alcoa Switching Station—Approval of abandonment of the 161–kV transmission line easement, affecting approximately 1.2 acres in Blount County, Tennessee, Tract No. JSAS–394, S.1X.
18. Regional Resource Stewardship Council—Approval of charter extension for 1 year, continuation of service of members and chair, and authorization of the Executive Vice President, River System Operations & Environment, to complete the charter renewal process in accordance with the Federal Advisory Committee Act.
19. Columbia to Murfreesboro Transmission Line—Approval of abandonment of easement affecting approximately 40 acres of land in Rutherford County, Tennessee, Tract Nos. CMB–129 through CMB–144.
20. Kevin and Karen Millikan—Approval of the sale of a nonexclusive permanent easement for private water-use facilities, affecting approximately .12 acre of land on Tellico Reservoir in Monroe County, Tennessee, Tract No. XTELR–254RE.
21. U.S. Department of Agriculture, Forest Service—Approval of sale of an approximately .06 acre portion of former TVA land on Blue Ridge Reservoir, in Fannin County, Georgia, XTBRR–1.
22. City of Norris—Approval of transfer of real property affecting approximately 420 acres of land on Norris Reservoir in Anderson County, Tennessee, Tract No. XTNR–117.
23. Assistant Secretaries of TVA—Approval of appointments of Nicholas P. Goschy, Jr., and Ralph E. Rodgers.
24. Condemnation Cases—Approval of filing to acquire easements and rights-of-way for transmission line projects, affecting Aspen Grove-Westhaven in Williamson County, Tennessee; Basin-Toccoa in Polk County, Tennessee; Northeast Benton—Etowah District in Polk and McMinn Counties, Tennessee; Cumberland FP-Montgomery in Montgomery County, Tennessee; and East Franklin-Truine Tap to Clovercroft in Williamson County, Tennessee.
25. Condemnation Cases—Approval of filing to acquire easements and rights-of-way for transmission projects, affecting East Franklin-Truine Tap to Clovercroft in Williamson County, Tennessee.
26. Delegations of Authority—Approval of extension of interim delegations relating to procurement contracts, financing, and personnel and compensation.
27. Tax-equivalent Payments—Approval of payments for Fiscal Year 2005 and estimate of payments for Fiscal Year 2006.
28. Winning Performance Team Incentive Plan—Approval of FY 2006 Scorecard.
29. TVA Retirement System Board—Approval of appointment of Phillip L. Reynolds to the Board of Directors.
30. TVA Retirement System (TVARS)—Amendments to the Rules and Regulations and to the Provisions of the TVA Savings and Deferral Retirement Plan.
31. The Office and Professional Employees International Union—

Approval of implementation of Fiscal Year 2006 pay adjustments.
32. International Brotherhood of Teamsters—Approval of implementation of Calendar Year 2006 pay adjustments.
33. Trades and Labor Annual Employees—Approval of implementation of Calendar Year 2006 pay adjustments.
34. Bellefonte Nuclear Plant—Approval of cancellation of construction of the deferred Units 1 and 2.
35. Alliance Coal Corporation—Approval of delegation of authority to the Executive Vice President, Fossil Power Group, to enter into a contract for coal supply to Bull Run Fossil Plant.
36. Norris Reservoir—Deed modification affecting approximately 6.5 acres of former TVA land in Campbell County, Tennessee, Tract No. XNR–165, S.2X.
37. Retention of Net Power Proceeds and Nonpower Proceeds and Payments to the U.S. Treasury—Approval.
38. Summer Place Tower—Authorization of the public auction sale of leasehold interests located at 500 West Summit Hill Drive, Knoxville, Knox County, Tennessee.

For more information: Please call TVA Media Relations at (865) 632–6000, Knoxville, Tennessee. Information is also available at TVA's Washington Office (202) 898–2999.

People who plan to attend the meeting and have special needs should call (865) 632–6000. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

Dated: February 6, 2006.

Maureen H. Dunn,

General Counsel and Secretary.

[FR Doc. 06–1228 Filed 2–7–06; 9:47 am]

BILLING CODE 8120–08–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Comments and Notice of Public Hearing Concerning Proposed Free Trade Agreement With Republic of Korea

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of intent to initiate negotiations on a free trade agreement with the Republic of Korea, request for comments, and notice of public hearing.

SUMMARY: The United States intends to initiate negotiations with the Republic of Korea (Korea) on a free trade agreement (FTA). The interagency Trade Policy Staff Committee (TPSC) will convene a public hearing and seek public comment to assist the United States Trade Representative (USTR) in amplifying and clarifying negotiating objectives for the proposed agreement and to provide advice on how specific goods and services and other matters should be treated under the proposed agreement.

DATES: Persons wishing to testify orally at the hearing must provide written notification of their intention, as well as their testimony, by March 3, 2006. A hearing will be held in Washington, DC, beginning on March 14, 2006 and will continue as necessary on subsequent days. Written comments are due by noon, March 24, 2006.

ADDRESSES: Submissions by electronic mail: *FR0607@ustr.eop.gov* (notice of intent to testify and written testimony); *FR0608@ustr.eop.gov* (written comments). Submissions by facsimile: Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–6143. The public is strongly encouraged to submit documents electronically rather than by facsimile. (See requirements for submissions below.)

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning written comments or participation in the public hearing, contact Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–3475. All other questions should be directed to Scott Ki, Senior Director for Korea, at (202) 395–5070.

SUPPLEMENTARY INFORMATION:

1. Background

Under section 2104 of the Bipartisan Trade Promotion Authority Act of 2002 (TPA Act) (19 U.S.C. 3804), for agreements that will be approved and implemented through TPA procedures, the President must provide the Congress with at least 90 days' written notice of his intent to enter into negotiations and identify the specific objectives for the negotiations. Before and after the submission of this notice, the President is to consult with appropriate Congressional committees and the Congressional Oversight Group (COG) regarding the negotiations. Under the Trade Act of 1974, as amended, the President must (i) afford interested persons an opportunity to present their views regarding any matter relevant to any proposed agreement, (ii) designate an agency or inter-agency committee to hold a public hearing regarding any proposed agreement, and (iii) seek the advice of the U.S. International Trade Commission (ITC) regarding the probable economic effects on U.S. industries and consumers of the removal of tariffs and non-tariff barriers on imports pursuant to any proposed agreement.

On February 2, 2006, after consulting with relevant Congressional committees and the COG, the USTR notified the Congress that the President intends to initiate free trade agreement negotiations with Korea and identified specific objectives for the negotiations. In addition, the USTR has requested that the ITC provide its advice on the probable economic effects of the free trade agreement. This notice solicits views from the public on these negotiations and provides information on a hearing that will be conducted pursuant to the requirements of the Trade Act of 1974.

2. Public Comments and Testimony

To assist the Administration as it continues to develop its negotiating objectives for the proposed agreement, the Chairman of the TPSC invites written comments and/or oral testimony of interested persons at a public hearing. Comments and testimony may address the reduction or elimination of tariffs or non-tariff barriers on any articles provided for in the Harmonized Tariff Schedule of the United States (HTSUS) that are products of Korea, any concession which should be sought by the United States, or any other matter relevant to the proposed agreement. The TPSC invites comments and testimony on all of these matters and, in particular, seeks comments and testimony addressed to:

(a) General and commodity-specific negotiating objectives for the proposed agreement.

(b) Economic costs and benefits to U.S. producers and consumers of removal of tariffs and non-tariff barriers affecting United States—Korea trade.

(c) Treatment of specific goods (described by HTSUS numbers) under the proposed agreement, including comments on:

(1) product-specific import or export interests or barriers,

(2) experience with particular measures that should be addressed in the negotiations, and

(3) in the case of articles for which immediate elimination of tariffs is not appropriate, a recommended staging schedule for such elimination.

(d) Adequacy of existing customs measures to ensure Korean origin of imported goods, and appropriate rules of origin for goods entering the United States under the proposed agreement.

(e) Existing Korean sanitary and phytosanitary measures and technical barriers to trade that should be addressed in the negotiations.

(f) Existing barriers to trade in services between the United States and Korea that should be addressed in the negotiations.

(g) Relevant electronic commerce issues that should be addressed in the negotiations.

(h) Relevant trade-related intellectual property rights issues that should be addressed in the negotiations.

(i) Relevant investment issues that should be addressed in the negotiations.

(j) Relevant competition-related matters that should be addressed in the negotiations.

(k) Relevant government procurement issues that should be addressed in the negotiations.

(l) Relevant environmental issues that should be addressed in the negotiations.

(m) Relevant labor issues that should be addressed in the negotiations.

Comments identifying as present or potential trade barriers laws or regulations that are not primarily trade-related should address the economic, political, and social objectives of such laws or regulations and the degree to which they discriminate against producers of the other country. At a later date, the USTR, through the TPSC, will publish notice of reviews regarding (a) the possible environmental effects of the proposed agreement and the scope of the U.S. environmental review of the proposed agreement, and (b) the impact of the proposed agreement on U.S. employment and labor markets.

A hearing will be held beginning on March 14, 2006, in Rooms 1 and 2, 1724 F Street, NW., Washington, DC. If necessary, the hearing will continue on subsequent days. Persons wishing to testify at the hearing must provide written notification of their intention by March 3, 2006. The notification should include: (1) The name, address, and telephone number of the person presenting the testimony; and (2) a short (one or two paragraph) summary of the presentation, including the subject matter and, as applicable, the product(s) (with HTSUS numbers), service sector(s), or other subjects (such as investment, intellectual property, and/or government procurement) to be discussed. A copy of the testimony must accompany the notification. Remarks at the hearing should be limited to no more than five minutes to allow for possible questions from the TPSC. Persons with mobility impairments who will need special assistance in gaining access to the hearing should contact the TPSC Executive Secretary.

Interested persons, including persons who participate in the hearing, may submit written comments by noon, March 24, 2006. Written comments may include rebuttal points demonstrating errors of fact or analysis not pointed out in the hearing. All written comments must state clearly the position taken, describe with particularity the supporting rationale, and be in English. The first page of written comments must specify the subject matter, including, as applicable, the product(s) (with HTSUS numbers), service sector(s), or other subjects (such as investment, intellectual property, and/or government procurement).

3. Requirements for Submissions

In order to facilitate prompt processing of submissions, the Office of the United States Trade Representative strongly urges and prefers electronic (e-mail) submissions in response to this notice. In the event that an e-mail submission is impossible, submissions should be made by facsimile.

Persons making submissions by e-mail should use the following subject line: "United States-Republic of Korea Free Trade Agreement" followed by (as appropriate) "Notice of Intent to Testify," "Testimony," or "Written Comments." Documents should be submitted as either WordPerfect, MSWord, or text (.TXT) files. Supporting documentation submitted as spreadsheets are acceptable as Quattro Pro or Excel. If any document submitted electronically contains business confidential information, the file name of the business confidential version should begin with the characters "BC-," and the file name of the public version should begin with the characters "P-." The "P-" or "BC-" should be followed by the name of the submitter. Persons who make submissions by e-mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. To the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Written comments, notice of testimony, and testimony will be placed in a file open to public inspection pursuant to 15 CFR 2003.5, except business confidential information exempt from public inspection in accordance with 15 CFR 2003.6. Business confidential information submitted in accordance with 15 CFR 2003.6 must be clearly marked "BUSINESS CONFIDENTIAL" at the top of each page, including any cover letter or cover page, and must be accompanied by a non-confidential summary of the confidential information. All public documents and non-confidential summaries shall be available for public inspection in the USTR Reading Room. The USTR Reading Room is open to the public, by appointment only, from 10 a.m. to 12 noon and 1 p.m. to 4 p.m., Monday through Friday. An appointment to review the file must be scheduled at least 48 hours in advance and may be made by calling (202) 395–6186.

General information concerning the Office of the United States Trade Representative may be obtained by accessing its Internet Web site (*http://www.ustr.gov*).

Carmen Suro-Bredie,

Chairman, Trade Policy Staff Committee.

[FR Doc. E6–1770 Filed 2–8–06; 8:45 am]

BILLING CODE 3190–W6–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements filed the week ending January 20, 2006

The following Agreements were filed with the Department of Transportation under sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1382 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2005–23654.

Date Filed: January 17, 2006.

Parties: Members of the International Air Transport Association.

Subject:

PAC/RESO/442 dated 13 December 2005;

MAIL VOTE (A128);

PAC2 (Mail A128) 814hh;

Extension of Resolution 814hh to Latvia and Lithuania.

Intended effective date: 1 February 2006.

Docket Number: OST–2005–23655.

Date Filed: January 17, 2006.

Parties: Members of the International Air Transport Association.

Subject:

PAC/RESO/442 dated 13 December 2005;

MAIL VOTE (A127);

PAC2 (Mail A127) 818;

New Financial Evaluation Criteria for Latvia.

Intended effective date: 1 February 2006.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E6–1793 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending January 20, 2006

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et. seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–2005–23664.

Date Filed: January 17, 2006.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 7, 2006.

Description: Application of TEM Enterprises d/b/a Xtra Airways ("Xtra") requesting a certificate of public convenience and necessity authorizing Xtra to engage in foreign scheduled air transportation of persons, property and mail from any point or points in the United States to any point or points in the Republic of Costa Rica and the Dominican Republic, and between Atlanta, GA; Cincinnati, OH; Memphis, TN and Orlando, FL, on the one hand, and Cancun, Mexico on the other.

Docket Number: OST–2005–23694.

Date Filed: January 20, 2006.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 10, 2006.

Description: Application of Business Jet Services, Ltd. ("BJS") requesting a certificate of public convenience and necessity authorizing BJS to engage in interstate charter air transportation of persons, property and mail.

Docket Number: OST–2005–23695.

Date Filed: January 20, 2006.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 10, 2006.

Description: Application of Business Jet Services, Ltd. ("BJS") requesting a certificate of public convenience and necessity authorizing BJS to engage in foreign charter air transportation of persons, property and mail.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E6–1794 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Agency Information Collection Activities: Submission for OMB Review

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: The FHWA has forwarded the information collection request described in this notice to the Office of Management and Budget (OMB) for review and comment. We published a Federal Register Notice with a 60-day public comment period on this information collection on November 23, 2005. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by March 13, 2006.

ADDRESSES: You may send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: DOT Desk Officer. You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burden; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information.

FOR FURTHER INFORMATION CONTACT: Mr. Kreig Larson, (202) 366–2056, Department of Transportation, Federal Highway Administration, Office of Planning, Environment and Realty, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: *Title:* Environmental Streamlining: Measuring the Performance of Stakeholders in the Transportation Project Development Process II.

Abstract: The U.S. Department of Transportation (DOT), FHWA, has contracted with the Gallup Organization to conduct a survey of professionals associated with transportation and resource agencies in order to gather their views on the workings of the environmental review process for transportation projects and how the process can be streamlined. The purpose of the survey is to: (1) Collect the perceptions of agency professionals involved in conducting the decision-making processes mandated by the National Environmental Policy Act (NEPA) and other resource protection laws in order to develop benchmark performance measures; and (2) identify where the performance of the process might be improved by the application of techniques for streamlining. This is a phone survey conducted of only local, state, and Federal officials who work with the NEPA process.

Respondents: Approximately 2,000 professionals/officials from transportation and natural resource agencies.

Frequency: This will be the second time this survey will be conducted in four years.

Estimated Total Annual Burden Hours: The FHWA estimates that each respondent will complete the survey in approximately 15 minutes. With 2,000 surveys expected, an estimated 500 burden hours are expected for this project.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: February 2, 2006.

James R. Kabel,

Chief, Management Programs and Analysis Division.

[FR Doc. E6–1758 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2005–22938]

Commercial Driver's License Standards; Application for Exemption; Volvo Trucks North America, Inc.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that Volvo Trucks North America, Inc. (Volvo) has applied for an exemption from the Federal requirement for drivers of commercial motor vehicles (CMVs) to hold a commercial driver's license (CDL). Volvo requests that the exemption cover 11 Swedish engineers and technicians who will test-drive CMVs for Volvo within the United States. All 11 Volvo employees hold a valid Swedish CDL. Volvo states the exemption is needed to allow required testing of its CMVs under various climatic and environmental conditions within the United States. Volvo believes the knowledge and skills tests and training program that Swedish drivers undergo to obtain a Swedish CDL ensures the exemption would provide a level of safety that is equivalent to, or greater than, the level of safety obtained by complying with the U.S. requirement for a CDL.

DATES: Comments must be received on or before March 13, 2006.

ADDRESSES: Your comments may be submitted by any of the following methods:

Docket Management System (DMS) Web site at *http://dmses.dot.gov/submit*, under the last 5 digits of Docket No. FMCSA–2005–*22938*, and following the on-line instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.

Hand Delivery: Room PL–401 on the Plaza Level, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Federal eRulemaking Portal: http://www.regulations.gov. Follow the on-line instructions for submitting comments.

Docket: To read background documents or comments received, go to *http://dms.dot.gov* at any time or Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The DMS is available 24 hours each day, 365 days each year. If you want to be notified that we received your comments, please include a self-addressed, stamped envelope or postcard, or you can print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may view or download comments submitted in any of DOT's dockets by the name of the commenter or name of the person signing the comment (if submitted on behalf of an association, business, labor union, or other entity). You may view DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 at 65 FR 19477. It is also available at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey Van Ness, (202) 366–4009, Office of Bus and Truck Standards and Operations (MC–PSV), Federal Motor Carrier Safety Administration, DOT, 400 Seventh Street, SW., Washington, DC 20590; or e-mail: jeffrey.vanness@fmcsa.dot.gov. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Section 4007 of the Transportation Equity Act for the 21st Century (TEA–21), Public Law 105–178, 112 Stat. 107 (June 9, 1998), which amended 49 U.S.C. 31315 and 31136(e), authorizes the agency to grant exemptions from the Federal Motor Carrier Safety Regulations (FMCSRs). On December 8, 1998 (63 FR 67600), the Federal Highway Administration's Office of Motor Carriers, predecessor of FMCSA, published an interim final rule to implement section 4007 of TEA–21. On August 20, 2004 (69 FR 51589), FMCSA adopted as final the interim regulations at 49 CFR part 381. These regulations require FMCSA to publish a notice of each exemption request in the **Federal Register**, 49 CFR 381.315(a). We must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. We must also provide an opportunity for public comment on the request.

We will review the safety analyses and the public comments and determine whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation, 49 CFR 381.305. We must publish the agency's decision in the **Federal Register**, 49 CFR 381.315(b). If the agency denies the request, we must state the reason for doing so. If the agency grants the exemption, we must publish a notice to: specify the person or class of persons receiving the exemption; the regulatory provision or provisions from which exemption is being granted; the effective period of the exemption (up to 2 years); and the terms and conditions of the exemption. The exemption may be renewed, 49 CFR 381.300(b).

Volvo Trucks North America, Inc.'s Application for an Exemption

Volvo has applied for an exemption from the commercial driver's license (CDL) rules. Specifically, 49 CFR 383.23 prescribes licensing requirements for drivers operating CMVs in interstate or intrastate commerce. Volvo requests the exemption because its driver-employees are citizens and residents of Sweden, and because they cannot apply for a CDL from a State in the United States. A copy of the application is in Docket No. FMCSA–2005–22938.

The exemption would allow the following 11 drivers to operate tractor trailer combination vehicles in interstate commerce as part of a team of drivers who develop, design and/or test engines for CMVs that will be manufactured, assembled, sold or primarily used in the United States: Christer Milding, Jonas Gustafsson, Sten-Ake Sandberg, Daniel Kanebratt, Per Urban Walter, Dennis Mattsson, Fredrik Wattwil, Jonas Nilsson, Bjorn Nyman, Lars Johansson, and David Aas.

These drivers are a team of designers employed by Volvo in Sweden, that would operate CMVs in the United States for the purpose of testing and evaluating production and prototype CMVs to ensure the vehicles are well-tested for use on U.S. highways. Each driver holds a valid Swedish CDL. Because of strict Swedish regulations for obtaining a CDL and the drivers' level of training and experience, Volvo believes the exemption will likely achieve a level of safety equivalent to, or greater than, the level of safety that would be obtained absent the exemption.

Volvo explained that drivers applying for a Swedish-issued CDL must pass knowledge and skills tests. Therefore, the process for obtaining a Swedish-issued CDL is considered to be comparable to, or as effective as the Federal requirements of Part 383, and adequately assesses the driver's ability to operate CMVs in the United States.

Once a Swedish driver is granted a Swedish CDL, he/she is allowed to drive any CMV currently allowed on Swedish roads. There are no limits to types or weights of vehicles that may be operated by the drivers.

Request for Comments

Accordingly, FMCSA requests public comment from all interested persons on Volvo's application for an exemption from the CDL requirements of 49 CFR 383.23. See 49 U.S.C. 31315(b)(4) and 31136(e). The agency will consider all comments received by close of business on March 13, 2006. Comments will be

available for examination in the docket. We will consider comments received after the comment closing date to the extent practicable.

Issued on: February 2, 2006.

Annette M. Sandberg,

Administrator.

[FR Doc. E6–1755 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA–99–5748, 99–6156]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 10 individuals. FMCSA has statutory authority to exempt individuals from vision standards if the exemptions granted will not compromise safety. The agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective March 7, 2006. Comments must be received on or before March 13, 2006.

ADDRESSES: You may submit comments identified by DOT Docket Management System (DMS) Docket Numbers FMCSA–99–5748 and FMCSA–99–6156 using any of the following methods.

- Web Site: *http://dmses.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket numbers for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading for further information.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The DMS is available 24 hours each day, 365 days each year. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477; Apr. 11, 2000). This information is also available at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *maggi.gunnels@fmcsa.dot.gov* FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Exemption Decision

Under 49 U.S.C. 31315 and 31136(e), FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381. This notice addresses 10 individuals who have requested renewal of their exemptions in a timely manner. FMCSA has evaluated these 10 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Herman L. Bailey, Jr.
Mark A. Baisden
Brad T. Braegger
Daniel R. Franks
Dennis J. Lessard
Harry R. Littlejohn
James D. Simon
Wayland O. Timberlake
Robert J. Townsley
Jeffrey G. Wuensch

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e).

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31315 and 31136(e), each of the 10 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (64 FR 40404; 64 FR 66962; 67 FR 10475; 69 FR 8260; 64 FR 54948; 65 FR 159). Each of these 10 applicants has requested timely renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31315 and 31136(e). However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by March 13, 2006.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31315 and 31136(e) can be satisfied by initially granting the renewal and then requesting and subsequently evaluating comments submitted by interested parties. As indicated above, the agency previously published notices of final disposition announcing its decision to exempt these 10 individuals from the vision requirement in 49 CFR 391.41(b)(10). That final decision to grant the exemption to each of these individuals was based on the merits of each case and only after careful consideration of the comments received to its notices of applications. Those notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all of these drivers, are not currently achieving the statutory level of safety should immediately notify FMCSA. The agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e), FMCSA will take immediate steps to revoke the exemption of the driver(s) in question.

Issued on: February 2, 2006.

Larry W. Minor,

Office Director, Bus and Truck Standards and Operations.

[FR Doc. E6–1753 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA–99–5748, FMCSA–2001–10578, FMCSA–2003–15892, FMCSA–2003–16241]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 6 individuals. FMCSA has statutory authority to exempt individuals from vision standards if the exemptions granted will not compromise safety. The agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective February 9, 2006. Comments from interested persons should be submitted by March 13, 2006.

ADDRESSES: You may submit comments identified by DOT Docket Management System (DMS) Docket Numbers FMCSA–99–5748, FMCSA–2001–10578, FMCSA–2003–15892, or FMCSA–2003–16241, using any of the following methods:

- Web Site: *http://dmses.dot.gov/submit*. Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket numbers for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. Please see the Privacy Act heading for further information.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The DMS is available 24 hours each day, 365 days each year. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477; Apr. 11, 2000). This information is also available at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *maggi.gunnels@fmcsa.dot.gov*, FMCSA. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Exemption Decision

Under 49 U.S.C. 31315 and 31136(e), FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381. This notice addresses 6 individuals who have requested renewal of their exemptions. FMCSA has evaluated these 6 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Eric D. Bennett
Charlie F. Cook
Dustin G. Davis
John K. DeGolier
Vernon J. Dohrn
Dennie R. Ferguson

These exemptions are extended subject to the following conditions: (1)

That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination: and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e).

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31315 and 31136(e), each of the 6 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (64 FR 40404; 64 FR 66962; 66 FR 66969; 68 FR 69432; 66 FR 53826; 66 FR 66966; 68 FR 69434; 68 FR 52811; 68 FR 61860; 68 FR 61857; 68 FR 75715). Each of these 6 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31315 and 31136(e). However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by March 13, 2006.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31315 and 31136(e) can be satisfied by initially granting the renewal and then requesting and subsequently evaluating comments submitted by interested parties. As indicated above, the agency previously published notices of final disposition announcing its decision to exempt these 6 individuals from the vision requirement in 49 CFR 931.41(b)(10). That final decision to grant the exemption to each of these individuals was based on the merits of each case and only after careful consideration of the comments received to its notices of applications. Those notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all of these drivers, are not currently achieving the statutory level of safety should immediately notify FMCSA. The agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e), FMCSA will take immediate steps to revoke the exemption of the driver(s) in question.

Issued on: February 2, 2006.

Larry W. Minor,

Office Director, Bus and Truck Standards and Operations.

[FR Doc. E6–1754 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2006–23773]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption from the vision standard; request for comments.

SUMMARY: FMCSA announces receipt of applications from 19 individuals for exemption from the vision requirement in the Federal Motor Carrier Safety Regulations. If granted, the exemptions will enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the Federal vision standard.

DATES: Comments must be received on or before March 13, 2006.

ADDRESSES: You may submit comments identified by DOT Docket Management System (DMS) Docket Number FMCSA–2006–23773 using any of the following methods:

- Web Site: *http://dmses.dot.gov/submit*. Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. Please see the Privacy Act heading for further information.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The DMS is available 24 hours each day, 365 days each year. If you want

acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgment page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477; Apr. 11, 2000). This information is also available at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *maggi.gunnels@fmcsa.dot.gov,* FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31315 and 31136(e), FMCSA may grant an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." FMCSA can renew exemptions at the end of each 2-year period. The 19 individuals listed in this notice each have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

Qualifications of Applicants

Scott E. Ames

Mr. Ames, age 38, has loss of vision in his left eye due to traumatic optic neuropathy since 1987. The best corrected visual acuity in his right eye is 20/15 and in the left, 20/400. Following an examination in 2005, his optometrist noted, "In my medical opinion, Mr. Scott Ames has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Ames reported that he has driven straight trucks for 12 years, accumulating 360,000 miles, and tractor-trailer combinations for 7 years, accumulating 238,000 miles. He holds a Class A commercial driver's license (CDL) from Maine. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Otto J. Ammer, Jr.

Mr. Ammer, 44, has had macular scaring in his right eye since childhood due to ocular histoplasmosis. The best corrected visual acuity in his right eye is 20/200 and in the left, 20/20. His optometrist examined him in 2005 and noted; "It is my opinion that Mr. Ammer's visual acuity and visual fields will remain stable over the ensuing years. It is, further, my opinion that Mr. Ammer has sufficient vision to operate a commercial motor vehicle." Mr. Ammer reported that he has driven straight trucks for 5 years, accumulating 50,000 miles, and tractor-trailer combinations for 25 years, accumulating 1.7 million miles. He holds Class A CDL from Pennsylvania. His driving record for the last three years shows no crashes or convictions for moving violations in a CMV.

Harold J. Bartley, Jr.

Mr. Bartley, 37, has aphakia in his left eye due to a traumatic injury sustained as a child. The visual acuity in his right eye is 20/20 and in the left, count-finger-vision. His ophthalmologist examined him in 2005 and noted, "In my opinion, Mr. Bartley has excellent visual acuity in his right eye and good peripheral vision in his left eye and his condition is stable. Mr. Bartley has sufficient vision to perform the driving tasks required to operate a commercial vehicle at this time." Mr. Bartley reported that he has driven straight trucks for 10 years, accumulating 230,000 miles. He holds a Class B CDL from Kentucky. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Arthur L. Fields

Mr. Fields, 54, has a prosthetic left eye due to trauma sustained in 1992. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2005, his optometrist noted, "I do certify that Mr. Fields has sufficient vision to perform the driving tasks to operate a commercial vehicle." Mr. Fields reported that he has driven straight trucks for 6.5 years, accumulating 78,000 miles. He holds a Class A CDL from South Carolina. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

John W. Forgy

Mr. Forgy, 51, has had a chronic retinal detachment with aphakia in his right eye due to trauma sustained as a child. The visual acuity in his right eye is hand-motion-vision and in the left, 20/20. Following an examination in 2005, his ophthalmologist noted, "I feel that Mr. Forgy has sufficient vision to drive commercial vehicles without any reservation." Mr. Forgy reported that he has driven straight trucks for 3 years, accumulating 65,000 miles. He holds a Class B CDL from Idaho. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Rupert G. Gilmore, III

Mr. Gilmore, 47, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20 and in the left, 20/100. Following an examination in 2005, his ophthalmologist noted, "In my opinion, this gentleman has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Gilmore reported that he has driven straight trucks for 23 years, accumulating 276,000 miles. He holds a Class B CDL from Alabama. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

George R. Gorsuch, Jr.

Mr. Gorsuch, 56, has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/25 and in the left, 20/60. His optometrist examined him in 2005 and noted, "After interpreting the data, I am pleased to report that the patient has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Gorsuch reported that he has driven straight trucks for 30 years, accumulating 1 million miles and tractor-trailer combinations for 30 years, accumulating 1 million miles. He holds A Class A CDL from Indiana. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Walter R. Hardiman

Mr. Hardiman, 59, has loss of vision in his right eye due to an injury sustained as a child. The best corrected visual acuity in his right eye is 20/200 and in the left, 20/20. Following an examination in 2005, his optometrist noted, "In my opinion, Mr. Hardiman's condition is stable and he has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Hardiman reported that he has driven straight trucks for 8 years,

accumulating 192,000 miles. He holds a Class A CDL from West Virginia. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Sergio A. Hernandez

Mr. Hernandez, 59, has a congenital cataract in his left eye. The visual acuity in his right eye is 20/20 and in the left, light perception only. Following an examination in 2005, his optometrist noted, "In my opinion, his monocular vision is sufficient to drive a commercial vehicle without concern." Mr. Hernandez reported that he has driven straight trucks for 5 years, accumulating 100,000 miles, and tractor-trailer combinations for 9 years, accumulating 180,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Burt A. Hughes

Mr. Hughes, 53, has had loss of vision in the left eye due to retinopathy of prematurity since birth. The best corrected visual acuity in his right eye is 20/25 and in the left, count-finger-vision at 3 feet. Following an examination in 2005, his optometrist noted, "It is my opinion that the patient has sufficient vision at this time to continue to perform the driving tasks required to operate a commercial motor vehicle." Mr. Hughes reported that he has driven straight trucks for 6 years, accumulating 192,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Fredrick C. Ingles

Mr. Ingles, 55, has had a prosthetic right eye due to a traumatic injury sustained in 1988. The visual acuity in his left eye is 20/20. Following an examination in 2005, his ophthalmologist noted, "In my opinion, Mr. Ingles is safe to operate a commercial vehicle, having excellent vision in the left eye. His vision in the left eye is stable and the fitting of the prosthesis in the right eye is excellent." Mr. Ingles reported that he has driven straight trucks for 9 years, accumulating 178,000 miles. He holds a Class D operator's license from West Virginia. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Clyde Johnson, III

Mr. Johnson, 44, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20 and in the left, count-finger-vision at 4 feet. Following an examination in 2005, his optometrist noted, "Mr. Johnson's amblyopia does not affect his visual field capabilities. Therefore, his visual skills should allow him to perform the driving tasks required to drive a commercial vehicle. Mr. Johnson reported that he has driven straight trucks for 15 years, accumulating 75,000 miles, and tractor-trailer combinations for 15 years, accumulating 1.8 million miles. He holds a Class A CDL from Michigan. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Paul E. Lindon

Mr. Lindon, 51, has had a macular scar in his left eye for more than 10 years due to ocular histoplasmosis. The best corrected vision in his right eye is 20/20 and in the left, 20/400. Following an examination in 2005, his optometrist noted, "In my medical opinion, Paul Lindon has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Lindon reported that he has driven straight trucks for 2 years, accumulating 62,000 miles, and tractor-trailer combinations for 1 year, accumulating 53,000 miles. He holds a Class D operator's license from Kentucky. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Aaron C. Lougher

Mr. Lougher, 32, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20 and in the left, 20/200. Following an examination in 2005, his optometrist noted, "In my opinion, I do believe Mr. Lougher does have sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Lougher reported that he has driven straight trucks for 13 years, accumulating 260,000 miles, and tractor-trailer combinations for 11 years, accumulating 330,000 miles. He holds a Class A CDL from Oregon. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Joe S. Nix, IV

Mr. Nix, 27, has complete loss of vision in the left eye due to an injury sustained as a child. The visual acuity in his right eye is 20/20. Following an examination in 2005, his optometrist noted, "In my opinion, Joe has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Nix reported that he has driven straight trucks for 8 years, accumulating 624,000 miles. He holds a Class B CDL from Missouri. His driving record for the 3 years shows no crashes or convictions for moving violations in a CMV.

Luis F. Saavedra

Mr. Saavedra, 55, has had ischemic optic neuropathy in his right eye since 2002. The best corrected visual acuity in his right eye is 20/70 and in the left, 20/20. Following an examination in 2005, his ophthalmologist noted, "It is my opinion that Mr. Saavedra has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Saavedra reported that he has driven straight trucks for 30 years, accumulating 390,000 miles. He holds a Class D operator's license from Florida. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Raul R. Torres

Mr. Torres, 44, has loss of vision in his right eye due to trauma sustained in 1989. The best corrected visual acuity in his right eye is 20/80 and in the left, 20/20. Following an examination in 2005, his optometrist noted, "All our findings were discussed with Mr. Torres. We informed him that in our opinion, he has sufficient vision to perform the driving tasks required to operate a commercial motor vehicle." Mr. Torres reported that he has driven tractor-trailer combinations for 10 years, accumulating 120,000 miles. He holds a Class A CDL from California. His driving record for the last 3 years shows no crashes and one conviction for a moving violation in a CMV, failure to stop at a red light.

Darwin J. Thomas

Mr. Thomas, 57, has had amblyopia in his left eye since birth. The best corrected visual acuity in his right eye is 20/25 and in the left, 20/80. His optometrist examined him in 2005 and noted, "His vision both in terms of acuity and field of vision, in my opinion, is adequate to drive a commercial vehicle." Mr. Thomas reported that he has driven straight trucks for 2 years, accumulating, 12,000 miles and tractor-trailer combinations for 21 years, accumulating 2.1 million miles. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Darel G. Wagner

Mr. Wagner, 50, has had chorioretinitis in his left eye since childhood. The best corrected vision in

his right eye is 20/20 and in the left, 20/100. Following an examination in 2005, his optometrist noted, "I expect Mr. Wagner's vision condition is stable, and I do not anticipate any retinal change. Because he has learned to adapt to this condition as a child, it is my professional opinion that he has sufficient vision to operate a commercial vehicle safely." Mr. Wagner reported that he has driven tractor-trailer combinations for 5 years, accumulating 350,000 miles. He holds a Class A CDL from Minnesota. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), FMCSA requests public comment from all interested persons on the exemption applications described in this notice. The agency will consider all comments received before the close of business March 13, 2006. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: February 2, 2006.

Larry W. Minor,

Office Director, Bus and Truck Standards and Operations.

[FR Doc. E6–1756 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2003–16564]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 18 individuals. FMCSA has statutory authority to exempt individuals from vision standards if the exemptions granted will not compromise safety. The agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective March 5, 2006. Comments from interested persons should be submitted by March 13, 2006.

ADDRESSES: You may submit comments identified by DOT Docket Management System (DMS) Docket Numbers FMCSA–2003–16564. Using any of the following methods.

- Web Site: *http://dmses.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket numbers for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading for further information.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The DMS is available 24 hours each day, 365 days each year. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgment page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477; April 11, 2000). This information is also available at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *maggi.gunnels@fmcsa.dot.gov* FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Exemption Decision

Under 49 U.S.C. 31315 and 31136(e), FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381. This notice addresses 18 individuals who have requested renewal of their exemptions in a timely manner. FMCSA has evaluated these 18 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Lee A. Burke
Barton C. Caldara
Allan Darley
Charley J. Davis
Ray L. Emert
Robin S. England
Richard Hailey, Jr.
Spencer N. Haugen
Thomas R. Hedden
William G. Hix
Robert V. Hodges
George R. Knavel
John R. Knott, III
Duane R. Krug
Edward D. Pickle
Charles D. Pointer
Kent S. Reining
Ronald D. Ulmer

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual

medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e).

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31315 and 31136(e), each of the 18 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (68 FR 74699; 69 FR 10503). Each of these 18 applicants has requested timely renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31315 and 31136(e). However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by March 13, 2006.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31315 and 31136(e) can be satisfied by initially granting the renewal and then requesting and subsequently evaluating comments submitted by interested parties. As indicated above, the agency previously published notices of final disposition announcing its decision to exempt these 18 individuals from the vision requirement in 49 CFR 931.41(b)(10). That final decision to grant the exemption to each of these individuals was based on the merits of each case and only after careful consideration of the comments received to its notices of applications. Those notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all of these drivers, are not currently achieving the statutory level of safety should immediately notify FMCSA. The agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e), FMCSA will take immediate steps to revoke the exemption of the driver(s) in question.

Issued on: February 2, 2006.

Larry W. Minor,

Office Director, Bus and Truck Standards and Operations.

[FR Doc. E6–1757 Filed 2–8–06; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2005–23090]

Amendments to Highway Safety Program Guidelines

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for comments, highway safety program guidelines.

SUMMARY: Section 402 of title 23 of the United States Code requires the Secretary of Transportation to promulgate uniform guidelines for State highway safety programs.

NHTSA is seeking comments on proposed amendments to six (6) of the existing guidelines to reflect program methodology and approaches that have proven to be successful and are based in sound science and program administration. The guidelines the agency proposes to revise are as follows: Guideline No. 3 Motorcycle Safety, Guideline No. 8 Impaired Driving, Guideline No. 14 Pedestrian and Bicycle Safety, Guideline No. 15 Traffic Enforcement Services (formerly Police Traffic Services), Guideline No. 19 Speed Management (formerly Speed Control), and Guideline No. 20 Occupant Protection.

NHTSA believes the proposed revisions will provide more accurate, current and detailed guidance to the States. The revised guidelines will be made publicly available on the NHTSA Web site.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than March 13, 2006.

ADDRESSES: You may submit comments in writing to: Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. Alternatively, you may submit your comments electronically by logging onto the Docket Management System (DMS) Web site at *http://dms.dot.gov*. Click on "Help & Information" or "Help/Info" to view instructions for filing your comments electronically. Regardless of how you submit your comments, you should mention the docket number of this document.

FOR FURTHER INFORMATION CONTACT: The following person at the National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590: Julie Ross, Program Development and Delivery, NTI–100, telephone (202) 366–9895, facsimile: (202) 366–7149.

SUPPLEMENTARY INFORMATION:

Background

Section 402 of title 23 of the United States Code requires the Secretary of Transportation to promulgate uniform guidelines for State highway safety programs. As the highway safety environment changes, it is necessary for NTHSA to update the guidelines to provide current information on effective program content for States to use in developing and assessing their traffic safety programs. Each of the proposed revised guidelines reflects the sound science and the experience of States in traffic safety program content. NHTSA will update the guidelines periodically to reflect new issues and to emphasize program methodology and approaches that have proven to be highly effective in these program areas.

The guidelines offer direction to States in formulating their highway

safety plans for highway safety efforts that are supported with Section 402 grant funds. The guidelines provide a framework for developing a balanced highway safety program and serve as a tool with which States can assess the effectiveness of their own programs. NHTSA encourages States to use these guidelines and build upon them to optimize the effectiveness of highway safety programs conducted at the State and local level. The revised guidelines will emphasize areas of national concern and highlight effective countermeasures. The six (6) guidelines NHTSA plans to revise as a result of this Notice represent the first in a series of revisions NHTSA will propose. As each guideline is updated, it will include a date representing the date of its revision.

The guidelines (as of July 18, 1995) can be found in their entirety in the Highway Safety Grant Management Manual or at *http://www.nhtsa.dot.gov/nhtsa/whatsup/tea21/GrantMan/HTML/05h_ProgGuidlines.html.*

Comments

Interested persons are invited to submit comments in response to this request for comments. Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents in your comments. There is no limit on the length of the attachments.

Please submit two copies of your comments, including the attachments, to Docket Management at the address given above under **ADDRESSES**. If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail. If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel at the following address: National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR part 512).

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

You may read the comments received by Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. The hours of the Docket are 9 a.m. to 5 p.m., Monday to Friday, except Federal holidays. You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

- Go to the Docket Management System (DMS) Web page of the Department of Transportation (*http://dms.dot.gov*).
- On that page, click on "search."
- On the next page (*http://dms.dot.gov/search/*), type in the five-digit docket number shown at the beginning of this document. Example: If the docket number were "NHTSA–2001–12345," you would type "12345." After typing the docket number, click on "search."
- On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may download the comments.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

In consideration of the foregoing, NHTSA proposes to amend the guidelines as follows.

Highway Safety Program Guideline

Motorcycle Safety Guideline No. 3

Each State, in cooperation with its political subdivisions and tribal governments, should develop and implement a comprehensive highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. The highway safety program should include a comprehensive motorcycle safety program that aims to reduce motorcycle crashes and related deaths and injuries. Each comprehensive State motorcycle safety program should address the use of helmets (meeting Federal Motor Vehicle Safety Standard 218) and other protective gear, proper licensing, impaired riding, rider training, conspicuity and motorist awareness. This guideline describes the components that a State motorcycle safety program should include and the criteria that the program components should meet.

I. Program Management

Each State should have centralized program planning, implementation and coordination to identify the nature and extent of its motorcycle safety problems, to establish goals and objectives for the State's motorcycle safety program and to implement projects to reach the goals and objectives. State motorcycle safety plans should:

- Designate a lead agency for motorcycle safety;
- Develop funding sources;
- Collect and analyze data on motorcycle crashes, injuries and fatalities;
- Identify and prioritize the State's motorcycle safety problem areas;
- Encourage collaboration among agencies and organizations responsible for, or impacted by, motorcycle safety issues;
- Develop programs (with specific projects) to address problems;
- Coordinate motorcycle safety projects with those for the general motoring public;
- Integrate motorcycle safety into State strategic highway safety plans, and other related highway safety activities including impaired driving, occupant protection, speed management and driver licensing programs; and
- Routinely evaluate motorcycle safety programs and services.

II. Motorcycle Personal Protective Equipment

Each State should support passage and enforcement of mandatory all-rider motorcycle helmet use laws. In addition, each State should encourage motorcycle operators and passengers to use the following protective equipment through an aggressive communication campaign:

- Motorcycle helmets that meet the Federal helmet standard;
- Proper clothing, including gloves, boots, long pants and a durable long-sleeved jacket; and
- Eye and face protection.

Additionally, each passenger should have a seat and footrest.

III. Motorcycle Operator Licensing

States should require every person who operates a motorcycle on public roadways to pass an examination designed especially for motorcycle operation and to hold a license endorsement specifically authorizing motorcycle operation. Each State should have a motorcycle licensing system that requires:

- Motorcycle operator's manual that contains essential safe riding information;
- Motorcycle license examination, including knowledge and skill tests, and State licensing medical criteria;
- License examiner training specific to testing of motorcyclists;
- Motorcycle license endorsement;
- Cross referencing of motorcycle registrations with motorcycle licenses to identify motorcycle owners who may not have the proper endorsement;
- Motorcycle license renewal requirements;
- Learner's permits issued for a period of 90 days and the establishment of limits on the number and frequency of learner's permits issued per applicant to encourage each motorcyclist to get full endorsement; and
- Penalties for violation of motorcycle licensing requirements.

IV. Motorcycle Rider Education and Training

Safe motorcycle operation requires specialized training by qualified instructors. Each State should establish a State Motorcycle Rider Education Program that has:

- A source of program funding;
- A state organization to administer the program;
- A mandate to use the State-approved curriculum;
- Reasonable availability of rider education courses for all interested residents of legal riding age;
- A documented policy for instructor training and certification;
- Incentives for successful course completion such as licensing test exemption;
- A plan to address the backlog of training, if applicable;
- State guidelines for conduct and quality control of the program; and
- A program evaluation plan.

V. Motorcycle Operation Under the Influence of Alcohol or Other Drugs

Each State should ensure that programs addressing impaired driving include an impaired motorcyclist component. The following programs should be used to reach impaired motorcyclists:

- Community traffic safety and other injury control programs, including outreach to motorcyclist clubs and organizations;
- Youth anti-impaired driving programs and campaigns;
- High visibility law enforcement programs and communications campaigns;
- Judge and prosecutor training programs;
- Anti-impaired driving organizations' programs;
- College and school programs;
- Workplace safety programs;
- Event-based programs such as motorcycle rallies, shows, etc.; and
- Server training programs.

VI. Legislation and Regulations

Each State should enact and enforce motorcycle-related traffic laws and regulations, including laws that require all riders to use motorcycle helmets compliant with the Federal helmet standard. Specific policies should be developed to encourage coordination with appropriate public and private agencies in the development of regulations and laws to promote motorcycle safety.

VII. Law Enforcement

Each State should ensure that State and community motorcycle safety programs include a law enforcement component. Each State should emphasize strongly the role played by law enforcement personnel in motorcycle safety. Essential components of that role include:

- Developing knowledge of motorcycle crash situations, investigating crashes, and maintaining a reporting system that documents crash activity and supports problem identification and evaluation activities;
- Providing communication and education support;
- Providing training to law enforcement personnel in motorcycle safety, including how to identify impaired motorcycle operators and helmets that do not meet FMVSS 218; and
- Establishing agency goals to support motorcycle safety.

VIII. Highway Engineering

Traffic engineering is a critical element of any crash reduction program. This is true not only for the development of programs to reduce an existing crash problem, but also to design transportation facilities that provide for the safe movement of motorcyclists and all other motor vehicles.

Balancing the needs of motorcyclists must always be considered. Therefore, each State should ensure that State and community motorcycle safety programs include a traffic-engineering component that is coordinated with enforcement and educational efforts. This engineering component should improve the safety of motorcyclists through the design, construction, operation and maintenance of engineering measures. These measures may include, but should not be limited to:

- Considering motorcycle needs when selecting pavement skid factors; and
- Providing advance warning signs to alert motorcyclists to unusual or irregular roadway surfaces.

IX. Motorcycle Rider Conspicuity and Motorist Awareness Programs

State motorcycle safety programs, communication campaigns and state motor vehicle operator manuals should emphasize the issues of rider conspicuity and motorist awareness of motorcycles. These programs should address:

- Daytime use of motorcycle headlights;
- Brightly colored clothing and reflective materials for motorcycle riders and motorcycle helmets with high daytime and nighttime conspicuity;
- Lane positioning of motorcycles to increase vehicle visibility;
- Reasons why motorists do not see motorcycles; and
- Ways that other motorists can increase their awareness of motorcyclists.

X. Communication Program

States should develop and implement communications strategies directed at specific high-risk populations as identified by data. Communications should highlight and support specific policy and progress underway in the States and communities and should be culturally relevant and appropriate to the audience. States should:

- Focus their communication efforts to support the overall policy and program;
- Review data to identify populations at risk; and
- Use a mix of media strategies to draw attention to the problem.

XII. Program Evaluation and Data

Both problem identification and continual evaluation require effective record keeping by State and local government. The State should identify the frequency and types of motorcycle crashes. After problem identification is complete, the State should identify appropriate countermeasures.

The State should promote effective evaluation by:

• Supporting the analysis of police crash reports involving motorcyclists;
• Encouraging, supporting and training localities in process, impact and outcome evaluation of local programs;
• Conducting and publicizing statewide surveys of public knowledge and attitudes about motorcycle safety;
• Maintaining awareness of trends in motorcycle crashes at the national level and how trends might influence activities statewide;
• Evaluating the use of program resources and the effectiveness of existing countermeasures for the general public and high-risk population; and
• Ensuring that evaluation results are used to identify problems, plan new programs and improve existing programs.

Highway Safety Program Guideline

Impaired Driving

Guideline No. 8

Each State, in cooperation with its political subdivisions and tribal governments, should develop and implement a comprehensive highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. The highway safety program should include an Impaired Driving component that addresses highway safety activities related to impaired driving. (Throughout this guideline, the term impaired driving means operating a motor vehicle while affected by alcohol and/or other drugs, including prescription drugs, over-the-counter medicines or illicit substances:) This guideline describes the components that a State impaired driving program should include and the criteria that the program components should meet.

I. Program Management and Strategic Planning

An effective impaired driving program should be based on strong leadership, sound policy development, program management and strategic planning, and an effective communication program. Program efforts should be data-driven, focusing on populations and geographic areas that are most at risk, and science-based, determined through independent evaluation as likely to succeed. Programs and activities should be guided by problem identification and carefully managed and monitored for effectiveness. Adequate resources should be devoted to the problem and costs should be borne, to the extent possible, by impaired drivers. Each State should include the following as part of their impaired driving program:

• *Task Forces or Commissions:* Convene Driving While Impaired (DWI) task forces or commissions to foster leadership, commitment and coordination among all parties interested in impaired driving issues, including both traditional and non-traditional parties, such as highway safety enforcement, criminal justice, driver licensing, treatment, liquor law enforcement, business, medical, health care, advocacy and multicultural groups and the media.

• *Strategic Planning:* Develop and implement an overall plan for short- and long-term impaired driving activities based on careful problem identification.

• *Program Management:* Establish procedures to ensure that program activities are implemented as intended.

• *Resources:* Allocate sufficient funding, staffing and other resources to support impaired driving programs. Programs should aim for self-sufficiency and, to the extent possible, costs should be borne by impaired drivers.

• *Data and Records:* Establish and maintain a records system that uses data from other sources [e.g., U.S. Census, Fatality Analysis Reporting System (FARS), Crash Outcome Data Evaluation System (CODES)] to fully support the impaired driving program, and that is guided by a statewide traffic records coordinating committee (TRCC) that represents the interests of all public and private sector stakeholders and the wide range of disciplines that need the information.

• *Communication Program:* Develop and implement a comprehensive communications program that supports priority policies and program efforts and is directed at impaired driving; underage drinking; and reducing the risk of injury, death and resulting medical, legal, social and other costs.

II. Prevention

Prevention programs should aim to reduce impaired driving through public health approaches, including altering social norms, changing risky or dangerous behaviors and creating safer environments. Prevention programs should promote communication strategies that highlight and support specific policies and program activities and promote activities that educate the public on the effects of alcohol and other drugs, limit the availability of alcohol and other drugs, and discourage those impaired by alcohol and other drugs from driving.

Prevention programs may include responsible alcohol service practices, transportation alternatives and community-based programs carried out in schools, work sites, medical and health care facilities, and by community coalitions. Prevention efforts should be directed toward populations at greatest risk. Programs and activities should be science-based and proven effective and include a communication component. Each State should:

• *Promote Responsible Alcohol Service:* Promote policies and practices that prevent underage drinking by people under age 21 and over-service to people ages 21 and older.

• *Promote Transportation Alternatives:* Promote alternative transportation programs, such as designated driver and safe ride programs, especially during high-risk times, which enable drinkers ages 21 and older to reach their destinations without driving.

• *Conduct Community-Based Programs:* Conduct community-based programs that implement prevention strategies at the local level through a variety of settings, including schools, employers, medical and health care professionals, community coalitions and traffic safety programs.

Schools: School-based prevention programs, beginning in elementary school and continuing through college and trade school, should play a critical role in preventing underage drinking and impaired driving. These programs should be developmentally appropriate, culturally relevant and coordinated with drug prevention and health promotion programs.

Employers: States should provide information and technical assistance to employers and encourage employers to offer programs to reduce underage drinking and impaired driving by employees and their families.

Community Coalitions and Traffic Safety Programs: Community coalitions and traffic safety programs should provide the opportunity to conduct prevention programs collaboratively with other interested parties at the local level and provide communications toolkits for local media relations, advertising and public affairs activities. Coalitions may include representatives of government such as highway safety; enforcement; criminal justice; liquor law enforcement; public health; driver licensing and education; business, including employers and unions; the military; medical, health care and treatment communities; multicultural, faith-based, advocacy and other community groups; and neighboring countries, as appropriate.

III. Criminal Justice System

Each State should use the various components of its criminal justice system—laws, enforcement, prosecution, adjudication, criminal and administrative sanctions and communications—to achieve both specific and general deterrence.

Specific deterrence focuses on individual offenders and seeks to ensure that impaired drivers will be detected, arrested, prosecuted and subject to swift, sure and appropriate sanctions. Using these measures, the criminal justice system seeks to reduce recidivism. General deterrence seeks to increase the public perception that impaired drivers will face severe consequences, discouraging individuals from driving impaired.

A multidisciplinary approach and close coordination among all components of the criminal justice system are needed to make the system work effectively. In addition, coordination is needed among law enforcement agencies at the State, county, municipal and tribal levels to create and sustain both specific and general deterrence.

A. Laws

Each State should enact impaired driving laws that are sound, rigorous and easy to enforce and administer. The laws should clearly define offenses, contain provisions that facilitate effective enforcement and establish effective consequences.

The laws should define offenses to include:

- Driving while impaired by alcohol or other drugs (whether illegal, prescription or over-the-counter) and treating both offenses similarly;
- Driving with a Blood Alcohol Concentration (BAC) limit of 0.08, making it illegal "per se" to operate a vehicle at or above this level without having to prove impairment;
- Driving with a high BAC (*i.e.*, 0.16 BAC or greater) with enhanced sanctions above the standard impaired driving offense;
- Zero Tolerance for underage drivers, making it illegal "per se" for people under age 21 to drive with any measurable amount of alcohol in their system (*i.e.*, 0.02 BAC or greater);
- Repeat offender with increasing sanctions for each subsequent offense;
- BAC test refusal with sanctions at least as strict or stricter than a high BAC offense;
- Driving with a license suspended or revoked for impaired driving, with vehicular homicide or causing personal injury while driving impaired as separate offenses with additional sanctions;
- Open container, prohibiting possession or consumption of any open alcoholic beverage in the passenger area of a motor vehicle located on a public highway or right-of-way (limited exceptions are permitted under 23 U.S.C. 154 and its implementing regulations, 23 CFR part 1270); and
- Primary safety belt provisions that do not require that officers observe or cite a driver for a separate offense other than a safety belt violation.

The laws should include provisions to facilitate effective enforcement that:

- Authorize law enforcement to conduct sobriety checkpoints, (i.e., stop vehicles on a nondiscriminatory basis to determine whether operators are driving while impaired by alcohol or other drugs);
- Authorize law enforcement to use passive alcohol sensors to improve the detection of alcohol in drivers;
- Authorize law enforcement to obtain more than one chemical test from an operator suspected of impaired driving, including preliminary breath tests, evidential breath tests, and screening and confirmatory tests for alcohol or other impairing drugs; and
- Require law enforcement to conduct mandatory BAC testing of drivers involved in crashes producing fatal or serious injuries.

The laws should establish effective penalties that include:

- Administrative license suspension or revocation (ALR) for failing or refusing to submit to a BAC or other drug test;
- Prompt and certain administrative license suspension of at least 90 days for first-time offenders determined by chemical test(s) to have a BAC at or above the State's "per se" level;
- Enhanced penalties for BAC test refusals, high BAC, repeat offenders, driving with a suspended or revoked license, driving impaired with a minor in the vehicle, vehicular homicide or causing personal injury while driving impaired, including: longer license suspension or revocation; installation of ignition interlock devices; license plate confiscation; vehicle impoundment, immobilization or forfeiture; intensive supervision and electronic monitoring; and threat of imprisonment;
- Assessment for alcohol or other drug abuse problems for all impaired driving offenders and, as appropriate, treatment, abstention from use of alcohol and other drugs and frequent monitoring; and
- Driver license suspension for people under age 21 for any violation of law involving the use or possession of alcohol or illicit drugs.

B. Enforcement

Each State should conduct frequent, highly visible, well publicized and fully coordinated impaired driving (including zero tolerance) law enforcement efforts throughout the State, especially in locations where alcohol-related fatalities most often occur. To maximize visibility, States should maximize contact between officers and drivers, using sobriety checkpoints and saturation patrols and should widely publicize these efforts—before, during and after they occur. Highly visible, highly publicized efforts should be conducted periodically and also on a sustained basis throughout the year. To maximize resources, the State should coordinate efforts among State, county, municipal and tribal law enforcement agencies. Each State should coordinate efforts with liquor law enforcement officials. To increase the probability of detection, arrest and prosecution, participating officers should receive training in the latest law enforcement techniques, including Standardized Field Sobriety Testing (SFST), and selected officers should receive training in media relations and Drug Evaluation and Classification (DEC).

C. Publicizing High Visibility Enforcement

Each State should communicate its impaired driving law enforcement efforts and other elements of the criminal justice system to increase the public perception of the risks of detection, arrest, prosecution and sentencing for impaired driving. Each State should develop and implement a year-round communications plan that provides emphasis during periods of heightened enforcement, provides sustained coverage throughout the year, includes both paid and earned media and uses messages consistent with National campaigns. Publicity should be culturally relevant, appropriate to the audience and based on market research.

D. Prosecution

States should implement a comprehensive program to visibly, aggressively and effectively prosecute and publicize impaired driving-related efforts, including use of experienced prosecutors (e.g., Traffic Safety Resource Prosecutors), to help coordinate and deliver training and technical assistance to prosecutors handling impaired driving cases throughout the State.

E. Adjudication

States should impose effective, appropriate and research-based sanctions, followed by close supervision, and the threat of harsher consequences for non-compliance when adjudicating cases. Specifically, DWI Courts should be used to reduce recidivism among repeat and high BAC offenders. DWI Courts involve all criminal justice stakeholders (prosecutors, defense attorneys, probation officers and judges) along with alcohol and drug treatment professionals and use a cooperative approach to systematically change participant behavior. The effectiveness of enforcement and prosecution efforts is strengthened by knowledgeable, impartial and effective adjudication. Each State should provide state-of-the-art education to judges, covering SFST, DEC, alternative sanctions and emerging technologies.

Each State should utilize DWI courts to help improve case management and to provide access to specialized personnel, speeding up disposition and adjudication. DWI courts also increase access to testing and assessment to help identify DWI offenders with addiction problems and to help prevent them from re-offending. DWI courts additionally help with sentence monitoring and enforcement. Each State should provide adequate staffing and training for probation programs with the necessary resources, including technological resources, to monitor and guide offender behavior.

F. Administrative Sanctions and Driver Licensing Programs

States should use administrative sanctions, including the suspension or revocation of an offender's driver's license; the impoundment, immobilization or forfeiture of a vehicle; the impoundment of a license plate; or the use of ignition interlock devices, which are among the most effective actions to prevent repeat impaired driving offenses. In addition, other licensing activities can prove effective in preventing, deterring and monitoring impaired driving, particularly among novice drivers. Publicizing related efforts is part of a comprehensive communications program.

- *Administrative License Revocation and Vehicle Sanctions:* Each State's Motor Vehicle Code should authorize the imposition of administrative penalties by the driver licensing agency upon arrest for violation of the state's impaired driving laws, including administrative driver's license suspension, vehicle sanctions and installation of ignition interlock devices.
- *Programs:* Each State's driver licensing agency should conduct programs that reinforce and complement the State's overall program to deter and prevent impaired driving, including graduated driver licensing (GDL) for novice drivers, education programs that explain alcohol's effects on driving and the State's zero tolerance laws and a program to prevent individuals from using a fraudulently obtained or altered driver's license.

IV. Communication Program

States should develop and implement a comprehensive communication program that supports priority policies and program efforts. States should:

- Develop and implement a year-round communication plan that includes policy and program priorities; comprehensive research; behavioral and communications objectives; core message platforms; campaigns that are audience relevant and linguistically appropriate; key alliances with private and public partners; specific activities for advertising, media relations and public affairs; special emphasis periods during high risk times; and evaluation and survey tools;
- Employ a communications strategy principally focused on increasing knowledge and awareness, changing attitudes and influencing and sustaining appropriate behavior;
- Use traffic-related data and market research to identify specific audiences segments to maximize resources and effectiveness; and
- Adopt a comprehensive marketing approach that coordinates elements like media relations, advertising and public affairs/advocacy.

V. Alcohol and Other Drug Misuse: Screening, Assessment, Treatment and Rehabilitation

Impaired driving frequently is a symptom of a larger alcohol or other drug problem. Many first-time impaired driving offenders and most repeat offenders have alcohol or other drug abuse or dependency problems. Without appropriate assessment and treatment, these offenders are more likely to repeat their crimes.

In addition, alcohol use leads to other injuries and health care problems. Frequent visits to emergency departments present an opportunity for intervention, which might prevent future arrests or motor vehicle crashes, and result in decreased alcohol consumption and improved health.

Each State should encourage its employers, educators and health care professionals to implement a system to identify, intervene and refer individuals for appropriate substance abuse treatment.

- *Screening and Assessment:* Each State should encourage its employers, educators and health care professionals to have a systematic program to screen and/or assess drivers to determine whether they have an alcohol or drug abuse problem and, as appropriate, briefly intervene or refer them for appropriate treatment. A marketing campaign should promote year-round screening and brief intervention to medical, health and business partners and to identified audiences. In particular:
  - *Criminal Justice System:* Within the criminal justice system, people convicted of an impaired driving offense should be assessed to determine whether they have an alcohol or drug abuse problem and whether they need treatment. The assessment should be required by law and completed prior to sentencing or reaching a plea agreement.
  - *Medical and Health Care Settings:* Within medical or health care settings, any adult or adolescent seen by a medical or health care professional should be screened to determine whether they may have an alcohol or drug abuse problem. A person may have a problem with alcohol abuse or dependence, a brief intervention should be conducted and, if appropriate, the person should be referred for assessment and further treatment.
- *Treatment and Rehabilitation:* Each State should work with health care professionals, public health departments and third party payers to establish and maintain treatment programs for persons referred through the criminal justice system, medical or health care professionals and other entities. This will help ensure that offenders with alcohol or other drug dependencies begin appropriate treatment and complete recommended treatment before their licenses are reinstated.
- *Monitoring Impaired Drivers:* Each State should establish a program to facilitate close monitoring of impaired drivers. Controlled input and access to an impaired driver tracking system, with appropriate security protections, is essential. Monitoring functions should be housed in the driver licensing, judicial, corrections and treatment systems. Monitoring systems should be able to determine the status of all offenders in meeting their sentencing requirements for sanctions and/or rehabilitation and must be able to alert courts to non-compliance. Monitoring requirements should be established by

law to assure compliance with sanctions by offenders and responsiveness of the judicial system. Non-compliant offenders should be handled swiftly either judicially or administratively. Many localities are successfully utilizing DWI courts or drug courts to monitor DWI offenders.

VI. Program Evaluation and Data

Each State should have access to and analyze reliable data sources for problem identification and program planning. Each State should conduct several different types of evaluations to effectively measure progress, to determine program effectiveness, to plan and implement new program strategies and to ensure that resources are allocated appropriately.

Each State should establish and maintain a records system that uses data from other sources (e.g., U.S. Census, FARS, CODES) to fully support the impaired driving program. A statewide traffic records coordinating committee that represents the interests of all public and private sector stakeholders and the wide range of disciplines that need the information should guide the records system.

Each State's driver licensing agency should maintain a system of records that enables the State to: (1) Identify impaired drivers; (2) maintain a complete driving history of impaired drivers; (3) receive timely and accurate arrest and conviction data from law enforcement agencies and the courts, including data on operators as prescribed by the commercial driver licensing regulations; and (4) provide timely and accurate driver history records to law enforcement and the courts.

Highway Safety Program Guideline Pedestrian and Bicycle Safety Guideline No. 14

Each State, in cooperation with its political subdivisions and tribal governments, should develop and implement a comprehensive highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. The highway safety program should include a comprehensive pedestrian and bicycle safety program that promotes safe pedestrian and bicycle practices, educates drivers to share the road safely with other road users and provides safe facilities for pedestrians and bicyclists through a combination of policy, enforcement, communication, education, incentive and engineering strategies. This guideline describes the components that a State pedestrian and bicycle safety program should include and the criteria that the program components should meet.

I. Program Management

Each State should have centralized program planning, implementation and coordination to promote pedestrian and bicycle safety program issues as part of a comprehensive highway safety program. Evaluation should be used to revise existing programs, develop new programs and determine progress and success of pedestrian and bicycle safety programs. The State Highway Safety Office (SHSO) should:

- Train program staff to effectively carry out recommended activities;
- Provide leadership, training and technical assistance to other State agencies and local pedestrian and bicycle safety programs and projects;
- Conduct regular problem identification and evaluation activities to determine pedestrian and bicyclist fatality, injury and crash trends and to provide guidance in development and implementation of countermeasures;
- Promote the proper use of bicycle helmets as a primary measure to reduce death and injury among bicyclists;
- Coordinate with the State Department of Transportation to ensure provision of a safe environment for pedestrians and bicyclists through engineering measures such as sidewalks and bicycle facilities in the planning and design of all highway projects;
- Support the enforcement of State bicycle and pedestrian laws by local enforcement agencies; and
- Develop safety initiatives to reduce fatalities and injuries among high-risk groups including children, older adults and alcohol-impaired pedestrians and bicyclists.

II. Multi-disciplinary Involvement

Pedestrian and bicyclist safety requires the support and coordinated activity of multidisciplinary agencies, at both the State and local levels. At a minimum, the following communities should be involved:

- State Pedestrian/Bicycle Coordinators.
- Law Enforcement and Public Safety.
- Education.
- Public Health and Medicine.
- Driver Education and Licensing.
- Transportation—Engineering, Planning, Local Transit.
- Media and Communications.
- Community Safety Organizations.
- Non-Profit Organizations.

III. Legislation, Regulation and Policy

Each State should enact and enforce pedestrian and bicyclist-related traffic laws and regulations, including laws that require the proper use of bicycle helmets. States should develop and enforce appropriate sanctions that compel compliance with laws and regulations. Specific policies should be developed to encourage coordination with appropriate public and private agencies in the development of regulations and laws to promote pedestrian and bicyclist safety.

IV. Law Enforcement

Each State should ensure that State and community pedestrian and bicycle programs include a law enforcement component. Each State should strongly emphasize the role played by law enforcement personnel in pedestrian and bicyclist safety. Essential components of that role include:

- Developing knowledge of pedestrian and bicyclist crash situations, investigating crashes and maintaining a reporting system that documents crash activity and supports problem identification and evaluation activities;
- Providing communication and education support;
- Providing training to law enforcement personnel in pedestrian and bicycle safety;
- Establishing agency policies to support pedestrian and bicycle safety;
- Enforcing pedestrian and bicycle laws;
- Coordinating with and supporting education and engineering activities; and
- Suggesting creative strategies to promote safe pedestrian, bicyclist and motorist behaviors (e.g., citation diversion classes for violators).

V. Highway Engineering

Traffic engineering is a critical element of any motor vehicle crash reduction program, but is especially important for the safe movement of pedestrians and bicyclists. States should utilize national guidelines for constructing safe pedestrian and bicycle facilities in all new transportation projects, and are required to follow all federal regulations on accessibility.

Each State should ensure that State and community pedestrian and bicycle programs include a traffic engineering component that is coordinated with enforcement and educational efforts. This engineering component should improve the safety of pedestrians and bicyclists through the design, construction, operation and maintenance of engineering measures such as:

- Pedestrian, bicycle and school bus loading zone signals, signs and markings;
- Parking regulations;
- Traffic calming, or other approaches for slowing traffic and improving safety;
- On-road facilities (e.g., signed routes, marked lanes, wide curb lanes, paved shoulders);
- Sidewalk design;
- Pedestrian pathways;
- Off-road bicycle facilities (trails and paths); and
- Accommodations for people with disabilities.

VI. Communication Program

Each State should ensure that State and community pedestrian and bicycle programs contain a comprehensive communication component to support program and policy efforts. This component should address coordination with traffic engineering and law enforcement efforts, school-based education programs, communication and awareness campaigns, and other focused educational programs such as those for seniors and other identified high-risk populations. The State should enlist the support of a variety of media; including mass media, to improve public awareness of pedestrian and bicyclist crash problems and programs directed at preventing them. Communication programs should be culturally relevant and address issues such as:

- Visibility, or conspicuity, in the traffic system;
- Correct use of facilities and accommodations;
- Law enforcement initiatives;
- Proper street crossing behavior;
- Safe practices near school buses, including loading and unloading practices;
- The nature and extent of traffic related pedestrian and bicycle fatalities and injuries;
- Driver training regarding pedestrian and bicycle safety;
- Rules of the road;
- Proper selection, use, fit and maintenance of bicycles and bicycle helmets;
- Skills training for bicyclists; and
- Sharing the road safely among motorists and bicyclists.

VII. Outreach Program

Each State should encourage extensive community involvement in pedestrian and bicycle safety education by involving individuals and organizations outside the traditional highway safety community. Outreach efforts should include a focus on reaching vulnerable road users, such as older pedestrians, young children and new immigrant populations. States should also incorporate pedestrian and bicycle safety education into school curricula. To encourage community and school involvement, States should:

- Establish and convene a pedestrian and bicycle safety advisory task force or coalition to organize and generate broad-based support for pedestrian and bicycle programs;
- Create an effective communications network among coalition members to keep members informed and to coordinate efforts;
- Integrate culturally relevant pedestrian and bicycle safety programs into local traffic safety injury prevention initiatives and local transportation plans;
- Provide culturally relevant materials and resources to promote pedestrian and bicycle safety education programs;
- Ensure that highway safety in general, and pedestrian and bicycle safety in particular, are included in the State-approved K–12 health and safety education curricula and textbooks, and in materials for preschool age children and their caregivers;
- Encourage the promotion of safe pedestrian and bicyclist practices (including practices near school buses) through classroom and extra-curricular activities; and
- Establish and enforce written policies requiring safe pedestrian and bicyclist practices to and from school, including proper use of bicycle helmets on school property.

VIII. Driver Education and Licensing

Each State should address pedestrian and bicycle safety in State driver education training (i.e., in the classroom and behind the wheel), materials and licensing programs.

IX. Evaluation Program

Both problem identification and evaluation of pedestrian and bicycle crashes require effective record keeping by State and local government representatives. The State should identify the frequency and type of pedestrian and bicycle crashes to inform selection, implementation and evaluation of appropriate countermeasures. The State should promote effective program evaluation by:

- Supporting detailed analyses of police accident reports involving pedestrians and bicyclists;
- Encouraging, supporting and training localities in process, impact and outcome evaluation of local programs;
- Conducting and publicizing statewide surveys of public knowledge and attitudes about pedestrian and bicyclist safety;
- Maintaining awareness of trends in pedestrian and bicyclist crashes at the national level and how this might influence activities statewide;
- Evaluating the use of program resources and the effectiveness of existing countermeasures for the general public and high-risk populations; and
- Ensuring that evaluation results are used to identify problems, plan new programs and improve existing programs.

Highway Safety Program Guideline

Traffic Enforcement Services

Guideline No. 15

Each State, in cooperation with its political subdivisions and tribal governments, should develop and implement a comprehensive highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. The highway safety program should include a traffic enforcement services program designed to enforce traffic laws and regulations; reduce traffic-crashes and resulting fatalities and injuries; provide aid and comfort to the injured; investigate and report specific details and causes of traffic crashes; supervise traffic crash and highway incident clean-up; and maintain safe and orderly movement of traffic along the highway system. This guideline describes the components that a State traffic enforcement services program should include and the minimum criteria that the program components should meet.

I. Program Management

A. Planning and Coordination

Each State should have centralized program planning, implementation and coordination to achieve and sustain effective traffic enforcement services. The State Highway Safety Office (SHSO) should provide the leadership, training and technical assistance necessary to:

- Develop and implement a comprehensive highway safety plan for all traffic enforcement service programs, in cooperation with law enforcement (i.e., State, county, local or tribal law enforcement agency leaders);
- Generate broad-based support for traffic enforcement programs;
- Coordinate traffic enforcement services with other traffic safety program areas including Commercial Motor Vehicle (CMV) safety activities such as the Motor Carrier Safety Assistance Program; and

• Integrate traffic enforcement services into traffic safety and other injury prevention programs.

B. Program Elements

State, local and tribal law enforcement agencies, in conjunction with the SHSO, should establish traffic safety services as a priority within their comprehensive enforcement programs. A law enforcement program should be built on a foundation of commitment, cooperation, planning, monitoring, and evaluation within the agency's enforcement program. State, local and tribal law enforcement agencies should:

• Provide the public with effective and efficient traffic enforcement services through enabling legislation and regulations;

• Coordinate activities with State Departments of Transportation to ensure both support and accurate date collection.

• Develop and implement a comprehensive traffic enforcement services program that is focused on general deterrence and inclusive of impaired driving (i.e., alcohol or other drugs), safety belt use and child passenger safety laws, motorcycles, speeding and other programs to reduce hazardous driving behaviors;

• Develop cooperative working relationships with other governmental agencies, community organizations and traffic safety stakeholders on traffic safety and enforcement issues;

• Maintain traffic enforcement strategies and policies for all areas of traffic safety including roadside sobriety checkpoints, safety belt use, pursuit driving, crash investigating and reporting, speed enforcement and hazardous moving traffic violations; and

• Establish performance measures for traffic enforcement services that are both qualitative and quantitative.

Traffic enforcement services should look beyond the issuance of traffic citations to include enforcement of criminal laws and that address drivers of all types of vehicles, including trucks and motorcycles.

II. Resource Management

The SHSO should encourage law enforcement agencies to develop and maintain a comprehensive resource management plan that identifies and deploys resources necessary to effectively support traffic enforcement services. The resource management plan should include a specific component on traffic enforcement services and safety, integrating traffic enforcement services and safety initiatives into a comprehensive agency enforcement program. Law enforcement agencies should:

• Periodically conduct assessments of traffic enforcement service demands and resources to meet identified needs;

• Develop a comprehensive resource management plan that includes a specific traffic enforcement services and safety component;

• Define the management plan in terms of budget requirements and services to be provided; and

• Develop and implement operational strategies and policies that identify the deployment of traffic enforcement services resources to address program demands and agency goals.

III. Training

Training is essential to support traffic enforcement services and to prepare law enforcement officers to effectively perform their duties. Training accomplishes a wide variety of necessary goals and can be obtained through a variety of sources. Law enforcement agencies should periodically assess enforcement activities to determine training needs and to ensure training is endorsed by the State Police Officers Standards and Training (POST) agency. Effective training should:

• Provide officers the knowledge and skills to act decisively and correctly;

• Increase compliance with agency enforcement goals;

• Assist in meeting priorities;

• Improve compliance with established policies;

• Result in greater productivity and effectiveness;

• Foster cooperation and unity of purpose;

• Help offset liability actions and prevent inappropriate conduct by law enforcement officers;

• Motivate and enhance officer professionalism; and

• Require traffic enforcement knowledge and skills for all recruits. Law enforcement agencies should:

• Provide traffic enforcement in-service training to experienced officers;

• Provide specialized CMV in-service training to traffic enforcement officers as appropriate.

• Conduct training to implement specialized traffic enforcement skills, techniques, or programs; and

• Train instructors using certified training in order to increase agency capabilities and to ensure continuity of specialized enforcement skills and techniques.

IV. Traffic Law Enforcement

Providing traffic enforcement services and the enforcement of traffic laws and ordinances is a responsibility shared by all law enforcement agencies. Among the primary objectives of this function is encouraging motorists and pedestrians to comply voluntarily with the laws and ordinances. Administrators should apply their enforcement resources in a manner that ensures the greatest impact on traffic safety. Traffic enforcement services should:

• Include accurate problem identification and countermeasure design;

• Apply at appropriate times and locations, coupled with paid media and communication efforts designed to make the motoring public aware of the traffic safety problem and planned enforcement activities; and

• Include a system to document and report results.

V. Communication Program

States should develop and implement communication strategies directed at supporting policy and program elements. Public awareness and knowledge about traffic enforcement services are essential for sustaining increased compliance with traffic laws and regulations. Communications should highlight and support specific program activities underway in the community and be culturally relevant and appropriate to the audience. This requires a well-organized, effectively managed social marketing campaign that addresses specific high-risk populations. The SHSO, in cooperation with law enforcement agencies, should develop a statewide communications plan and campaign that:

• Identifies and addresses specific audiences at particular risk;

• Addresses enforcement of safety belt use, child passenger safety, impaired driving, speed and other serious traffic laws;

• Capitalizes on special events and awareness campaigns;

• Identifies and supports the efforts of traffic safety activist groups, community coalitions and the health and medical community to gain increased support of, and attention to, traffic safety and enforcement;

• Uses national themes, events and materials;

• Motivates the public to support increased enforcement of traffic laws;

• Educates and reminds the public about traffic laws and safe driving behaviors;

• Disseminates information to the public about agency activities and accomplishments;

• Enhances relationships with news media and health and medical communities;

- Provides safety education and community services;
- Provides legislative and judicial information and support;
- Increases the public's understanding of the enforcement agency's role in traffic safety;
- Markets information about internal activities to sworn and civilian members of the agency;
- Enhances the agency's safety enforcement role and increases employee understanding and support; and
- Recognizes employee achievements.

VI. Data and Program Evaluation

The SHSO, in conjunction with law enforcement agencies, should develop a comprehensive evaluation program to measure progress toward established project goals and objectives; effectively plan and implement statewide, county, local and tribal traffic enforcement services programs; optimize the allocation of limited resources; measure the impact of traffic enforcement on reducing crime and traffic crashes, injuries and deaths; and compare costs of criminal activity to costs of traffic crashes. Data should be collected from police accident reports, daily officer activity reports that contain workload and citation information, highway department records (e.g., traffic volume), citizen complaints and officer observations. Law enforcement managers should:

- Include evaluation in initial program planning efforts to ensure that data will be available and that sufficient resources will be allocated;
- Report results regularly to project and program managers, law enforcement decision-makers and members of the public and private sectors;
- Use results to guide future activities and to assist in justifying resources to governing bodies;
- Conduct a variety of surveys to assist in determining program effectiveness, such as roadside sobriety surveys, speed surveys, license checks, belt use surveys and surveys measuring public knowledge and attitudes about traffic enforcement programs;
- Evaluate the effectiveness of services provided in support of priority traffic safety areas;
- Maintain and report traffic data to appropriate repositories, such as police accident reports, the FBI *Uniform Crime Report*, FMCSA's SAFETYNET system and annual statewide reports; and
- Evaluate the impact of traffic enforcement services on criminal activity.

An effective records program should:

- Provide information rapidly and accurately;
- Provide routine compilations of data for management use in the decision making process;
- Provide data for operational planning and execution;
- Interface with a variety of data systems, including statewide traffic safety records systems; and
- Be accessible to enforcement, planners and management.

Highway Safety Program Guideline Speed Management Guideline No. 19

Each State, in cooperation with its political subdivisions and tribal governments, should develop and implement a comprehensive highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. The highway safety program should include a comprehensive speed management program that encourages citizens to voluntarily comply with speed limits. This guideline describes the components that a State speed management program should contain and the criteria that the program components should meet.

Speed management involves a balanced program effort that includes: Defining the relationship between speed, speeding and safety; applying road design and engineering measures to obtain appropriate speeds; setting speed limits that are safe and reasonable; applying enforcement efforts and appropriate technology that effectively target speeders and deter speeding; marketing communication and educational messages that focus on high-risk drivers; and soliciting the cooperation, support and leadership of traffic safety stakeholders.

I. Program Management

While speeding is a national problem, effective solutions must be applied locally. The success of a speed management program is enhanced by coordination and cooperation among the engineering, enforcement and educational disciplines. To reduce speeding-related fatalities, injuries and crashes, State, local or tribal governments should:

- Provide the NHTSA Speed Management Workshop that offers a comprehensive approach to speed management through partnering a broad range of transportation and safety disciplines. This multi-disciplinary team improves communication and cooperation and facilitates the development of innovative strategies for reducing speeding-related fatalities and injuries.
- Establish a Speed Management Working Group as outlined in the *Speed Management Workshop Guidelines* to develop and implement a localized action plan that identifies specific speeding and speeding-related crash problems and the actions necessary to address problems and to establish the credibility of posted speed limits.

The action plan should:

- Galvanize a localized effort and identify specific actions to be taken to effectively address managing speed and reducing speeding-related crash risks;
- Address how to effectively overcome institutional and jurisdictional barriers to setting appropriate speed limits and enforcement practices;
- Address how to effectively coordinate with stakeholders across organizations and disciplines to improve support needed for establishing an effective speed management program; and
- Address how to effectively communicate and exchange information between the transportation disciplines and the public to reinforce the importance of setting and enforcing appropriate speed limits.

II. Problem Identification

The relationship between speed limits, travel speeds and speed differential are the defining components of speed management as a highway safety issue. Speed increases crash severity, however, crash probability resulting from speed and speed differential is not clearly defined. Data collection and analysis is required to identify and develop countermeasures and awareness initiatives that lead to appropriate modifications in driver behavior. To achieve this goal, States should assist Speed Management Working Groups in making appropriate decisions about concentrated resource allocation. Each State should provide leadership, training and technical assistance to:

- Monitor and report travel speed trends across the entire localized road network;
- Identify local road segments where excessive and inappropriate vehicle speeds contribute to speeding-related crashes;
- Monitor the effects on vehicle speeds and crash risk of setting appropriate speed limits; and
- Coordinate, monitor and evaluate the short- and long-term effect of State legislative and local ordinance changes that establish appropriate speed laws

and posted speed limits on mobility and safety.

III. Engineering Countermeasurers

The establishment of appropriate speed limits facilitates voluntary public compliance and is the cornerstone for effective speed management. Speed management techniques and technology can be engineered into the existing highway system or incorporated into the Intelligent Transportation System to improve voluntary compliance with speed limits and prevent speeding. The State should aid established Speed Management Working Groups by providing the leadership, training and technical assistance necessary to:

- Comply with the Manual on Uniform Traffic Control Devices guidelines to establish appropriate speed limits;
- Provide a computer-based expert system speed zone advisor to set credible, safe and consistent speed limits;
- Train traffic engineers in the proper techniques to deploy speed-monitoring devices and conduct engineering studies for the purpose of establishing appropriate speed limits;
- Determine and apply the appropriate frequency for speed limit signs;
- Identify sites and applications where variable speed limit signs can reinforce appropriate speed limits for prevailing conditions;
- Identify and apply appropriate traffic calming techniques for reducing speed in pedestrian and bicyclist activity areas;
- Employ speed-activated roadside displays that warn drivers exceeding safe speeds based on roadway curve geometry, pavement friction and/or vehicle characteristics; and
- Promote the application of onboard vehicle and communication technologies that prevent drivers from exceeding safe speeds, including adaptive cruise control, vehicle limit sensing and feedback, driver control speed limitors, wireless roadside beacons, vehicle infrastructure integrated safety systems and stability control systems.

IV. Communication Program

Communication strategies, accompanied by enforcement, can modify driver behavior. Communication programs should be developed to ensure motorist acceptance and to enhance compliance with the introduction of revised speed limits and strict enforcement operations. If the public is not aware of, or does not understand, the potential consequences of speeding to themselves and others, they are unlikely to adjust speeds for traffic and weather conditions, or to comply with posted speed limits. The State should aid established Speed Management Working Groups by providing the leadership, training and technical assistance necessary to:

- Develop and evaluate public awareness campaigns to educate drivers on the importance of obeying speed limits and the potential consequences of speeding;
- Use market research to identify and clearly understand how, when and where to reach high-risk drivers;
- Develop a strategy to educate the public about why and how speed limits are set;
- Capitalize on special enforcement activities or events such as saturation patrols and sobriety checkpoints, impaired driving crackdowns, occupant protection mobilizations, and other highly publicized sustained enforcement activities;
- Identify and collaboratively support efforts of highway safety partners, traffic safety stakeholders and the health and medical communities to include speed management as a priority safety, economic and public health issue; and
- Promote responsible driver behavior and speed compliance in advertising.

V. Enforcement Countermeasurers

Enforcement is critical to achieve compliance with speed limits. More than half of all traffic stops result from speeding violations, and public support for speed enforcement activities depends on the confidence of the public that speed enforcement is fair, rational and motivated by safety concerns. The State should provide the leadership, training and technical assistance necessary to:

- Support speed enforcement operations that:
  - Compliment a comprehensive speed management program including traffic engineering, enforcement, judiciary and public support;
  - Strategically address speeders, locations and conditions most common or most hazardous in speeding-related crashes; and
  - Support the national commercial motor vehicle safety enforcement program;
- Integrate speed enforcement into related highway safety and priority enforcement activities such as impaired driving prevention, safety belt use, motorcycle rider training and other injury control activities;
- Provide speed enforcement guidelines that promote driver compliance with appropriately set speed limits;
- Coordinate speed enforcement programs with educational and media communication activities;
- Ensure the accuracy and reliability of speed-measuring devices used during speed enforcement operations through compliance with the appropriate performance specifications and established testing protocols;
- Ensure the knowledge, skills and abilities of law enforcement officers involved in speed enforcement activities through comprehensive speed management training and appropriate speed-measuring device operator training programs; and
- Promote the proper use of automated speed enforcement programs, application of automated speed enforcement technologies and compliance with automated speed enforcement implementation guidelines designed to deter speeding effectively and to prohibit revenue generation beyond reasonable operational cost.

VI. Legislation, Regulation and Policy

A key component of a successful speed management program is consistent, effective public policy to support speed management strategies and countermeasures. Traffic court judges, prosecutors, safety organizations, health professionals, lawmakers and policy makers have a stake in establishing the legitimacy of speed limits and effectively managing speed to reduce injuries and fatalities. The support and leadership of traffic court judges and prosecutors is essential to ensure that speeding violations are treated seriously and consistently. Safety goals can only be achieved through the leadership of local authorities who are responsible for implementing most speed management measures. Each State should aid established Speed Management Working Groups by providing the leadership, training and technical assistance necessary to:

- Promote speed management as a public policy priority;
- Create a network of key partners to carry the speed management message and leverage their resources to extend the reach and frequency of a speed management communication program;
- Target speed management initiatives at sites and on highways that offer the greatest opportunity for making a significant reduction in speeding-related crashes;
- Provide speed management program information and training opportunities for traffic court judges and prosecutors that outline the negative

effects of speeding on the quality of life in their communities;

• Provide sentencing guidelines to ensure and promote consistent treatment of violators in order to defuse any public perception that speed limits are arbitrary or capricious; and

• Promote and provide speed management workshops within communities to enhance communications and support for the implementation of a comprehensive, balanced and effective speed management program.

VII. Data and Evaluation

An evaluation component is a critical element of any speed management program. The evaluation design should measure the impact and effectiveness of a comprehensive speed management program on traffic fatalities, injuries and crashes and provide information for future program revisions, improvement and planning. The State should aid established Speed Management Working Groups by providing the leadership, training and technical assistance necessary to:

• Include an evaluation component in the initial program planning efforts to ensure that data will be available and that sufficient resources will be allocated;

• Provide reports regularly to a Speed Management Working Group, project and program managers; law enforcement commanders and officers; transportation engineers; members of the highway safety, health and medical communities; public and private sectors; and other traffic safety stakeholders;

• Use evaluation results to verify problem identification, guide future speed management activities and assist in justifying resources to legislative bodies;

• Conduct surveys to determine program effectiveness and public knowledge and attitudes about the speed management program;

• Analyze speed compliance and speeding-related crashes in areas with actual hazards to the public;

• Evaluate the effectiveness of speed management activities provided in relation to other priority traffic safety areas;

• Maintain and report traffic data to the SHSO and other appropriate repositories, including the *FBI Uniform Crime Reports*, FMCSA's SAFETYNET system and annual statewide reports.

Highway Safety Program Guideline

Occupant Protection

Guideline No. 20

Each State, in cooperation with its political subdivisions and tribal governments, should develop and implement a comprehensive highway safety program, reflective of State demographics, to achieve a significant reduction in traffic crashes, fatalities and injuries on public roads. The highway safety program should include a comprehensive occupant protection program that educates and motivates the public to properly use available motor vehicle occupant protection systems. A combination of legislation and use requirements, enforcement, communication, education and incentive strategies is necessary to achieve significant, lasting increases in safety belt and child safety seat usage. This guideline describes the components that a State occupant protection program should include and the criteria that the program components should meet.

I. Program Management

Each State should have centralized program planning, implementation and coordination to achieve and sustain high rates of safety belt use. Evaluation should be used to revise existing programs, develop new programs and determine progress and success. The State Highway Safety Office (SHSO) should:

• Provide leadership, training and technical assistance to other State agencies and local occupant protection programs and projects;

• Establish and convene an occupant protection advisory task force or coalition to organize and generate broad-based support for programs. The coalition should include agencies and organizations that are representative of the State's demographic composition and critical to the implementation of occupant protection initiatives;

• Integrate occupant protection programs into community/corridor traffic safety and other injury prevention programs; and

• Evaluate the effectiveness of the State's occupant protection program.

II. Legislation, Regulation and Policy

Each State should enact and enforce occupant protection use laws, regulations and policies to provide clear guidance to the public concerning motor vehicle occupant protection systems. This legal framework should include:

• Legislation permitting primary enforcement that requires all motor vehicle occupants to use systems provided by the vehicle manufacturer;

• Legislation permitting primary enforcement that requires that children birth to 16 years old (or the State's driving age) be properly restrained in an appropriate child restraint system (*i.e.*, certified by the manufacturer to meet all applicable Federal safety standards) or safety belt;

• Legislation permitting primary enforcement that requires children under 13 years old to be properly restrained in the rear seat (unless all available rear seats are occupied by younger children);

• Graduated Driver Licensing (GDL) laws that include three stages of licensure, and that place restrictions and sanctions on high-risk driving situations for novice drivers (*i.e.*, nighttime driving restrictions, passenger restrictions, zero tolerance, required safety belt use);

• Regulations requiring employees and contractors at all levels of government to wear safety belts when traveling on official business;

• Official policies requiring that organizations receiving Federal highway safety program grant funds develop and enforce an employee safety belt use policy; and

• Encouragement to motor vehicle insurers to offer economic incentives for policyholders who wear safety belts and secure children in child safety seats or other appropriate restraints.

III. Enforcement Program

Each State should conduct frequent, high-visibility law enforcement efforts, coupled with communication strategies, to increase safety belt and child safety seat use. Essential components of a law enforcement program include:

• Written, enforced safety belt use policies for law enforcement agencies with sanctions for noncompliance to protect law enforcement officers from harm and for officers to serve as role models for the motoring public;

• Vigorous enforcement of safety belt and child safety seat laws, including citations and warnings;

• Accurate reporting of occupant protection system information on police accident report forms, including safety belt and child safety seat use or non-use, restraint type, and airbag presence and deployment;

• Communication campaigns to inform the public about occupant protection laws and related enforcement activities;

• Routine monitoring of citation rates for non-use of safety belts and child safety seats;

• Use of National Child Passenger Safety Certification (basic and in-service) for law enforcement officers.

• Utilization of Law Enforcement Liaisons (LELs), for activities such as promotion of national and local mobilizations and increasing law enforcement participation in such

mobilizations and collaboration with local chapters of police groups and associations that represent diverse groups (*e.g.*, NOBLE, HAPCOA) to gain support for enforcement efforts.

IV. Communication Program

As part of each State's communication program, the State should enlist the support of a variety of media, including mass media, to improve public awareness and knowledge and to support enforcement efforts about safety belts, air bags, and child safety seats. To sustain or increase rates of safety belt and child safety seat use, a well organized, effectively managed communication program should:

- Identify specific audiences (*e.g.*, low belt use, high-risk motorists) and develop messages appropriate for these audiences;
- Address the enforcement of the State's safety belt and child passenger safety laws; the safety benefits of regular, correct safety belt (both manual and automatic) and child safety seat use; and the additional protection provided by air bags;
- Capitalize on special events, such as nationally recognized safety and injury prevention weeks and local enforcement campaigns;
- Provide materials and media campaigns in more than one language as necessary;
- Use national themes and materials;
- Participate in national programs to increase safety belt and child safety seat use and use law enforcement as the State's contribution to obtaining national public awareness through concentrated, simultaneous activity;
- Utilize paid media, as appropriate;
- Publicize safety belt use surveys and other relevant statistics;
- Encourage news media to report safety belt use and non-use in motor vehicle crashes;
- Involve media representatives in planning and disseminating communication campaigns;
- Encourage private sector groups to incorporate safety belt use messages into their media campaigns;
- Utilize and involve all media outlets: television, radio, print, signs, billboards, theaters, sports events, health fairs; and
- Evaluate all communication campaign efforts.

V. Occupant Protection for Children Program

Each State should enact occupant protection laws that require the correct restraint of all children, in all seating positions and in every vehicle. Regulations and policies should exist that provide clear guidance to the motoring public concerning occupant protection for children. Each State should require that children birth to 16 years old (or the State's driving age) be properly restrained in the appropriate child restraint system or safety belt. Gaps in State child passenger safety and safety belt laws should be closed to ensure that all children are covered in all seating positions, with requirements for age-appropriate child restraint use. Key provisions of the law should include: driver responsibility for ensuring that children are properly restrained; proper restraint of children under 13 years of age in the rear seat (unless all available rear seats are occupied by younger children); a ban of passengers from the cargo areas of light trucks; and a limit on the number of passengers based on the number of available safety belts in the vehicle. To achieve these objectives, State occupant protection programs for children should:

- Collect and analyze key data elements in order to evaluate the program progress;
- Assure that adequate and accurate training is provided to the professionals who deliver and enforce the occupant protection programs for parents and caregivers;
- Assure that the capability exists to train and retain nationally certified child passenger safety technicians to address attrition of trainers or changing public demographics;
- Promote the use of child restraints and assure that a plan has been developed to provide an adequate number of inspection stations and clinics, which meet minimum quality criteria;
- Maintain a strong law enforcement program that includes vigorous enforcement of the child occupant protection laws;
- Enlist the support of the media to increase public awareness about child occupant protection laws and the use of child restraints. Strong efforts should be made to reach underserved populations;
- Assure that the child occupant protection programs at the local level are periodically assessed and that programs are designed to meet the unique demographic needs of the community;
- Establish the infrastructure to systematically coordinate the array of child occupant protection program components; and
- Encourage law enforcement participation in the National Child Passenger Safety Certification (basic and in-service) training for law enforcement officers.

VI. Outreach Program

Each State should encourage extensive statewide and community involvement in occupant protection education by involving individuals and organizations outside the traditional highway safety community. Representation from the health, business and education sectors, and from diverse populations, within the community should be encouraged. Community involvement should broaden public support for the State's programs and increase a State's ability to deliver highway safety education programs. To encourage statewide and community involvement, States should:

- Establish a coalition or task force of individuals and organizations to actively promote use of occupant protection systems;
- Create an effective communications network among coalition members to keep members informed about issues;
- Provide culturally relevant materials and resources necessary to conduct occupant protection education programs, especially directed toward young people, in local settings; and
- Provide materials and resources necessary to conduct occupant protection education programs, especially directed toward specific cultural or otherwise diverse populations represented in the State and in its political subdivisions.

States should undertake a variety of outreach programs to achieve statewide and community involvement in occupant protection education, as described below. Programs should include outreach to diverse populations, health and medical communities, schools and employers.

A. Diverse Populations

Each State should work closely with individuals and organizations that represent the various ethnic and cultural populations reflected in State demographics. Individuals from these groups might not be reached through traditional communication markets. Community leaders and representatives from the various ethnic and cultural groups and organizations will help States to increase the use of child safety seats and safety belts. The State should:

- Evaluate the need for, and provide, if necessary, materials and resources in multiple languages;
- Collect and analyze data on fatalities and injuries in diverse communities;
- Ensure representation of diverse groups on State occupant protection coalitions and other work groups;

- Provide guidance to grantees on conducting outreach in diverse communities;
- Utilize leaders from diverse communities as spokespeople to promote safety belt use and child safety seats; and
- Conduct outreach efforts to diverse organizations and populations during law enforcement mobilization periods.

B. Health and Medical Communities

Each State should integrate occupant protection into health programs. The failure of drivers and passengers to use occupant protection systems is a major public health problem that must be recognized by the medical and health care communities. The SHSO, the State Health Department and other State or local medical organizations should collaborate in developing programs that:

- Integrate occupant protection into professional health training curricula and comprehensive public health planning;
- Promote occupant protection systems as a health promotion/injury prevention measure;
- Require public health and medical personnel to use available motor vehicle occupant protection systems during work hours;
- Provide technical assistance and education about the importance of motor vehicle occupant protection to primary caregivers (*e.g.*, doctors, nurses, clinic staff);
- Include questions about safety belt use in health risk appraisals;
- Utilize health care providers as visible public spokespeople for safety belt use and child safety seat use;
- Provide information about the availability of child safety seats at, and integrate child safety seat inspections into, maternity hospitals and other prenatal and natal care centers; and
- Collect, analyze and publicize data on additional injuries and medical expenses resulting from non-use of occupant protection devices.

C. Schools

Each State should encourage local school boards and educators to incorporate occupant protection education into school curricula. The SHSO in cooperation with the State Department of Education should:

- Ensure that highway safety and traffic-related injury control, in general, and occupant protection, in particular, are included in the State-approved K–12 health and safety education curricula and textbooks;
- Establish and enforce written policies requiring that school employees use safety belts when operating a motor vehicle on the job; and
- Encourage active promotion of regular safety belt use through classroom and extracurricular activities as well as in school-based health clinics; and
- Work with School Resource Officers (SROs) to promote safety belt use among high school students;
- Establish and enforce written school policies that require students driving to and from school to wear safety belts. Violation of these policies should result in revocation of parking or other campus privileges for a stated period of time.

D. Employers

Each State and local subdivision should encourage all employers to require safety belt use on the job as a condition of employment. Private sector employers should follow the lead of Federal and State government employers and comply with Executive Order 13043, "Increasing Seat Belt Use in the United States" as well as all applicable Federal Motor Carrier Safety Administration (FMCSA) Regulations or Occupational Safety and Health Administration (OSHA) regulations requiring private business employees to use safety belts on the job. All employers should:

- Establish and enforce a safety belt use policy with sanctions for non-use; and
- Conduct occupant protection education programs for employees on their safety belt use policies and the safety benefits of motor vehicle occupant protection devices.

VII. Data and Program Evaluation

Each State should access and analyze reliable data sources for problem identification and program planning. Each State should conduct several different types of evaluation to effectively measure progress and to plan and implement new program strategies. Program management should:

- Conduct and publicize at least one statewide observational survey of safety belt and child safety seat use annually, making every effort to ensure that it meets current, applicable Federal guidelines;
- Maintain trend data on child safety seat use, safety belt use and air bag deployment in fatal crashes;
- Identify high-risk populations through observational usage surveys and crash statistics;
- Conduct and publicize statewide surveys of public knowledge and attitudes about occupant protection laws and systems;
- Obtain monthly or quarterly data from law enforcement agencies on the number of safety belt and child passenger safety citations and convictions;
- Evaluate the use of program resources and the effectiveness of existing general communication as well as special/high-risk population education programs;
- Obtain data on morbidity, as well as the estimated cost of crashes, and determine the relation of injury to safety belt use and non-use; and
- Ensure that evaluation results are an integral part of new program planning and problem identification.

Dated: February 3, 2006.

Marilena Amoni,

Associate Administrator, Program Development and Delivery, NHTSA.

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DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–31 (Sub-No. 40X)]

Grand Trunk Western Railroad Incorporated—Abandonment—Exemption in Genesee County, MI

Grand Trunk Western Railroad Incorporated (GTW) has filed a notice of exemption under 49 CFR 1152 Subpart F–*Exempt Abandonments* to abandon its line of railroad, the Flint Old Main, between milepost 265.3 and milepost 267.5, in Flint, Genesee County, MI, a distance of 2.2 miles. The line traverses United States Postal Service Zip Codes 48503, 48507, and 48532.

GTW has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this

condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on March 11, 2006, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by February 21, 2006. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by March 1, 2006, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to GTW's representative: Michael J. Barron, Jr., Fletcher & Sippel LLC, 29 North Wacker Drive. Suite 920, Chicago, IL 60606–2832.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

GTW has filed environmental and historic reports which address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by February 14, 2006. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), GTW shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by GTW's filing of a notice of consummation by February 9, 2007, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: February 1, 2006.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 06–1157 Filed 2–8–06; 8:45 am]

BILLING CODE 4915–01–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,200. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF THE TREASURY

Departmental Offices/Federal Consulting Group; Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Federal Consulting Group within the Department of the Treasury is soliciting comments concerning the American Customer Satisfaction Index (ACSI) Customer Satisfaction Survey.

DATES: Written comments should be received on or before April 4, 2006 to be assured of consideration.

ADDRESSES: Direct all written comments to the Federal Consulting Group, Attention: Ronald Oberbillig, 799 9th Street, NW., Washington, DC 20239, (202) 504–3656, *Ron.Oberbillig@bpd.treas.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to the Federal Consulting Group, Attention: Ronald Oberbillig, 799 9th Street, NW., Washington, DC 20239, (202) 504–3656, *Ron.Oberbillig@bpd.treas.gov*.

SUPPLEMENTARY INFORMATION: *Title:* American Customer Satisfaction Index (ACSI) Survey.

OMB Number: 1505–0191.

Abstract: The following summary of the proposed renewal of an information collection activity is designed to continue to support a means to consistently measure and compare customer satisfaction with federal government agency programs and/or services within the Executive Branch. The Federal Consulting Group of the Department of the Treasury serves as the executive agent for this project, and has partnered with the CFI Group and the University of Michigan to offer the ACSI to federal government agencies ("the partnership").

The General Services Administration selected the ACSI in 1999 through a competitive procurement process as the vehicle for obtaining the required information. From 1999 to 2001, the General Services Administration served as the executive agent for the ACSI; and in 2001, the General Services Administration transferred the OMB clearance to the Department of the Treasury. The Federal Consulting Group requested and received a three-year generic clearance from the Office of Management and Budget for the ACSI in May 2003.

The CFI Group, a leader in customer satisfaction and customer experience management, offers a comprehensive system that quantifies the effects of quality improvements on citizen satisfaction. The CFI Group has developed the methodology and licenses it to the National Quality Research Center at the University of Michigan which produces the American Customer Satisfaction Index (ACSI). This national economic indicator, published quarterly in the Wall Street Journal, was introduced in 1994 by Professor Claes Fornell under the auspices of the University of Michigan, the American Society for Quality (ASQ), and the CFI Group. The ACSI monitors and benchmarks customer satisfaction across more than 200 companies and many U.S. federal agencies.

The ACSI is the only cross-agency methodology for obtaining comparable measures of customer satisfaction with federal government programs and/or services. Along with other economic objectives—such as employment and growth—the quality of output (goods and services) is a part of measuring living standards. The ACSI's ultimate purpose is to help improve the quality of goods and services available to American citizens.

The surveys that comprise the federal government's portion of the ACSI will be completely subject to the Privacy Act 1074, Public Law 93–579, December 31, 1974 (5 U.S.C. 522a). The agency information collection will be used solely for the purpose of the survey. The ACSI partnership will not be authorized

to release any agency information upon completion of the survey without first obtaining permission from the Federal Consulting Group and the participating agency. In no case shall any new system of records containing privacy information be developed by the Federal Consulting Group, participating agencies, or the contractor collecting the data. In addition, participating federal agencies may only provide information used to randomly select respondents from among established systems of records provided for such routine uses.

This survey asks no questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Current Actions: Proposed renewal of collection of information.

Type of Review: Renewal.

Affected Public: Individuals or households/business or other for-profit/not-for-profit institutions/farms/federal government/state, local or tribal government.

Estimated Number of Respondents: Participation by federal agencies in the ACSI is expected to vary as new customer segment measures are added or deleted. However, based on historical records, projected estimates for fiscal years 2006 through 2008 are as follows:

Fiscal Year 2006—100 Customer Satisfaction Surveys

Respondents: 26,000; annual responses: 26,000; average minutes per response: 12.0; burden hours: 5,200.

Fiscal Year 2007—150 Customer Satisfaction Surveys

Respondents: 39,000; annual responses: 39,000; average minutes per response: 12.0; burden hours: 7,800.

Fiscal Year 2008—200 Customer Satisfaction Surveys

Respondents: 52,000; annual responses: 52,000; average minutes per response: 12.0; burden hours: 10,400.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: February 3, 2006.

Ronald Oberbillig,

Chief Operating Officer, Federal Consulting Group.

[FR Doc. E6–1729 Filed 2–8–06; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network; Proposed Renewal Without Change; Comment Request; Customer Identification Programs for Various Financial Institutions

AGENCY: Financial Crimes Enforcement Network, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, the Financial Crimes Enforcement Network invites comment on a proposed renewal, without change, to information collections found in regulations requiring futures commission merchants, introducing brokers, banks, savings associations, credit unions, certain non-federally regulated banks, mutual funds, and broker-dealers, to develop and implement customer identification programs reasonably designed to prevent those financial institutions from being used to facilitate money laundering and the financing of terrorist activities. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

DATES: Written comments are welcome and must be received on or before April 10, 2006.

ADDRESSES: Written comments should be submitted to: Office of Chief Counsel, Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, VA 22183, Attention: Customer Identification Program Comments. Comments also may be submitted by electronic mail to the following Internet address: *regcomments@fincen.gov*, again with a caption, in the body of the text, "Attention: Customer Identification Program Comments."

Inspection of comments. Comments may be inspected, between 10 a.m. and 4 p.m., in the Financial Crimes Enforcement Network reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400 (not a toll free number).

FOR FURTHER INFORMATION CONTACT: The Regulatory Policy and Programs Division at (800) 949–2732.

SUPPLEMENTARY INFORMATION: *Abstract:* The statute generally referred to as the "Bank Secrecy Act," Titles I and II of Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5332, authorizes the Secretary of the Treasury, *inter alia*, to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities, to protect against international terrorism, and to implement counter-money laundering programs and compliance procedures.[1]

Regulations implementing Title II of the Bank Secrecy Act appear at 31 CFR part 103. The authority of the Secretary of the Treasury to administer the Bank Secrecy Act has been delegated to the Director of the Financial Crimes Enforcement Network. Regulations implementing section 5318(h)(1) are found at 31 CFR 103.121, 103.122, 103.123, and 103.131. In general, the regulations require the referenced financial institutions to establish, document, and maintain customer identification programs as an aid in securing the U.S. financial system. Financial institutions defined in 31 U.S.C. 5312(a)(2) and 31 CFR 103.11 are subject to the customer identification program requirement.

1. *Title:* Customer identification programs for banks, savings associations, credit unions, and certain non-federally regulated banks. (31 CFR 103.121.)

Office of Management and Budget Control Number: 1506–0026.

Abstract: Banks, savings associations, credit unions, and certain non-federally regulated banks are required to develop and maintain customer identification programs. Section 326 of the USA Patriot Act of 2001, (Pub. L. 107–56) provides that, at a minimum, financial institutions implement reasonable

[1] Language expanding the scope of the Bank Secrecy Act to intelligence or counter-intelligence activities to protect against international terrorism was added by Section 358 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107–56.

procedures for: (1) Verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency. In prescribing these regulations, the Secretary was directed to take into consideration the various types of accounts maintained by various types of financial institutions, the various methods of opening accounts, and the various types of identifying information available. (See FR 68, 25090, May 9, 2003.)

Current Action: There is no change to existing regulations.

Type of Review: Extension of a currently approved information collection.

Affected Public: Business and other for-profit institutions and non-profit institutions.

Burden: Estimated Number of Respondents: 22,060.

Estimated Average Annual Recordkeeping Burden per Respondent: 10 hours.

Estimated Average Annual Disclosure Burden per Respondent: 1 hour.

Estimated Total Annual Respondent Burden: 242,660 hours.

2. *Title:* Customer identification program for broker-dealers. (31 CFR 103.122.)

Office of Management and Budget Control Number: 1506–0034.

Abstract: Broker-dealers are required to establish and maintain customer identification programs. (See FR 68, 25113, May 9, 2003.) A copy of the written program must be maintained for five years.

Current Action: There is no change to existing regulations.

Type of Review: Extension of a currently approved information collection.

Affected Public: Business and other for-profit institutions.

Burden: Estimated Number of Respondents: 5,448.

Estimated Average Annual Burden Per Respondent: The estimated average burden associated with the notice requirement in this proposed rule is two minutes per respondent.

Estimated Number of Hours: 630,896.

3. *Title:* Customer identification programs for futures commission merchants and introducing brokers. (31 CFR 103.123.)

Office of Management and Budget Control Number: 1506–0022.

Abstract: Futures commission merchants and introducing brokers are required to develop and maintain customer identification programs. (See FR 68, 25149, May 9, 2003.) A copy of the written program must be maintained for five years.

Current Action: This requirement was renewed effective November 30, 2005; it is being renewed again so that all the customer identification program requirements for various financial institutions may be considered together concurrently.

Type of Review: Extension of a currently approved information collection.

Affected Public: Business and other for-profit institutions.

Burden: Estimated Number of Respondents: 1,856.

Estimated Average Annual Burden Per Respondent: The estimated average burden associated with the notice requirement in this proposed rule is two minutes per espondent.

Estimated Number of Hours: 20,471.

4. *Title:* Customer identification programs for mutual funds. (31 CFR 103.131.)

Office of Management and Budget Control Number: 1505–0033.

Abstract: Mutual funds are required to establish and maintain customer identification programs. (See FR 68, 25131, May 9, 2003.) A copy of the written program must be maintained for five years.

Current Action: There is no change to existing regulations.

Type of Review: Extension of a currently approved information collection.

Affected Public: Business and other for-profit institutions.

Burden: Estimated Number of Respondents: 2,296.

Estimated Average Annual Burden Per Respondent: The estimated average burden associated with the notice requirement in this proposed rule is 2 minutes per respondent.

Estimated Number of Hours: 266,700.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget. Records required to be retained under the Bank Secrecy Act must be retained for five years. Generally, information collected pursuant to the Bank Secrecy Act is confidential but may be shared as provided by law with regulatory and law enforcement authorities.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected: (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance and purchase of services to provide information.

Dated: February 3, 2006.

William D. Langford, Jr.,

Associate Director, Regulatory Policy and Programs Division, Financial Crimes Enforcement Network.

[FR Doc. E6–1744 Filed 2–8–06; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

February 1, 2006.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before March 13, 2006 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1961.

Type of Review: Extension.

Title: Application for Extension of Time for Payment of Tax.

Form: IRS form 1127.

Description: Form 1127 is used by taxpayers to request extension of time to pay taxes. The conditions under which extensions may be granted are stated under Section 6161 of the Internal Revenue Code.

Respondents: Individuals or households.

Estimated Total Burden Hours: 833 hours.

Clearance Officer: Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E6–1750 Filed 2–8–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

NATIONAL CREDIT UNION ADMINISTRATION

[No. 2006–04]

Office of the Comptroller of the Currency

Office of Thrift Supervision

Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters

AGENCIES: Office of Thrift Supervision (OTS), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); National Credit Union Administration (NCUA); Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Issuance of Interagency Advisory.

SUMMARY: The OTS, Board, FDIC, NCUA, and OCC (collectively, the "Agencies"), have finalized the *Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters* ("Advisory"). The Advisory informs financial institutions' boards of directors, audit committees, and management that they should not enter into agreements that incorporate unsafe and unsound external auditor limitation of liability provisions with respect to engagements for financial statement audits, audits of internal control over financial reporting, and attestations on management's assessment of internal control over financial reporting.

DATES: *Effective Date:* The Advisory is effective for engagement letters executed on or after February 9, 2006.

FOR FURTHER INFORMATION CONTACT: *OTS:* Jeffrey J. Geer, Chief Accountant, at *jeffrey.geer@ots.treas.gov* or (202) 906–6363; or Patricia Hildebrand, Senior Policy Accountant, at *patricia.hildebrand@ots.treas.gov* or (202) 906–7048.

Board: Terrill Garrison, Supervisory Financial Analyst, at *terrill.garrison@frb.gov* or (202) 452–2712; or Nina A. Nichols, Assistant Director, at *nina.nichols@frb.gov* or (202) 452–2961.

FDIC: Harrison E. Greene, Jr., Senior Policy Analyst (Bank Accounting), Division of Supervision and Consumer Protection, at *hgreene@fdic.gov* or (202) 898–8905; or Michelle Borzillo, Counsel, Supervision and Legislation Section, Legal Division, at *mborzillo@fdic.gov* or (202) 898–7400.

NCUA: Karen Kelbly, Chief Accountant, at *kelblyk@ncua.gov* or (703) 518–6389; or Steven Widerman, Trial Attorney, Office of General Counsel, at *widerman@ncua.gov* or (703) 518–6557.

OCC: Zane Blackburn, Chief Accountant, at *zane.blackburn@occ.treas.gov* or (202) 874–4944; or Kathy Murphy, Deputy Chief Accountant, at *kathy.murphy@occ.treas.gov* or (202) 874–5675.

SUPPLEMENTARY INFORMATION:

I. Background

The Agencies have observed an increase in the types and frequency of provisions in financial institutions' external audit engagement letters that limit the auditors' liability. These provisions take many forms, but can generally be categorized as an agreement by a financial institution that is a client of an external auditor to:

- Indemnify the external auditor against claims made by third parties;
- Hold harmless or release the external auditor from liability for claims or potential claims that might be asserted by the client financial institution; or
- Limit the remedies available to the client financial institution.

Reliable financial and regulatory reporting supports the Agencies' risk-focused supervision of financial institutions by contributing to effective pre-examination planning and off-site monitoring and appropriate assessments of an institution's internal control over financial reporting, capital adequacy, financial condition, and performance. Audits play a valuable role in ensuring the reliability of institutions' financial information.

The Agencies believe that when financial institutions agree to limit their external auditors' liability, either in provisions in engagement letters or in provisions that accompany alternative dispute resolution (ADR) agreements, such provisions may weaken the external auditors' objectivity, impartiality, and performance. The inclusion of such provisions in financial institutions' external audit engagement letters may reduce the reliability of audits and therefore raises safety and soundness concerns.

On May 10, 2005, the Federal Financial Institutions Examinations Council (FFIEC) on behalf of the Agencies published in the **Federal Register** a proposed *Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions and Certain Alternative Dispute Resolution Provisions in External Audit Engagement Letters* (70 FR 24576) and sought comments to fully understand the effect of the proposed Advisory on financial institutions.

II. Scope of Advisory

The Advisory applies to engagement letters between financial institutions and external auditors with respect to financial statement audits, audits of internal control over financial reporting, and attestations on management's assessment of internal control over financial reporting (collectively, "Audit" or "Audits"). The Advisory does not apply to:

- Non-audit services that may be performed by financial institutions' external auditors;
- Audits of financial institutions' 401K plans, pension plans, and other similar audits;
- Services performed by accountants who are not engaged to perform financial institutions' Audits (*e.g.*, outsourced internal audits, loan reviews); and
- Other service providers (*e.g.*, software consultants, legal advisors).

The Advisory applies to all Audits of financial institutions, regardless of whether an institution is a public or a non-public company, including Audits required under Section 36 of the Federal Deposit Insurance Act, OTS regulations, or Section 202 of the Federal Credit Union Act, Audits required by any of the Agencies, and voluntary Audits.

III. Summary of Comments

Overview

The Agencies received 44 comment letters from auditors, financial institutions, trade organizations, attorneys, arbitration associations, and other interested parties. While public comments were requested on all aspects of the Advisory, the Agencies specifically sought comments on seven questions. Less than one third of all commenters addressed all seven questions.

Most financial institutions and industry trade groups supported the proposed Advisory and commended the Agencies' efforts. A number of the commenters explained that limitation of liability provisions in audit engagement letters originate with external auditing firms rather than financial institutions.

Most of the letters from external auditors opposed the proposal. External auditors explained that limitation of liability provisions are risk management tools commonly used in audit engagement pricing as well as in other business transactions. They asserted that such provisions allocate risk and facilitate a timely and cost effective means to resolve disputes while minimizing litigation expenses. Further, auditors stated that they should not be liable for losses resulting from knowing misrepresentations by the client's management.

A number of commenters asked for clarification on the scope of the Advisory and on the application of the Advisory to ADR agreements (*e.g.*, arbitration) and waivers of jury trials. The Agencies have addressed these comments in the Advisory.

A number of commenters stated that the U.S. Securities and Exchange Commission (SEC), the Public Company Accounting Oversight Board (PCAOB), and the American Institute of Certified Public Accountants (AICPA) have established auditor independence rules and requirements; therefore, they asserted, the Advisory is not needed. Other commenters expressed a need for the SEC, PCAOB, and AICPA to clarify their guidance. On September 15, 2005, the AICPA published for comment its proposed interpretation of its auditor independence standards. In that proposal, the AICPA specifically identified limitation of liability provisions that impair auditor independence under its standards. Most of the provisions cited as unsafe and unsound in the Agencies' Advisory were also deemed to impair independence in the AICPA's proposed interpretation.

Comments

A. Application to Non-public Companies

A number of commenters expressed concern that the Agencies were applying SEC and PCAOB auditor independence rules to Audits of non-public companies. The Agencies' audit rules for financial institutions generally reference both the AICPA and SEC auditor independence standards and already apply to many non-public institutions. Therefore, the concept of applying SEC auditor independence standards to non-public financial institutions is in place under existing bank and thrift audit regulations and is not the result of the issuance of the Advisory. Since safety and soundness concerns apply equally to all institutions' Audits, the Advisory does not establish different requirements for public and non-public financial institutions.

B. Risk Management and Business Practices

Auditors asserted that to the extent the Advisory would limit an auditor's ability to use risk allocation tools such as: (1) Capping damages; (2) restricting the time period to file a claim; (3) restricting the transfer or assignment of legal rights by an audit client; or (4) otherwise limiting the allocation of risk between contracting parties, the Advisory would result in auditors assuming more risk, which would lead to economic costs with no countervailing showing of benefits, such as improved audits.

Auditors further stated that the Advisory largely ignores the interest that financial institutions have in obtaining professional and independent audit services within a framework of allocated risk. Further, auditors stated that the Advisory attempts to use safety and soundness as a means for setting auditor independence standards and limits the use of accepted business practices to manage disputes. In addition, the auditors and some financial institutions expressed concerns that the Advisory may result in an increase in costs and be a disincentive for financial institutions to continue to engage an auditor when not required to do so.

The Agencies continue to believe that certain limitation of liability provisions reduce the auditor's accountability and thus may weaken the auditor's objectivity, impartiality, and performance. In the Agencies' judgment, concerns about potential increased costs or restrictions on the ability of the parties to an audit engagement letter to allocate risk do not outweigh the need to protect financial institutions from the safety and soundness concerns posed by such limitation of liability provisions. Furthermore, any disincentive for financial institutions to obtain Audits when not required should be limited because Audits represent best practices and are strongly encouraged by the Agencies.

In addition, these limitations on external auditor liability may not be consistent with the auditor independence standards of the SEC, PCAOB, and AICPA. All financial institution Audits must comply with the independence standards set by one or more of these standard-setters.

C. Management's Knowing Misrepresentations

Many auditors asserted that the information provided to outside auditors is management's responsibility and that audit firms should not be liable unless fraudulent behavior or willful misconduct exists on the part of the auditor. Further, if management knowingly misrepresents significant facts to the external auditor, it is sometimes impossible for the auditor to uncover the true facts of a situation. The auditors asserted that they should be allowed to limit their liability when knowing misrepresentations of management contribute to the loss.

Those commenters further stated that indemnification for management's knowing misrepresentations communicates a commitment that financial institution management and its governing board understand their responsibilities to perform honestly and legally. These commenters rejected the assertion that indemnifying auditors for management's knowing misrepresentations might cause an auditor to lose independence or to perform a less responsible audit. They also stated that protections that the client may provide against the client's own knowing misrepresentations do not preclude third parties from suing the auditor.

Nevertheless, a clause that would release, indemnify, or hold an external auditor harmless from any liability resulting from knowing misrepresentations by management is inappropriate under the SEC's existing guidance on auditor independence (see Appendix B of the Advisory). The inclusion in external audit engagement letters of limitation of liability provisions that are prohibited by the auditor independence rules and interpretations of the SEC, PCAOB, or AICPA is considered an unsafe and unsound practice for financial

institutions. Provisions not clearly addressed by authoritative guidance may also raise safety and soundness concerns when there is a potential impairment of the external auditors' independence, objectivity, impartiality, or performance.

The AICPA's Professional Standards, AU Section 110: *Responsibilities and Functions of the Independent Auditor* state: "The auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud." The Agencies believe that including an indemnification or limitation of liability provision for the client's knowing misrepresentations, willful misconduct, or fraudulent behavior in an Audit engagement letter may not be viewed as consistent with the auditor's duty and obligation to comply with auditing standards.

The Agencies acknowledge that management bears the responsibility for its conduct and representations. Nevertheless, the auditor has a responsibility to obtain reasonable assurance that the financial statements are free from material misstatements, including misstatements caused by management fraud. A limitation of liability provision in external Audit engagement letters for management's knowing misrepresentations, willful misconduct, or fraudulent behavior could act to reduce the auditor's professional skepticism. Limited liability could lead to inadvertent consequences such as an auditor not fully considering the possibility that management fraud exists. This might result in less robust challenges to and over-reliance on management's representations rather than performance of appropriate audit procedures to corroborate them.

The Agencies believe that the auditor's potential liability related to material misstatements due to management's misrepresentations should be decided by a trier of fact in a legal or other proceeding and should not be predetermined in the engagement letter. The trier of fact would take into account whether the Audit was properly conducted in accordance with applicable auditing standards.

D. Auditor Independence and Performance Standards

Many auditors contended that various limitation of liability provisions addressed in the proposed Advisory would not impair their independence. For example, a large accounting firm stated, "* * * the Proposal goes far beyond the independence standards established by the SEC, PCAOB, and AICPA." Another large accounting firm stated, "Of the specific contractual terms identified for criticism in the proposal, some are already prohibited by the SEC for those entities subject to SEC regulation. Other contractual terms, however, are fully permissible and widely in use as tools to allocate risk."

In contrast, other commenters contended that all of the provisions in the proposal impair an auditor's independence. This view was most clearly expressed in the comment letter from an independent proxy and financial research firm, which stated, "We believe audit engagement letters containing liability limitations impair the auditor's independence and reduce audit quality to an unacceptable level." They further stated, "We believe it is inappropriate for an audit contract between a company and its auditor to limit the auditor's liability including (1) Any limitations on rights to trial, (2) limits on compensatory or punitive damages, or (3) limits on discovery, including in arbitration."

A number of commenters discussed the auditor's requirement to comply with auditing standards and stated that the failure to comply with such standards would result in the violation of the requirements of the SEC, PCAOB, AICPA, and/or state licensing authorities. Some commenters stated that adherence to professional auditing standards is further assured by periodic peer reviews and by PCAOB inspections. Commenters noted that auditors are subject to possible disciplinary action by state boards of accountancy, the SEC, the PCAOB, and the AICPA. These commenters concluded that the auditor's performance is controlled by professional standards and is not influenced by provisions in audit engagement letters that limit the auditor's liability. Consequently, they believed that the Advisory is unnecessary.

The Agencies' observations lead them to conclude otherwise. Their concern is that limitation of liability provisions may adversely impact the reliability of Audits whether related to disincentives for auditor performance or impairment of auditor independence in fact or appearance. The Agencies have not attempted to categorize limitation of liability provisions that adversely affect safety and soundness as either matters of performance or independence.

The Agencies acknowledge that the SEC, PCAOB, and AICPA set independence and performance standards for auditors. The Advisory does not purport to affect those standards. Regardless of whether limitation of liability provisions are permissible under auditor independence standards, the Agencies have a separate obligation to evaluate their impact on the safety and soundness of financial institutions.

Some commenters questioned whether the Agencies have adequate evidence that limitation of liability provisions adversely affect auditor independence, objectivity, and performance. The Agencies acknowledge that it is inherently difficult to prove links from circumstances to states of mind and from there to performance. Nevertheless, the Agencies cannot wait for proof of harm before establishing guidance to ensure the safety and soundness of financial institutions. The Agencies must make judgments about circumstances that may render Audits less reliable. The Agencies' concern with the potential impact of such provisions is not only that an auditor might intentionally act less than appropriately, but might unconsciously do so.

A reasonable person may believe that limitation of liability provisions create circumstances that may adversely affect Audit reliability. For example, a reasonable person may conclude that if the auditor faces less potential liability for the Audit, the auditor may be less thorough. Further, that knowledge may erode the auditor's independence of mind.

The Agencies observe that the SEC has addressed limitations of liability in its independence rulings for more than 50 years. The AICPA also addresses limitations of liability in its independence standards and related interpretations. Additionally, many commenters stated that limitations of liability impair an auditor's independence.

Auditors, in their comments, expressed inconsistent interpretations of the meaning and scope of the SEC, PCAOB, and AICPA auditing standards relating to limitations of liability. The Agencies have concluded that supervisory guidance in addition to the existing auditing standards is necessary to carry out their safety and soundness mandate. Because the Agencies rely on Audits to help ensure the safety and soundness of financial institutions, they are necessarily concerned with provisions that could affect the auditor's judgment and professional skepticism. Thus, the Agencies have concluded that since the limitation of liability provisions may adversely affect Audit reliability, such provisions are considered unsafe and unsound.

E. Waivers of Punitive Damages

The comment letters included much discussion on punitive damage waivers. Some commenters stated that the Advisory should not prohibit these waivers. The AICPA's comment letter typified the views of the commenters advocating punitive damage waivers. The AICPA asserted, "* * * limiting an auditor's liability to the client for punitive damage claims will not impair independence or objectivity, provided the auditor remains liable for actual damages—that is, the auditor remains exposed to clients, and also to lenders, shareholders, and other non-clients, for damages for any actual harm caused." Others noted that a waiver of punitive damages by the client has no bearing on punitive damages that may be sought by a third party. Several commenters stated that a financial institution's agreement to not seek punitive damages has no effect on the safety and soundness of a financial institution.

Due in part to the extensive comments regarding client agreements not to seek punitive damages from their auditors, the Agencies have decided to take the issue under advisement. Accordingly, at this time, provisions that waive the right of financial institutions to seek punitive damages from their external auditor are not treated as unsafe and unsound under the Advisory. Nevertheless, the Agencies have concluded that agreements by financial institutions to indemnify their auditors for third party punitive damage awards are deemed unsafe and unsound.

To enhance transparency and market discipline, public financial institutions that agree to waive claims for punitive damages against their external auditors may want to disclose annually the nature of these arrangements in their proxy statements or other public reports.

F. Alternative Dispute Resolution Agreements and Waiver of Jury Trials

The Advisory encourages all financial institutions to review proposed Audit engagement letters presented by audit firms and understand any limitations imposed by mandatory pre-dispute alternative dispute resolution agreements (ADR) (including arbitration agreements) or jury trial waivers on the institution's ability to recover damages from an audit firm in any future litigation. The Advisory also directs financial institutions to review rules of procedure referenced in ADR agreements to ensure that the potential consequences of such procedures are acceptable to the institution and to recognize that ADR agreements may themselves incorporate limitation of liability provisions.

A number of commenters stated that the Advisory addresses mandatory ADR mechanisms and the waiver of jury trials in a way that will discourage financial institutions from agreeing in advance with their auditors to use these widely accepted, efficient, and cost effective means of resolving disputes. A few commenters noted that ADR and waiver of jury trial provisions do not take away rights; they merely reflect the parties' choice of a method for resolving a dispute. Further, commenters stated that the Agencies have previously issued pronouncements that recognize and even encourage the use of ADR, for example, the FDIC's *Statement of Policy on Use of Binding Arbitration* (66 FR 18632 (April 10, 2001)). The *Interagency Policy Statement on the Internal Audit Function and its Outsourcing* (issued by the OTS, Board, FDIC, and OCC in March 2003) provides that all written contracts between vendors and financial institutions shall prescribe a process (arbitration, mediation, or other means) for resolving disputes and for determining who bears the costs of consequential damages arising from errors, omissions, and negligence. Commenters also stated that ADR is commercially reasonable because it creates certainty and reduces litigation-related costs and, therefore, should be encouraged.

The Agencies observed that limitation of liability provisions frequently accompanied ADR or waiver of jury trial agreements contained in or referenced by Audit engagement letters. The Agencies do not oppose ADR or waiver of jury trial agreements. However, the Agencies do object to the practice of including unsafe and unsound limitation of liability provisions in these agreements.

In response to the comments received, the Agencies clarified that ADR or waiver of jury trial provisions in Audit engagement letters do not present safety and soundness concerns, provided the agreements do not incorporate limitation of liability provisions. Institutions should carefully review ADR and jury trial provisions in engagement letters, as well as any agreements regarding rules of procedure. ADR agreements should not include any unsafe and unsound limitation of liability provisions. The Advisory does not change or affect previously issued policies referencing ADR and does not encourage or discourage the use of ADR in Audit engagement letters.

G. Legal Considerations

Four commenters addressed legal aspects of the proposed Advisory. Two of the four commented that state and Federal laws explicitly permit limitation of liability or indemnification provisions. They indicated that these clauses are a common feature in many business and consumer contracts in wide use today. The Agencies note that Audits by their nature require a uniquely high level of objectivity and impartiality as compared to other types of business arrangements. Therefore, some commonly used limitation of liability provisions that may be acceptable for other business contracts are inappropriate for Audits of financial institutions.

Another commenter stated that certain jurisdictions prohibit claims against auditors where management fraud is imputable to the client. The Advisory is not intended to override existing state or Federal laws that govern the types of damages that may be awarded by the courts. It advises financial institutions' boards of directors, audit committees, and management that they should not agree to any Audit engagement letters that may present safety and soundness concerns, including provisions that may violate the auditor independence standards of the SEC, PCAOB, or AICPA, as applicable.

One commenter stated that the Agencies have not complied with the legal constraints on Federal agency rulemaking (*e.g.*, the Administrative Procedures Act (APA) and Executive Order 12866) with the Advisory. The APA prohibits agency action that is, among other things, arbitrary and capricious. Executive Order 12866 provides that when a Federal agency engages in rulemaking, it must first determine whether a rule is necessary.

The Agencies have authority to issue safety and soundness guidance without engaging in a formal rulemaking procedure. Under 12 U.S.C. 1831p–1(d)(1), the Agencies issue standards for safety and soundness by regulation or by guideline. The Advisory is issued under that authority and the supervisory authority vested in each of the Agencies. The Agencies have determined that there is a significant need for guidance based on their review of actual auditor engagement letters, the comments from financial institutions that strongly expressed a need for guidance, and the likely benefits as compared to the possible costs.

H. Other Considerations

Several commenters expressed concern that, since the Advisory does not apply to other industries, financial institutions will not have a level playing field with other audit clients when negotiating audit engagement terms. In the Agencies' judgment, any concerns about potential increased costs or restrictions on the ability of financial institutions, as compared to other audit clients, to negotiate Audit engagement terms do not outweigh the need to protect financial institutions from safety and soundness concerns posed by limitation of liability provisions.

Other commenters stated that auditors should only be liable for audits they perform. The commenters believed that a financial institution's engagement letter covers only the period under audit and that auditors should not be held responsible for losses arising in subsequent periods in which the auditor was not engaged. Further, losses that arise in subsequent periods that may be related to matters that existed during periods previously audited by another audit firm should not result in a liability to the successor audit firm.

The Agencies concur with the concept that auditors are not responsible for the work of others. The Agencies object to provisions that are worded in a way that may not only preclude collection of consequential damages for harm in later years, but that may also preclude any recovery at all. For example, the Agencies observed provisions where no claim of liability could be brought against an auditor until the audit report is actually delivered, and then these provisions limited any liability thereafter to claims raised during the period covered by the audit. In other words, the auditor's liability may be limited to claims raised during the period before there could be any liability. Read more broadly, the auditor would be liable for losses that arise in subsequent years only if the auditor continued to audit subsequent periods.

Several commenters asked the Agencies to provide examples of losses sustained by financial institutions as a result of limitation of liability provisions discussed in the Advisory. The Agencies' charge is to identify and mitigate the risk of loss to financial institutions, not merely to react after losses occur. Therefore, the appropriate standard to be applied in the Advisory is the risk of loss created by limitation of liability provisions, and not losses sustained by reason of such provisions.

I. Questions, Comments, and Responses

1. The Advisory, as written, indicates that limitation of liability provisions are inappropriate for all financial institution external audits.

a. Is the scope appropriate? If not, to which financial institutions should the Advisory apply and why?

b. Should the Advisory apply to financial institution audits that are not required by law, regulation, or order?

Comments and Responses: The vast majority of commenters stated that the Advisory should apply uniformly to audits of financial statements for all financial institutions. A few commenters stated that voluntary audits should not be subject to the provisions in the Advisory. Several commenters stated that the Advisory should apply to audits of all entities, not just financial institutions.

Since the Agencies are concerned with the safety and soundness of all financial institutions, the Advisory applies to all Audits of financial institutions including voluntary Audits. Regarding the comments relative to the broader application of the Advisory, the Agencies do not have the authority to apply the Advisory to entities other than financial institutions.

2. What effects would the issuance of this Advisory have on financial institutions' ability to negotiate the terms of audit engagements?

Comments and Responses: Several commenters stated that the Advisory will harm financial institutions' ability to negotiate the terms of audit engagements and therefore either result in higher audit costs or a lessened ability to negotiate on usual business terms. Other commenters stated that negotiations would be easier because auditors would not be able to force undesirable terms into engagement letters.

The Agencies believe that the Advisory does not unduly affect the negotiating positions of the parties or pose undue burdens on auditors because these clauses did not exist in the majority of the engagement letters reviewed by the Agencies.

3. Would the Advisory on limitation of liability provisions result in an increase in external audit fees?

a. If yes, would the increase be significant?

b. Would it discourage financial institutions that voluntarily obtain audits from continuing to be audited?

c. Would it result in fewer audit firms being willing to provide external audit services to financial institutions?

Comments and Responses: The majority of commenters stated that audit fees would increase; however, the range of increase was judged to be anywhere from "insignificant" to "dramatic." A few commenters stated that fees would remain the same because many auditors have performed audits without limitation of liability provisions for a very long period of time. Most commenters stated that an increase in audit fees would not discourage financial institutions from engaging auditors because Audits represent best business practices and because the benefits of Audits would continue to outweigh the costs.

A few commenters said that the increase in fees would reduce the number of financial institutions that voluntarily obtain audits. More than half of the commenters expressed concern about the number of auditors willing to perform audits of financial institutions because of the inability to include limitation of liability provisions in the engagement letters.

Several commenters noted that the use of such clauses furthers the public interest in reducing dispute resolution costs and ensures the availability of reasonably affordable audit services and the equitable distribution of financial risk. Commenters also noted that audit fees are determined by a variety of factors and engagement risk is a significant component.

In the Agencies' judgment, any concerns about potential increased costs or restrictions on the ability of the parties to an Audit engagement letter to allocate risk do not outweigh the need to protect financial institutions from safety and soundness concerns posed by limitation of liability provisions. Furthermore, any disincentive for financial institutions to obtain Audits when not required should be limited because Audits represent best practices and are strongly encouraged by the Agencies.

The Agencies do not believe that the Advisory would significantly affect the number of audit firms willing to provide external Audit services to financial institutions because limitation of liability provisions were not present in the majority of the engagement letters reviewed by the Agencies.

4. The Advisory describes three general categories of limitation of liability provisions.

a. Is the description complete and accurate?

b. Is there any aspect of the Advisory or terminology that needs clarification?

Comments and Responses: The vast majority of commenters found the three general categories of limitation of liability provisions complete and accurate and did not express a need for

the Advisory or terminology to be clarified. It was apparent from the comments received that the discussion of ADR was unclear; the Agencies have clarified their position in the Advisory.

5. Appendix A of the Advisory contains examples of limitation of liability provisions.

a. Do the examples clearly and sufficiently illustrate the types of provisions that are inappropriate?

b. Are there other inappropriate limitation of liability provisions that should be included in the Advisory? If so, please provide examples.

Comments and Responses: The vast majority of commenters found the examples of limitation of liability provisions to clearly and sufficiently illustrate the types of provisions that are inappropriate. A number of commenters stated that permitting an auditor and a client to agree to a release from or indemnification for claims resulting from knowing misrepresentations by management is fundamentally fair to the client and is a significant deterrent to management fraud. As discussed in section C. *Management's Knowing Misrepresentations*, the Agencies are not persuaded by the commenters' arguments.

6. Is there a valid business purpose for financial institutions to agree to any limitation of liability provision? If so, please describe the limitation of liability provision and its business purpose.

Comments and Responses: Very few commenters directly responded to this question. Those commenters indicated there is not a valid business purpose for financial institutions to agree to any limitation of liability provision in audit engagements.

7. The Advisory strongly recommends that financial institutions take appropriate action to nullify limitation of liability provisions in 2005 audit engagement letters that have already been accepted. Is this recommendation appropriate? If not, please explain your rationale (including burden and cost).

Comments and Responses: The vast majority of commenters stated that accepted audit engagement letters containing limitation of liability provisions should not require nullification for a number of reasons, including the fact that a contract negotiated in good faith should not be subject to renegotiation.

The Agencies agreed with these comments. The Advisory applies to Audit engagement letters executed on or after February 9, 2006. Financial institutions are not required to nullify Audit engagement letters executed prior to February 9, 2006. If a financial institution has executed a multi-year Audit engagement letter prior to February 9, 2006 (*e.g.*, covering years ending in 2007 or later), the Agencies encourage financial institutions to seek to amend the engagement letter to be consistent with the Advisory for any Audit periods ending in 2007 or later.

IV. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Agencies have reviewed the Advisory and determined that it does not contain a collection of information pursuant to the Act.

Text of Interagency Advisory

The text of the *Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters* follows:

Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters

Purpose

This Advisory, issued jointly by the Office of Thrift Supervision (OTS), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Office of the Comptroller of the Currency (OCC) (collectively, the "Agencies"), alerts financial institutions' [1] boards of directors, audit committees, management, and external auditors to the safety and soundness implications of provisions that limit external auditors' liability in audit engagements.

Limits on external auditors' liability may weaken the external auditors' objectivity, impartiality, and performance and, thus, reduce the Agencies' ability to rely on Audits. Therefore, certain limitation of liability provisions (described in this Advisory and Appendix A) are unsafe and unsound. In addition, such provisions may not be consistent with the auditor independence standards of the U.S. Securities and Exchange Commission (SEC), the Public Company Accounting Oversight Board (PCAOB), and the American Institute of Certified Public Accountants (AICPA).

Scope

This Advisory applies to engagement letters between financial institutions and external auditors with respect to financial statement audits, audits of internal control over financial reporting, and attestations on management's assessment of internal control over financial reporting (collectively, "Audit" or "Audits").

This Advisory does not apply to:

- Non-Audit services that may be performed by financial institutions' external auditors;
- Audits of financial institutions' 401K plans, pension plans, and other similar audits;
- Services performed by accountants who are not engaged to perform financial institutions' Audits (*e.g.*, outsourced internal audits, loan reviews); and
- Other service providers (*e.g.*, software consultants, legal advisors).

While the Agencies have observed several types of limitation of liability provisions in external Audit engagement letters, this Advisory applies to any agreement that a financial institution enters into with its external auditor that limits the external auditor's liability with respect to Audits in an unsafe and unsound manner.

Background

A properly conducted audit provides an independent and objective view of the reliability of a financial institution's financial statements. The external auditor's objective in an audit is to form an opinion on the financial statements taken as a whole. When planning and performing the audit, the external auditor considers the financial institution's internal control over financial reporting. Generally, the external auditor communicates any identified deficiencies in internal control to management, which enables management to take appropriate corrective action. In addition, certain financial institutions are required to file audited financial statements and internal control audit/attestation reports with one or more of the Agencies. The Agencies encourage financial institutions not subject to mandatory audit requirements to voluntarily obtain audits of their financial statements. The Federal Financial Institutions Examination Council's (FFIEC) *Interagency Policy Statement on External Auditing Programs of Banks and Savings Associations* [2] notes, "[a]n institution's internal and external audit programs are critical to its safety and soundness." The Policy also states that an effective external auditing program "can improve the safety and soundness

[1] As used in this document, the term *financial institutions* includes banks, bank holding companies, savings associations, savings and loan holding companies, and credit unions.

[2] Published in the **Federal Register** on September 28, 1999 (64 FR 52319). The NCUA, a member of the FFIEC, has not adopted the policy statement.

of an institution substantially and lessen the risk the institution poses to the insurance funds administered by the Federal Deposit Insurance Corporation (FDIC)."

Typically, a written engagement letter is used to establish an understanding between the external auditor and the financial institution regarding the services to be performed in connection with the financial institution's audit. The engagement letter commonly describes the objective of the audit, the reports to be prepared, the responsibilities of management and the external auditor, and other significant arrangements (*e.g.*, fees and billing). The Agencies encourage boards of directors, audit committees, and management to closely review all of the provisions in the audit engagement letter before agreeing to sign. As with all agreements that affect a financial institution's legal rights, legal counsel should carefully review audit engagement letters to help ensure that those charged with engaging the external auditor make a fully informed decision.

While the Agencies have not observed provisions that limit an external auditor's liability in the majority of external audit engagement letters reviewed, they have observed a significant increase in the types and frequency of these provisions. These provisions take many forms, making it impractical to provide an all-inclusive list. This Advisory describes the types of objectionable limitation of liability provisions and provides examples.[3]

Financial institutions' boards of directors, audit committees, and management should also be aware that certain insurance policies (such as error and omission policies and director and officer liability policies) might not cover losses arising from claims that are precluded by limitation of liability provisions.

Limitation of Liability Provisions

The provisions the Agencies deem unsafe and unsound can be generally categorized as an agreement by a financial institution that is a client of an external auditor to:

- Indemnify the external auditor against claims made by third parties;
- Hold harmless or release the external auditor from liability for claims or potential claims that might be asserted by the client financial institution, other than claims for punitive damages; or
- Limit the remedies available to the client financial institution, other than punitive damages.

Collectively, these categories of provisions are referred to in this Advisory as "limitation of liability provisions."

Provisions that waive the right of financial institutions to seek punitive damages from their external auditor are not treated as unsafe and unsound under this Advisory. Nevertheless, agreements by clients to indemnify their auditors against any third party damage awards, including punitive damages, are deemed unsafe and unsound under this Advisory. To enhance transparency and market discipline, public financial institutions that agree to waive claims for punitive damages against their external auditors may want to disclose annually the nature of these arrangements in their proxy statements or other public reports.

Many financial institutions are required to have their financial statements audited while others voluntarily choose to undergo such audits. For example, banks, savings associations, and credit unions with $500 million or more in total assets are required to have annual independent audits.[4] Certain savings associations (for example, those with a CAMELS rating of 3, 4, or 5) and savings and loan holding companies are also required by OTS regulations to have annual independent audits.[5] Furthermore, financial institutions that are public companies[6] must have annual independent audits. The Agencies rely on the results of Audits as part of their assessment of the safety and soundness of a financial institution.

In order for Audits to be effective, the external auditors must be independent in both fact and appearance, and must perform all necessary procedures to comply with auditing and attestation standards established by either the AICPA or, if applicable, the PCAOB. When financial institutions execute agreements that limit the external auditors' liability, the external auditors' objectivity, impartiality, and performance may be weakened or compromised, and the usefulness of the Audits for safety and soundness purposes may be diminished.

By their very nature, limitation of liability provisions can remove or greatly weaken external auditors' objective and unbiased consideration of problems encountered in audit engagements and may diminish auditors' adherence to the standards of objectivity and impartiality required in the performance of Audits. The existence of such provisions in external audit engagement letters may lead to the use of less extensive or less thorough procedures than would otherwise be followed, thereby reducing the reliability of Audits. Accordingly, financial institutions should not enter into external audit arrangements that include unsafe and unsound limitation of liability provisions identified in this Advisory, regardless of (1) The size of the financial institution, (2) whether the financial institution is public or not, or (3) whether the external audit is required or voluntary.

Auditor Independence

Currently, auditor independence standard-setters include the SEC, PCAOB, and AICPA. Depending upon the audit client, an external auditor is subject to the independence standards issued by one or more of these standard-setters. For all credit unions under the NCUA's regulations, and for other non-public financial institutions that are not required to have annual independent audits pursuant to either Part 363 of the FDIC's regulations or § 562.4 of the OTS's regulations, the Agencies' rules require only that an external auditor meet the AICPA independence standards; they do not require the financial institution's external auditor to comply with the independence standards of the SEC and the PCAOB.

In contrast, for financial institutions subject to the audit requirements either in Part 363 of the FDIC's regulations or in § 562.4 of the OTS's regulations, the external auditor should be in compliance with the AICPA's Code of Professional Conduct and meet the independence requirements and interpretations of the SEC and its staff.[7] In this regard, in a December 13, 2004, Frequently Asked Question (FAQ) on the application of the SEC's auditor independence rules, the SEC staff reiterated its long-standing position that when an accountant and his or her client enter into an agreement which seeks to provide the accountant immunity from liability for his or her

[3] Examples of auditor limitation of liability provisions are illustrated in Appendix A.

[4] For banks and savings associations, see Section 36 of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831m) and Part 363 of the FDIC's regulations (12 CFR Part 363). For credit unions, see Section 202(a)(6) of the Federal Credit Union Act (12 U.S.C. 1782(a)(6)) and Part 715 of the NCUA's regulations (12 CFR Part 715).

[5] See OTS regulation at 12 CFR 562.4.

[6] Public companies are companies subject to the reporting requirements of the Securities Exchange Act of 1934.

[7] See FDIC Regulation 12 CFR Part 363, *Appendix A—Guidelines and Interpretations*; Guideline 14, *Role of the Independent Public Accountant—Independence*; and OTS Regulation 12 CFR 562.4(d)(3)(i), *Qualifications for independent public accountants*.

own negligent acts, the accountant is not independent. The FAQ also states that including in engagement letters a clause that would release, indemnify, or hold the auditor harmless from any liability and costs resulting from knowing misrepresentations by management would impair the auditor's independence.[8] The SEC's FAQ is consistent with Section 602.02.f.i. (Indemnification by Client) of the SEC's Codification of Financial Reporting Policies. (Section 602.02.f.i. and the FAQ are included in Appendix B.)

Based on this SEC guidance and the Agencies' existing regulations, certain limits on auditors' liability are already inappropriate in audit engagement letters entered into by:

- Public financial institutions that file reports with the SEC or with the Agencies;
- Financial institutions subject to Part 363; and
- Certain other financial institutions that OTS regulations (12 CFR 562.4) require to have annual independent audits.

In addition, certain of these limits on auditors' liability may violate the AICPA independence standards. Notwithstanding the potential applicability of auditor independence standards, the limitation of liability provisions discussed in this Advisory present safety and soundness concerns for all financial institution Audits.

Alternative Dispute Resolution Agreements and Jury Trial Waivers

The Agencies have observed that some financial institutions have agreed in engagement letters to submit disputes over external audit services to mandatory and binding alternative dispute resolution, binding arbitration, other binding non-judicial dispute resolution processes (collectively, "mandatory ADR") or to waive the right to a jury trial. By agreeing in advance to submit disputes to mandatory ADR, financial institutions may waive the right to full discovery, limit appellate review, or limit or waive other rights and protections available in ordinary litigation proceedings.

[8] In contrast to the SEC's position, AICPA Ethics Ruling 94 (ET § 191.188–189) currently concludes that indemnification for "knowing misrepresentations by management" does not impair independence. On September 15, 2005, the AICPA published for comment its proposed interpretation of its auditor independence standards. In that proposal the AICPA specifically identified limitation of liability provisions that impair auditor independence under the AICPA's standards. Most of the provisions cited in this Advisory were deemed to impair independence in the AICPA's proposed interpretation. At this writing, the AICPA has not issued a final interpretation.

The Agencies recognize that mandatory ADR procedures and jury trial waivers may be efficient and cost-effective tools for resolving disputes in some cases. Accordingly, the Agencies believe that mandatory ADR or waiver of jury trial provisions in external Audit engagement letters do not present safety and soundness concerns, provided that the engagement letters do not also incorporate limitation of liability provisions. The Agencies encourage institutions to carefully review mandatory ADR and jury trial provisions in engagement letters, as well as any agreements regarding rules of procedure, and to fully comprehend the ramifications of any agreement to waive any available remedies. Financial institutions should ensure that any mandatory ADR provisions in Audit engagement letters are commercially reasonable and:

- Apply equally to all parties;
- Provide a fair process (*e.g.*, neutral decision-makers and appropriate hearing procedures); and
- Are not imposed in a coercive manner.

Conclusion

Financial institutions' boards of directors, audit committees, and management should not enter into any agreement that incorporates limitation of liability provisions with respect to Audits. In addition, financial institutions should document their business rationale for agreeing to any other provisions that limit their legal rights.

This Advisory applies to engagement letters executed on or after February 9, 2006. The inclusion of limitation of liability provisions in external Audit engagement letters and other agreements that are inconsistent with this Advisory will generally be considered an unsafe and unsound practice. The Agencies' examiners will consider the policies, processes, and personnel surrounding a financial institution's external auditing program in determining whether (1) the engagement letter covering external auditing activities raises any safety and soundness concerns, and (2) the external auditor maintains appropriate independence regarding relationships with the financial institution under relevant professional standards. The Agencies may take appropriate supervisory action if unsafe and unsound limitation of liability provisions are included in external Audit engagement letters or other agreements related to Audits that are executed (accepted or agreed to by the financial institution) on or after February 9, 2006.

Appendix A

Examples of Unsafe and Unsound Limitation of Liability Provisions

Presented below are some of the types of limitation of liability provisions (with an illustrative example of each type) that the Agencies observed in financial institutions' external audit engagement letters. The inclusion in external Audit engagement letters or agreements related to Audits of any of the illustrative provisions (which do not represent an all-inclusive list) or any other language that would produce similar effects is considered an unsafe and unsound practice.

1. "Release From Liability for Auditor Negligence" Provision

In this type of provision, the financial institution agrees not to hold the audit firm liable for any damages, except to the extent determined to have resulted from willful misconduct or fraudulent behavior by the audit firm.

Example: In no event shall [the audit firm] be liable to the Financial Institution, whether a claim be in tort, contract or otherwise, for any consequential, indirect, lost profit, or similar damages relating to [the audit firm's] services provided under this engagement letter, except to the extent finally determined to have resulted from the willful misconduct or fraudulent behavior of [the audit firm] relating to such services.

2. "No Damages" Provision

In this type of provision, the financial institution agrees that in no event will the external audit firm's liability include responsibility for any compensatory (incidental or consequential) damages claimed by the financial institution.

Example: In no event will [the audit firm's] liability under the terms of this Agreement include responsibility for any claimed incidental or consequential damages.

3. "Limitation of Period To File Claim" Provision

In this type of provision, the financial institution agrees that no claim will be asserted after a fixed period of time that is shorter than the applicable statute of limitations, effectively agreeing to limit the financial institution's rights in filing a claim.

Example: It is agreed by the Financial Institution and [the audit firm] or any successors in interest that no claim arising out of services rendered pursuant to this agreement by, or on behalf of, the Financial Institution shall be asserted more than two years after the date of the last audit report issued by [the audit firm].

4. "Losses Occurring During Periods Audited" Provision

In this type of provision, the financial institution agrees that the external audit firm's liability will be limited to any losses occurring during periods covered by the external audit, and will not include any losses occurring in later periods for which the external audit firm is not engaged. This provision may not only preclude the collection of consequential damages for harm in later years, but could preclude any recovery at all. It appears that no claim of

liability could be brought against the external audit firm until the external audit report is actually delivered. Under such a clause, any claim for liability thereafter might be precluded because the losses did not occur during the period covered by the external audit. In other words, it might limit the external audit firm's liability to a period before there could be any liability. Read more broadly, the external audit firm might be liable for losses that arise in subsequent years only if the firm continues to be engaged to audit the client's financial statements in those years.

Example: In the event the Financial Institution is dissatisfied with [the audit firm's] services, it is understood that [the audit firm's] liability, if any, arising from this engagement will be limited to any losses occurring during the periods covered by [the audit firm's] audit, and shall not include any losses occurring in later periods for which [the audit firm] is not engaged as auditors.

5. "No Assignment or Transfer" Provision

In this type of provision, the financial institution agrees that it will not assign or transfer any claim against the external audit firm to another party. This provision could limit the ability of another party to pursue a claim against the external auditor in a sale or merger of the financial institution, in a sale of certain assets or a line of business of the financial institution, or in a supervisory merger or receivership of the financial institution. This provision may also prevent the financial institution from subrogating a claim against its external auditor to the financial institution's insurer under its directors' and officers' liability or other insurance coverage.

Example: The Financial Institution agrees that it will not, directly or indirectly, agree to assign or transfer any claim against [the audit firm] arising out of this engagement to anyone.

6. "Knowing Misrepresentations by Management" Provision

In this type of provision, the financial institution releases and indemnifies the external audit firm from any claims, liabilities, and costs attributable to any knowing misrepresentation by management.

Example: Because of the importance of oral and written management representations to an effective audit, the Financial Institution releases and indemnifies [the audit firm] and its personnel from any and all claims, liabilities, costs, and expenses attributable to any knowing misrepresentation by management.

7. "Indemnification for Management Negligence" Provision

In this type of provision, the financial institution agrees to protect the external auditor from third party claims arising from the external audit firm's failure to discover negligent conduct by management. It would also reinforce the defense of contributory negligence in cases in which the financial institution brings an action against its external auditor. In either case, the contractual defense would insulate the external audit firm from claims for damages even if the reason the external auditor failed to discover the negligent conduct was a failure to conduct the external audit in accordance with generally accepted auditing standards or other applicable professional standards.

Example: The Financial Institution shall indemnify, hold harmless and defend [the audit firm] and its authorized agents, partners and employees from and against any and all claims, damages, demands, actions, costs and charges arising out of, or by reason of, the Financial Institution's negligent acts or failure to act hereunder.

8. "Damages Not to Exceed Fees Paid" Provision

In this type of provision, the financial institution agrees to limit the external auditor's liability to the amount of audit fees the financial institution paid the external auditor, regardless of the extent of damages. This may result in a substantial unrecoverable loss or cost to the financial institution.

Example: [The audit firm] shall not be liable for any claim for damages arising out of or in connection with any services provided herein to the Financial Institution in an amount greater than the amount of fees actually paid to [the audit firm] with respect to the services directly relating to and forming the basis of such claim.

Note: The Agencies also observed a similar provision that limited damages to a predetermined amount not related to fees paid.

Appendix B

SEC's Codification of Financial Reporting Policies, Section 602.02.f.i and the SEC's December 13, 2004, FAQ on Auditor Independence

Section 602.02.f.i—Indemnification by Client, 3 Fed. Sec. L. (CCH) ¶ 38,335, at 38,603–17 (2003)

Inquiry was made as to whether an accountant who certifies financial statements included in a registration statement or annual report filed with the Commission under the Securities Act or the Exchange Act would be considered independent if he had entered into an indemnity agreement with the registrant. In the particular illustration cited, the board of directors of the registrant formally approved the filing of a registration statement with the Commission and agreed to indemnify and save harmless each and every accountant who certified any part of such statement, "from any and all losses, claims, damages or liabilities arising out of such act or acts to which they or any of them may become subject under the Securities Act, as amended, or at 'common law,' other than for their willful misstatements or omissions."

When an accountant and his client, directly or through an affiliate, have entered into an agreement of indemnity which seeks to assure to the accountant immunity from liability for his own negligent acts, whether of omission or commission, one of the major stimuli to objective and unbiased consideration of the problems encountered in a particular engagement is removed or greatly weakened. Such condition must frequently induce a departure from the standards of objectivity and impartiality which the concept of independence implies. In such difficult matters, for example, as the determination of the scope of audit necessary, existence of such an agreement may easily lead to the use of less extensive or thorough procedures than would otherwise be followed. In other cases it may result in a failure to appraise with professional acumen the information disclosed by the examination. *Consequently, the accountant cannot be recognized as independent for the purpose of certifying the financial statements of the corporation.* (Emphasis added.)

U.S. Securities and Exchange Commission; Office of the Chief Accountant: Application of the Commission's Rules on Auditor Independence Frequently Asked Questions; Other Matters—Question 4 (issued December 13, 2004)

Q: Has there been any change in the Commission's long standing view (Financial Reporting Policies—Section 600—602.02.f.i. "Indemnification by Client") that when an accountant enters into an indemnity agreement with the registrant, his or her independence would come into question?

A: No. When an accountant and his or her client, directly or through an affiliate, enter into an agreement of indemnity that seeks to provide the accountant immunity from liability for his or her own negligent acts, whether of omission or commission, the *accountant is not independent.* Further, including in engagement letters a clause that a registrant would release, indemnify or hold harmless from any liability and costs resulting from *knowing misrepresentations by management would also impair the firm's independence.* (Emphasis added.)

Dated: February 1, 2006.

By the Office of Thrift Supervision,

John M. Reich,

Director.

By order of the Board of Governors of the Federal Reserve System, February 1, 2006.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, DC, the 2nd day of February, 2006.

By order of the Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

By the National Credit Union Administration Board on January 31, 2006.

Mary F. Rupp,

Secretary of the Board.

Dated: February 1, 2006.

John C. Dugan,

Comptroller of the Currency.

[FR Doc. 06–1189 Filed 2–8–06; 8:45 am]

BILLING CODES 6720–01–P; 6210–01–P; 6714–01–P; 7535–01–P; 4810–33–P

DEPARTMENT OF THE TREASURY

United States Mint

Notification of American Eagle Silver and Gold Proof Coin Price Increases

SUMMARY: The United States Mint is increasing the prices for purchases of American Eagle silver and gold proof coins because of recent increases of the cost of silver and gold.

Pursuant to the authority that 31 U.S.C. 5112(f)&(i) grants to the Secretary of the Treasury to mint and issue silver and gold coins, and the authority that 31 U.S.C. 5111(a)(3) grants to the Secretary of the Treasury to prepare and distribute numismatic items, the United States Mint mints and issues 1-ounce silver proof coins known as "American Eagle Silver Proof Coins," and 1-ounce, ½-ounce, ¼-ounce, and 1/10-ounce gold proof coins known as "American Eagle Gold Proof Coins." The United States Mint is changing the price of these coins to reflect the increased costs of their precious metal content. Accordingly, effective February 2, 2006, the United States Mint will commence selling these coins according to the following price schedule: Silver 1-ounce ($27.95); gold four-coin set ($1,350); gold 1-ounce ($770); gold ½-ounce ($385); gold ¼-ounce ($200); gold 1/10-ounce ($100).

FOR FURTHER INFORMATION CONTACT: Gloria Eskridge, Associate Director for Sales and Marketing; United States Mint; 801 Ninth Street, NW.; Washington, DC 20220; or call 202–354–7500.

Authority: 31 U.S.C. 5111 and 5112.

Dated: February 2, 2006.

David A. Lebryk,

Acting Director, United States Mint.

[FR Doc. E6–1760 Filed 2–8–06; 8:45 am]

BILLING CODE 4810–37–P

Federal Register

Thursday,
February 9, 2006

Part II

Department of Energy

10 CFR Parts 850 and 851
Chronic Beryllium Disease Prevention Program; Worker Safety and Health Program; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 850 and 851

[Docket No. EH–RM–04–WSHP]

RIN 1901–AA99

Chronic Beryllium Disease Prevention Program; Worker Safety and Health Program

AGENCY: Department of Energy

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is today publishing a final rule to implement the statutory mandate of section 3173 of the Bob Stump National Defense Authorization Act (NDAA) for Fiscal Year 2003 to establish worker safety and health regulations to govern contractor activities at DOE sites. This program codifies and enhances the worker protection program in operation when the NDAA was enacted.

EFFECTIVE DATE: This rule is effective February 9, 2007. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of February 9, 2007.

FOR FURTHER INFORMATION CONTACT: Jacqueline D. Rogers, U.S. Department of Energy, Office of Environment, Safety and Health, EH–52, 1000 Independence Avenue, SW., Washington, DC 20585, 202–586–4714.

SUPPLEMENTARY INFORMATION:

Introduction

This final rule implements a worker safety and health program for the Department of Energy (DOE or the Department). This program establishes the framework for a worker protection program that will reduce or prevent occupational injuries, illnesses, and accidental losses by requiring DOE contractors to provide their employees' with safe and healthful workplaces. Also, the program establishes procedures for investigating whether a requirement has been violated, for determining the nature and extent of such violation, and for imposing an appropriate remedy.

In December 2002, Congress directed DOE to promulgate regulations on worker safety and health regulations to cover contractors with Price-Anderson indemnification agreements in their contracts. Specifically, section 3173 of the National Defense Authorization Act (NDAA) amended the Atomic Energy Act (AEA) to add section 234C (codified as 42 U.S.C. 2282c), which requires DOE to promulgate worker safety and health regulations that maintain "the level of protection currently provided to * * * workers." See Public Law 107–314 (December 2, 2002). These regulations are to include flexibility to tailor implementation to reflect activities and hazards associated with a particular work environment; to take into account special circumstances for facilities permanently closed or demolished, or which title is expected to be transferred; and to achieve national security missions in an efficient and timely manner (42 U.S.C. 2282c(3)). Section 234C also makes a DOE contractor with such an indemnification agreement that violates these regulations subject to civil penalties similar to the authority Congress granted to DOE in 1988 with respect to civil penalties for violations of nuclear safety regulations. Section 234C also directs DOE to insert in such contracts a clause providing for reducing contractor fees and other payments if the contractor or a contractor employee violates any regulation promulgated under section 234C, while specifying that both sanctions may not be used for the same violation.

On December 8, 2003, DOE published a notice of proposed rulemaking (NOPR) to implement section 3173 of the NDAA (68 FR 68276). The December proposal was intended to codify existing DOE practices in order to ensure the worker safety and health regulations would give DOE workers a level of protection equivalent to that afforded them when section 3173 was enacted. Specifically, under the December proposal, a contractor would comply with either a set of requirements based primarily on the provisions of DOE Order 440.1A *"Worker Protection Management for DOE Federal and Contractor Employees,"* March 27, 1998 (the current DOE order on worker safety and health) or a tailored set of requirements approved by DOE. The contractor would implement these requirements pursuant to a worker safety and health program approved by DOE.

On January 8, 2004, DOE held a televideo conference to allow DOE employees, DOE contractors, contractor employees, and employee representatives to become familiar with the proposal. DOE held public hearings on the proposal in Washington, DC, on January 21, 2004, and in Golden, Colorado, via televideo on February 4, 2004. In addition to the oral comments at the public hearings, DOE received approximately 50 written comments on the December proposal.

After becoming aware that the Defense Nuclear Facilities Safety Board (DNFSB), which has safety oversight responsibility with regard to DOE nuclear facilities, had concerns about the proposed rule, DOE suspended the rulemaking by publishing a notice in the **Federal Register** on February 27, 2004 (69 FR 9277). DOE stated in that notice that DOE would consult with the DNFSB in order to resolve its concerns, and also that it would consider views received from other stakeholders on its proposal.

As a result of its consultation with the DNFSB and consideration of other comments, DOE published a supplemental notice of proposed rulemaking (SNOPR) in the **Federal Register** (70 FR 3812) on January 26, 2005. The SNOPR proposed to (1) codify a minimum set of safety and health requirements with which contractors would have to comply; (2) establish a formal exemption process which would require approval by the Secretarial Officer with line management responsibility and which would provide significant involvement of the Assistant Secretary for Environment, Safety and Health; (3) delineate the role of the worker health and safety program and its relationship to integrated safety management; (4) set forth the general duties of contractors responsible for DOE workplaces; and (5) limit the scope of the regulations to contractor activities and DOE sites.

On March 23, 2005, DOE held a televideo forum to provide DOE contractors, contractor employees, and their representatives with the opportunity to ask questions and receive clarification on the provisions of the supplemental proposed rule. The public comment period for the supplemental proposal ended on April 26, 2005. During this period, DOE received 62 comment letters from private individuals, DOE contractors, other Federal agencies, and trade associations in response to the supplemental proposal. In addition, public hearings were held on March 29 and 30, 2005, in Washington, DC. Responding to a request from the Paper, Allied-Industrial, Chemical and Energy Workers International Union, DOE also held a public hearing on April 21, 2005, in Richland, Washington, via televideo.

DOE has carefully considered the comments and data from interested parties, and other information relevant to the subject of the rulemaking.

II. Legal Authority and Relationship to Other Regulatory Programs

A. Legal Authority

DOE has broad authority to regulate worker safety and health with respect to its nuclear and nonnuclear functions pursuant to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*; the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801–5911; and the Department of Energy Organization Act (DOEOA), 42 U.S.C. 7101–7352. Specifically, the AEA authorized and directed the Atomic Energy Commission (AEC) to protect health and promote safety during the performance of activities under the AEA. See Sec. 31a.(5) of AEA, 42 U.S.C. 2051(a)(5); Sec. 161b. of AEA, 42 U.S.C 2201(b); Sec. 161i.(3) of AEA, 42 U.S.C. 2201(i)(3); and Sec. 161p. of AEA, 42 U.S.C. 2201(p). The ERA abolished the AEC and replaced it with the Nuclear Regulatory Commission (NRC), which became responsible for the licensing of commercial nuclear activities, and the Energy Research and Development Administration (ERDA), which became responsible for the other functions of the AEC under the AEA, as well as several nonnuclear functions. The ERA authorized ERDA to use the regulatory authority under the AEA to carry out its nuclear and nonnuclear function, including those functions that might become vested in ERDA in the future. See Sec. 105(a) of ERA, 42 U.S.C. 5815(a); and Sec. 107 of ERA, 42 U.S.C. 5817. The DOEOA transferred the functions and authorities of ERDA to DOE. See Sec. 301(a) of DOEOA, 42 U.S.C. 7151(a); Sec. 641 of DOEOA, 42 U.S.C. 7251; and Sec. 644 of DOEOA, 42 U.S.C. 7254.

B. Relationship to Other Regulatory Programs

DOE (like its predecessors, AEC and ERDA) has implemented this authority in a comprehensive manner by incorporating appropriate provisions on worker safety and health into the contracts under which work is performed at DOE workplaces. During the past decade, DOE has taken steps to ensure that contractual provisions on worker safety and health are tailored to reflect particular workplace environments. In particular, the "Integration of Environment, Health and Safety into Work Planning and Execution" clause set forth in the DOE procurement regulations requires DOE contractors to establish an integrated safety management system (ISMS). See 48 Code of Federal Regulations (CFR) 952.223–71 and 970.5223–1. As part of this process, a contractor must define the work to be performed, analyze the potential hazards associated with the work, and identify a set of standards and controls that are sufficient to ensure safety and health if implemented properly. The identified standards and controls are incorporated as contractual requirements through the "Laws, Regulations and DOE Directives" clause set forth in the DOE procurement regulations. See 48 CFR 970.0470–2 and 970.5204–2.

Currently DOE Order 440.1A, "Worker Protection Management for DOE Federal and Contractor Employees," establishes requirements for a worker safety and health program. A DOE contractor with DOE Order 440.1A in its contract must have a worker protection program as stipulated by the Contractor Requirements Document (CRD) that accompanies the order. DOE applies these requirements through the incorporation of the CRD into relevant DOE contracts. In accordance with the CRD, contractors must implement a written worker protection program that integrates the performance-based requirements outlined in the CRD. A series of implementation guides and technical standards are available to assist DOE contractors in developing and implementing a worker protection program that will meet the intent of the performance-based requirements.

Also, DOE contractors are required to implement a worker safety and health program that is consistent with the "Integration of Environment, Health and Safety into Work Planning and Execution" clause set forth in the DOE procurement regulations. See 48 CFR 952.223–71, 970.5223–1.

Overview of DOE Order 440.1A. DOE Order 440.1A establishes a comprehensive worker protection program that provides the basic framework necessary for contractors to ensure the safety and health of their workforce. In short, the Order provides a well-integrated, cost-effective, performance-based program designed to ensure contractors recognize hazards, prevent accidents before they happen, and protect the lives and well-being of their employees.

Such "corporate" programs have long been recognized by private industry as the most effective and efficient means to protect worker health and safety on the job. Where applied, these programs have consistently resulted in enhanced worker protection, decreased worker's compensation premiums, increased productivity and employee morale, declines in absenteeism and employee turnover, and decreased employer liability. The Occupational Safety and Health Administration (OSHA) recognized the effectiveness of such programs in its Safety and Health Program Management Guidelines (published in 1989), which were derived from the safety and health programs of private industry firms with the best safety and health performance records. DOE Order 440.1A program requirements are organized and consistent with the four basic program elements of OSHA's Guidelines on Workplace Safety and Health Management (*i.e.*, (1) management commitment and employee involvement, (2) worksite analysis, (3) hazard prevention and control, and (4) training).

DOE Order 440.1A specifically requires contractors to implement a written worker protection program that describes site-specific methods for complying with the requirements of the order; establish written policies, goals, and objectives to provide a focus for, and foster continual improvement of, their worker protection programs; and identify existing and potential workplace hazards, evaluate associated risks, and implement appropriate risk-based controls. In addition, the order establishes (1) worker rights and responsibilities that are consistent with those afforded to private industry employees through Federal regulations and (2) baseline safety and health requirements in specific technical disciplines.

The order encompasses all worker protection disciplines, including occupational safety, industrial hygiene, fire protection (worker protection

aspects only), construction safety, explosives safety, contractor occupational medical care, pressure safety, firearms safety, and motor vehicle safety. Where necessary, the order cross-references related elements of other orders—such as training, accident investigation, and safety and health reporting orders—without duplicating their respective requirements.

Overview of Integrated Safety Management (ISM). A major concept of ISM is the integration of safety awareness and good practices into all aspects of work conducted at DOE. Simply stated, work should be conducted in such a manner that protects workers and other people, and does not cause harm to the environment. Safety is an integral part of each job, not a stand-alone program.

ISM has seven guiding principles and five core functions. The seven guiding principles of ISM are:

(1) Line management responsibility. Line management is directly responsible for the protection of the public, the workers, and the environment. As a complement to line management, the Office of Environment, Safety and Health (EH) provides safety policy, enforcement, and independent oversight functions.

(2) Clear roles and responsibilities. Clear and unambiguous lines of authority and responsibility for ensuring safety must be established and maintained at all organized levels within the Department and its contractors.

(3) Competence commensurate with the responsibility. Personnel must possess the experience, knowledge, skills, and abilities that are necessary to discharge their responsibilities.

(4) Balanced priorities. Resources must be effectively allocated to address safety, programmatic, and operational considerations. Protecting the public, the workers, and the environment must be a priority whenever activities are planned and performed.

(5) Identification of safety standards and requirements. Before work is performed, the associated hazards must be evaluated and an agreed-upon set of safety standards and requirements must be established which, if properly implemented, will provide adequate assurance that the public, the workers, and the environment are protected from adverse consequences.

(6) Hazard control tailored to work being performed. Administrative and engineering controls to prevent and mitigate hazards must be tailored to the work being performed and the associated hazards.

(7) Operations authorization. The conditions and requirements to be satisfied for operations to be initiated and conducted must be clearly established and agreed-upon.

The five core functions of ISM are: (1) Define the scope of work; (2) identify and analyze hazards associated with the work; (3) develop and implement hazard controls; (4) perform work within controls; and (5) provide feedback on adequacy of controls and continue to improve safety management.

Consistency with DOE Order 440.1A and Integrated System Management. This final rule builds on existing contract practices and processes to achieve safe and healthful workplaces. The rule is intended to be complementary to DOE Order 440.1A and ISM. Accordingly, DOE expects contractors to comply with the requirements of this rule in a manner that takes advantage of work already done as part of DOE Order 440.1A and ISM and to minimize duplicative or otherwise unnecessary work.

As a general matter, DOE expects that, if contractors at a DOE site have fulfilled their contractual responsibilities for DOE Order 440.1A and ISM properly, little, if any, additional work will be necessary to implement the written worker safety and health program required by this regulation. Contractors should undertake new analyses and develop new documents only to the extent existing analyses and documents are not sufficient for purposes of this regulation. In determining the allowability of costs incurred by contractors to develop approved worker safety and health programs, the Department will consider whether the amount and nature of a contractor's expenditures are necessary and reasonable in light of the fact that the contractor has an approved ISM system in place.

III. Overview of the Final Rule

This final rule codifies the Department's worker protection program requirements established in DOE Order 440.1A, "Worker Protection Management for DOE Federal and Contractor Employees." Consistent with the intent of Congress, DOE Order 440.1A forms the basis for the rule's substantive requirements. The Conference Committee for the NDAA recognized that contractors currently operate under this order, "which provides an adequate level of safety." (Conference Report 107–772, November 12, 2002, at 797.)

The Department has structured the final rule this way for three main reasons: (1) To take advantage of existing and effective comprehensive worker protection programs that have been implemented by contractors at DOE sites; (2) to minimize the burden on DOE contractors by clarifying that contractors need not establish redundant worker protection programs to comply with the proposed rule; and (3) to build on a successful program, given that DOE Order 440.1A has been successfully and effectively implemented by DOE contractors for close to a decade. DOE believes that basing this rule on DOE Order 440.1A is consistent with section 234C of the NDAA which directs the Department to promulgate regulations which provide a level of protection that is "substantially equivalent to the level of protection currently provided to" these workers (41 U.S.C. 2282c(a)(1)). Consistent with DOE Order 440.1A, this final rule establishes requirements for an effective worker safety and health program that will reduce or prevent injuries, illnesses, and accidental losses by providing DOE contractors and their workers with a safe and healthful workplace.

In basing the final rule on DOE Order 440.1A, DOE intends to take advantage of the existing series of implementation guides developed to assist DOE contractors in implementing the provisions of DOE Order 440.1A. Shortly after publication of this rule, DOE expects to publish updated implementation guides revised to specifically address the provisions of the final rule. Consistent with their use under DOE Order 440.1A, these updated guides will provide supplemental information and describe acceptable methods for implementing the performance-based requirements of the rule. DOE contractors are free to use the guidance provided in these non-mandatory documents or to develop and implement their own unique methods for compliance, provided that these methods afford workers a level of protection equal to or greater than that which would satisfy the rule's requirements. DOE believes that the availability of these updated guides will also further assist in ensuring a seamless transition from coverage under DOE Order 440.1A to regulation under 10 CFR part 851.

To ensure appropriate enforcement of the worker safety and health program the rule also establishes requirements and procedures for investigating the nature and extent of a violation, determining whether a violation has occurred, and imposing an appropriate remedy.

The Department has made changes in this final rule after considering the

concerns of the commenters with the supplemental notice of proposed rulemaking published in the **Federal Register** on January 26, 2005 (70 FR 3812). The principal changes are as follows:

(1) The final rule codifies key worker safety and health standards from DOE Order 440.1A with which contractors must comply.

(2) The final rule establishes a formal variance process that requires approval by the Under Secretary with line management responsibility for the contractor that is requesting the variance, after considering the recommendations of the Assistant Secretary for Environment Safety and Health. The rule adds detailed procedures in (Subpart D) whereby a contractor can obtain a variance from a specific worker safety and health standard or a portion of the standard. These procedures will ensure that variances are only granted where warranted and where an equivalent level of protection is provided through other means.

(3) The final rule establishes updates to functional areas. These updates are intended to ensure the function areas more closely reflect the requirements of DOE Order 440.1A.

(4) The final rule recognizes the value of a central technical authority and the importance of senior DOE management involvement. The Assistant Secretary for Environment, Safety and Health has played a central role in the development of the final rule and will continue to play a central role in its implementation and enforcement. In addition to providing technical guidance and assistance, the Assistant Secretary is responsible for recommending to the Under Secretary whether to grant or deny a variance. The Office of Price-Anderson Enforcement, which reports to the Assistant Secretary, is responsible for investigating potential violations and deciding whether to take certain enforcement actions against the contractor, including the imposition of civil penalties for all facilities. The final rule makes the Under Secretary with line management responsibility for a contractor responsible for deciding whether to grant a variance to the contractor.

The provisions of the rule are presented in five main subparts. Subpart A describes the scope, purpose, and applicability of the rule, defines terms that are critical to the rule's application and implementation, and establishes contractor responsibilities for executing the rule. Subpart B establishes program requirements to develop and maintain a worker safety and health program and to perform safety and health activities in accordance with the approved program. Subpart C establishes provisions that focus on management responsibilities and worker rights, protecting the worker from the effects of safety and health hazards by requiring hazard identification and assessment, hazard prevention and abatement, specific regulatory requirements, functional areas provisions, recordkeeping and program evaluations. Subpart D establishes the criteria and procedures for requesting a variance. Subpart E establishes the enforcement process.

To ensure that the Department captured the entire list of contractor requirements specified in DOE Order 440.1A, the Department developed a "crosswalk" of the requirements in the current DOE order and the final provisions of 10 CFR part 851. See Table 1.

TABLE 1.—CROSSWALK OF DOE ORDER 4401.1A REQUIREMENTS AND 10 CFR 851 FINAL RULE REQUIREMENTS

DOE order 440.1A requirements	Corresponding 10 CFR 851 provisions
1. Objective	.1 Purpose
3.b. Applicability	.1 Scope
3.c. Exclusions	.2 Exclusions
Attachment 2—Contractor Requirements Document	
The contractor shall comply with the requirements below; however, the requirements for the specific functional areas that are addressed in paragraphs 14 through 22 apply only if the contractor is involved in these activities.	.24 Functional areas.
1. Implement a written worker protection program that:	.11(a), .12 Preparation and submission of worker safety and health program Implementation.
1.a. Provide a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees; and.	.10(a)(1) General requirements.
1.b. Integrates all requirements contained in this attachment and other related site-specific worker protection activities.	.11(a)(3) (ii) Preparation and submission of worker safety and health program.
2. Establish written policy, goals, and objectives for the worker protection program.	.20(a)(1) Management responsibilities.
3. Use qualified worker protection staff to direct and manage the worker protection program.	.20(a)(2) Management responsibilities.
4. Assign worker protection responsibilities, evaluate personnel performance, and hold personnel accountable for worker protection performance.	.20(a)(3) Management responsibilities.
5. Encourage employee involvement in the development of program goals, objective, and performance measures and in the identification and control of hazards in the workplace.	.20(a)(4) Management responsibilities.
6. Provide workers the right, without reprisal, to:	.20(a)(6) Management responsibilities.
6.a. Accompany DOE worker protection personnel during workplace inspections;.	.20(b)(5) Worker rights.
6.b. Participate in activities provided for herein on official time;	.20(b)(1) Worker rights.
6.c. Express concerns related to worker protection;	.20(b)(7) Worker rights.

TABLE 1.—CROSSWALK OF DOE ORDER 4401.1A REQUIREMENTS AND 10 CFR 851 FINAL RULE REQUIREMENTS—Continued

DOE order 440.1A requirements	Corresponding 10 CFR 851 provisions
6.d. Decline to perform an assigned task because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious bodily harm to that individual, coupled with a reasonable belief that there is insufficient time to seek effective redress through the normal hazard reporting and abatement procedures established in accordance with the requirements herein;.	.20(b)(8) Worker rights.
6e. Have access to DOE worker protection publications, DOE-prescribed standards, and the organization's own protection standards or procedures applicable to the workplace;.	.20(b)(2) (i)–(ii) Worker rights.
6.f. Observe monitoring or measuring of hazardous agents and have access to the results of exposure monitoring;.	.20(b)(4) Worker rights.
6.g. Be notified when monitoring results indicate they were overexposed to hazardous materials; and.	.20(b)(3) Worker rights
6.h. Receive results of inspections and accident investigations upon request.	.20(b)(6) Worker rights
7. Implement procedures to allow workers, through their supervisors, to stop work when they discover employee exposures to imminent danger conditions or other serious hazards. The procedure shall ensure that any stop work authority is exercised in a justifiable and responsible manner.	.20(a)(9) Management responsibilities.
8. Inform workers of their rights and responsibilities by appropriate means, including posting the appropriate DOE Worker Protection Poster in the workplace where it is accessible to all workers.	.20(a)(10) Management responsibilities.
9. Identify existing and potential workplace hazards and evaluate the risk of associated worker injury and illness.	.21(a) Hazard identification and assessment.
9.a. Analyze or review: (1) Designs for new facilities and modifications to existing facilities and equipment; (2) Operations and procedures; and (3) Equipment, product and service needs.	.21(a)(4)–(5) Hazard identification and assessment.
9.b. Assess worker exposure to chemical, physical, biological, or ergonomic hazards through appropriate workplace monitoring (including personal, area, wipe, and bulk sampling); biological monitoring; and observation. Monitoring results shall be recorded [Documentation shall describe the tasks and locations where monitoring occurred, identify workers monitored or represented by the monitoring, and identify the sampling methods and durations, control measures in place during monitoring (including the use of personal protective equipment), and any other factors that may have affected sampling results.].	.21(a)(1)–(3) Hazard identification and assessment [Moved to guidance document.]
9.c. Evaluate workplaces and activities (accomplished routinely by workers, supervisors, and managers and periodically by qualified worker protection professionals).	.21(a)(5) Hazard identification and assessment.
9.d. Report and investigate accidents, injuries and illnesses and analyze related data for trends and lessons learned (reference DOE Order 210.1).	.26(d) Recordkeeping and reporting.
10. Implement a hazard control prevention/abatement process to ensure that all identified hazards are managed through final abatement or control.	.22(a) Hazard prevention and abatement.
10.a. For hazards identified either in the facility design or during the development of procedures, control shall be incorporated in the appropriate facility design or procedure.	.22(a)(1) Hazard prevention and abatement.
10.b. For existing hazards identified in the workplace, abatement actions prioritized according to risk to the worker shall be promptly implemented, interim protective measures shall be implemented pending final abatement, and workers shall be protected immediately from imminent danger conditions.	.22(a)(2) (i), (ii), & (iii) Hazard prevention and abatement.
10.c. Hazards shall be addressed when selecting or purchasing equipment, products, and services.	.22(c) Hazard prevention and abatement.
10.d. Hazard control methods shall be selected based on the following hierarchy: (1) Engineering control (2) Work practices and administrative controls that limit worker exposure (3) Personal protective equipment.	.22(b)(2)–(4) Hazard prevention and abatement.
11. Provide workers, supervisors, managers, visitors, and worker protection professionals with worker protection training.	.25 Information and training.
12. Comply with the following worker protection requirements:	.23(a) Safety and health standards.
12.a. Title 29 Code of Federal Regulations (CFR), Part 1910, "Occupational Safety and Health Standards".	.23(a)(3) Safety and health standards.
12.b. Title 29 CFR, Part 1915, "Shipyard Employment"	.23(a)(4) Safety and health standards.
12.c. Title 29 CFR, Part 1917, "Marine Terminals"	.23(a)(5) Safety and health standards.
12.d. Title 29 CFR, Part 1918, "Safety and Health Regulations for Longshoring".	.23(a)(6) Safety and health standards.

TABLE 1.—CROSSWALK OF DOE ORDER 4401.1A REQUIREMENTS AND 10 CFR 851 FINAL RULE REQUIREMENTS—Continued

DOE order 440.1A requirements	Corresponding 10 CFR 851 provisions
12.e. Title 29 CFR, Part 1926, "Safety and Health Regulations for Construction".	.23(a)(7) Safety and health standards.
12.f. Title 29 CFR, Part 1928, "Occupational Safety and Health Standards for Agriculture".	.23(a)(8) Safety and health standards.
12.g. American Conference of Governmental Industrial Hygienists (ACGIH), "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices" when the ACGIH Threshold Limit Values (TLVs) are lower (more protective) than permissible exposure limits in 29 CFR 1910. When the ACGIH TLVs are used as exposure limits, contractors must nonetheless comply with the other provisions of any applicable expanded health standard found in 29 CFR 1910.	.23(a)(9) Safety and health standards.
12.h. American National Standards Institute (ANSI) Z136.1, "Safe Use of Lasers".	.23(a)(11) Safety and health standards.
12.i. ANSI Z88.2, "American National Standard Practices for Respiratory Protection".	.23(a)(10) Safety and health standards.
12.j. ANSI Z49.1, "Safety in Welding, Cutting and Allied Processes," sections 4.3 and E4.3 (of the 1994 edition or equivalent sections of subsequent editions).	.23(a)(12) Safety and health standards.
12.k. National Fire Protection Association (NFPA) 70, "National Electrical Codes".	.23(a)(14) Safety and health standards.
12.l. NFPA 70E, "Electrical Safety in the Workplace"	.23(a)(15) Safety and health standards.
13. Ensure that subcontractors performing work on DOE-owned or -leased facilities comply with this Contractor Requirements Document and the contractor's own site worker protection standards (where applicable).	
14. Construction Safety	Appendix A section 1.
15. Fire Protection	Appendix A section 2.
16. Firearms Safety	Appendix A section 5.
17. Explosives Safety	Appendix A section 3.
18. Industrial Hygiene	Appendix A section 6.
19. Occupational Medicine	Appendix A section 8.
20. Pressure Safety	Appendix A section 4.
21. Motor Vehicle Safety	Appendix A section 9.
22. Suspect and Counterfeit Item (S/CI) Controls	Section moved to DOE Order 414.1C, Quality Assurance (June 17, 2005).

Many provisions have been reformatted and renumbered in this final rule, creating differences between it and the published supplemental notice of proposed rulemaking. To aid in tracking the provisions of both documents, the Department has included a table comparing sections in the final rule to the corresponding sections in the supplemental notice of proposed rulemaking. See Table 2.

TABLE 2.—COMPARISON OF FINAL 10 CFR 851 RULE SECTIONS WITH THE SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING (SNOPR)

Final rule section	Corresponding supplemental proposal section
PART 850—Chronic Beryllium Disease Prevention Program	
Authority	Notice of Proposed Rulemaking December 8, 2003, N/A.
850.1 Scope	Notice of Proposed Rulemaking December 8, 2003, N/A.
850.4 Enforcement	Notice of Proposed Rulemaking December 8, 2003, N/A.
PART 851—Worker Safety and Health Program	
Subpart A—General Provisions	**Subpart A—General Provisions**
851.1 Scope and purpose	851.1 Scope and exclusions. 851.2 Purpose.
851.2 Exclusions	851.1 Scope and exclusions.
851.3 Definitions	851.3 Definitions.
851.4 Compliance Order	851.5 Compliance Order.
851.5 Enforcement	851.9 Enforcement.
851.6 Petitions for generally applicable rulemaking	851.6 Interpretations.
851.7 Requests for a binding interpretive ruling	851.6 Interpretations.
851.8 Informal requests for information	851.6 Interpretations.

TABLE 2.—COMPARISON OF FINAL 10 CFR 851 RULE SECTIONS WITH THE SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING (SNOPR)—Continued

Final rule section	Corresponding supplemental proposal section
Subpart B—Program Requirements	**Subpart A—General Provisions** **Subpart B—Worker Safety and Health Program**
851.10 General requirements	851.4 General rule. 851.100 Worker safety and health program.
851.11 Development and approval of the worker safety and health program.	851.101 Approval and maintenance of the worker safety and health program.
851.12 Implementation	851.100 Worker safety and health program.
851.13 Compliance	851.8 Compliance.
Subpart C—Specific Program Requirements	**Subpart A—General Provisions** **Subpart B—Worker Safety and Health Program** **Subpart C—Safety and Health Requirements**
851.20 Management responsibilities and worker rights and responsibilities.	851.10 Worker rights.
851.21 Hazard identification and assessment	851.100 Worker safety and health program.
851.22 Hazard prevention and abatement	851.100 Worker safety and health program.
851.23 Workplace safety and health standards	851.200 Worker safety and health requirements. 851.201 Worker safety and health standards.
851.24 Functional areas	851.200 Worker safety and health requirements.
851.25 Training and information	851.100 Worker safety and health program.
851.26 Recordkeeping and reporting	851.7 Information and records.
851.27 Incorporation by reference.	
Subpart D—Variances	**Subpart D—Exemption Relief**
851.30 Consideration of variances	851.300 Exemptions.
851.31 Variance process	851.301 Exemption criteria.
851.32 Action on variance request	851.300 Exemptions.
851.33 Terms and conditions	851.302 Terms and conditions.
851.34 Requests for conferences.	
Subpart E—Enforcement Process	**Subpart E—Enforcement Process**
851.40 Investigations and inspections	851.400 Investigations and inspections.
851.41 Settlement.	
851.42 Preliminary notice of violation	851.402 Preliminary notice of violation.
851.43 Final notice of violation	851.403 Final notice of violation.
851.44 Administrative appeal	851.404 Administrative appeal.
851.45 Direction to NNSA contractors	851.405 Direction to NNSA contractors.
APPENDIX A TO PART 851—WORKER SAFETY AND HEALTH FUNCTIONAL AREAS.	**Subpart C—Safety and Health Requirements** (Sections 851.202 to 851.210)
A.1 Construction safety	851.202 Construction safety.
A.2 Fire protection	851.203 Fire protection.
A.3 Explosives safety	851.204 Explosives safety.
A.4 Pressure safety	851.205 Pressure retaining component safety.
A.5 Firearms safety	851.208 Firearms safety.
A.6 Industrial hygiene	851.209 Industrial hygiene.
A.7 Biological safety	851.207 Biological safety.
A.8 Occupational medicine	851.210 Occupational medicine.
A.9 Motor vehicle safety	851.206 Motor vehicle safety.
A.10 Electrical safety.	
A.11 Nanotechnology—Reserved.	
A.12 Workplace Violence Prevention—Reserved.	
APPENDIX B TO PART 851—GENERAL STATEMENT OF ENFORCEMENT POLICY	**APPENDIX A TO PART 851—GENERAL STATEMENT OF ENFORCEMENT POLICY**

IV. Section-by-Section Discussion of Comments and Rule Provisions

This section of the Supplementary Information responds to significant comments on specific proposed rule provisions. It contains explanatory material for some final rule provisions in order to provide interpretive guidance to DOE contractors that must comply with this rule. All substantive changes from the supplemental notice of proposed rulemaking are explained in this section. However, some non-substantive changes, such as renumbering of paragraphs and minor changes clarifying the meanings of rule provisions are not discussed.

DOE has determined that the requirements set forth in this rule are those which are necessary to provide a safe and healthful workplace for DOE contractors and their workers.

The majority of the comments received during the public comment period addressed specific provisions or subparts (*e.g.*, scope and exclusions, enforcement process, program requirements, exemption process, and consensus standards) of the supplemental proposed rule. Each of these comments is discussed in detail below in the discussion of the corresponding section of the rule.

Several commenters, however, expressed more general concerns regarding the entire proposed rule. For instance, a few commenters (Exs. 20, 27, 48) expressed concern regarding a perceived lack of detail in the proposed rule. One of these commenter (Ex. 20) felt that terms such as "reasonable," "any," "all," "significant," "adequate," "near miss," "potential," "comprehensive," and "general" used throughout the rule were too subjective to ensure consistency in contractor programs and enforcement. Another commenter (Exs. 48) believed that the proposed rule was not sufficiently developed and many processes and required guidance materials have either not yet been developed or have not been adequately described. This commenter also felt that the proposed regulation as currently written would represent a shift in safety emphasis from the positive influence, as described by the Integrated Safety Management System (ISMS), to a negative, enforcement-based culture. The commenter recommended that DOE consult with safety and health professionals within DOE, in other government agencies such as OSHA, and in private industry when preparing the final rule. The third commenter (Ex. 27) argued that the "level of protection" required under section 3173 of the NDAA must be defined in the rule to allow contractor compliance.

DOE has carefully reviewed the rule in light of these comments and other more specific comments received during the public comment period and has attempted to address those requesting clarification or further detail through either revisions to the text of the final rule or through clarification in this preamble discussion. DOE also intends to publish appropriate guidance materials to further assist contractors with implementation. DOE notes that this final rule is the result of extensive coordination within the DOE safety and health community and the careful consideration of all comments received during the pubic comment period including those comments received from health and safety professionals from other organizations.

Two commenters (Ex. 44, 60) urged DOE to begin the process of staffing, training, and setting forth resource requirements in order to implement this rule in a timely manner. DOE notes, however, that the rule is based largely on the provisions of DOE Order 440.1A. As a result, existing staff within DOE will be capable of performing Departmental actions necessary to implement the rule.

One commenter (Ex. 37) asserted that the health and safety framework established under the rule is unlike the health and safety provisions applicable to all other facilities in the country that are subject to OSHA jurisdiction. This commenter felt that such a discrepancy would discourage talented health and safety professionals from working at DOE facilities because of the prospect of learning a regulatory scheme that does not apply elsewhere. The commenter argued that "the best and the brightest" health and safety professionals would be hoping to acquire transferable skills. DOE disagrees with this commenter. The provisions of the final rule stem directly from DOE Order 440.1A which was modeled after OSHA's Safety and Health Program Management Guidelines. OSHA derived these guidelines from the safety and health program of private industry firms with the best safety and health performance records. OSHA encourages all employers to implement these guidelines and recognizes the accomplishments of the best performers in safety and health through its Voluntary Protection Program (VPP). As a result, DOE believes that the safety and health program required under this rule will continue to promote safety and health excellence among DOE contractors and will in fact attract "well qualified" safety and health professionals.

One commenter (Ex. 6) expressed concern that the proposed rule did not respond to past Inspector General (IG) and Government Accountability Office (GAO) reports recommending that DOE National Laboratories transition to external OSHA regulation. The commenter recommended that DOE compare the proposed rule with previous external IG and GAO reports regarding regulation of DOE National Laboratories. This same commenter also asserted that there is a need for a centralized enforcement (compliance) agency, and suggested that DOE follow the Great Britain model and combine the Environmental Protection Agency (EPA), OSHA, DOE, Nuclear Regulatory Commission (NRC), Defense Nuclear Facilities Safety Board (DNFSB), Price-Anderson Amendment Act (PAAA), DOE's Office of Independent Oversight and Performance Assurance, etc., compliance groups to form an "Agency of Oversight and Compliance" to provide coordinated, synergistic, and comprehensive oversight. Both suggestions, however, go beyond the statutory mandate of section 3173 of the NDAA and the scope of this rulemaking effort. Moreover, the Department lacks the authority and jurisdiction to implement these suggestions.

A. Subpart A—General Provisions

Section 851.1—Scope and Purpose

The worker safety and health program required by this rule establishes the framework for a comprehensive program that will reduce or prevent injuries, illnesses, and accidental losses by providing DOE contractors and their workers with a safe and healthful workplace. DOE has structured the rule this way for two main reasons: (1) To take advantage of existing and effective comprehensive worker protection programs that have been implemented at DOE facilities and (2) to minimize the burden on contractors by clarifying that they need not establish redundant worker protection programs to protect workers from occupational safety and health hazards.

Section 851.1(a) establishes the scope of this regulation. The worker safety and health requirements in this part govern the conduct of activities by DOE contractors at DOE sites. As clarified in the definition of "contractor" (section 851.3), DOE's intent is that the contractors covered under this rule include any entity under contract to perform activities at a DOE site in furtherance of a DOE mission, including subcontractors at any tier.

One commenter (Ex. 6) suggested the rule should apply only to defense nuclear facilities. DOE notes that the legislation, section 3173 of the NDAA is not limited to defense nuclear facilities.

A few commenters (Exs. 28, 45, 51) observed that section 3173 of the NDAA only applies to contractors covered by agreements of indemnification under section 170d. of the AEA. The commenters suggested that part 851 should not exceed this statutory mandate and should only apply to such contractors. Presumably since "contractual enforcement under proposed rule section 851.4(b) would only be available against prime contractors and not subcontractors," these commenters argued that, "the rule

should only apply to contractors covered by agreement of indemnification," amending the Nuclear Hazards Indemnity Agreement (NHIA) in order to put contractors on notice of civil and contract penalties for violation of DOE worker safety and health rules. Although DOE recognizes that section 234C of the AEA only mandates contractors covered by agreements of indemnification, DOE has decided to cover all of its contractors to ensure consistency in the protection of workers throughout the DOE complex. As described in Section II of this Supplementary Information, DOE has broad authority to regulate worker safety and health with respect to nuclear and nonnuclear functions, and it is not limited to the authority in section 234C. While the regulations cover all contractors, the authority to impose civil penalties is limited to those covered by agreements of indemnity.

Several commenters (Exs. 39, 49, 61) questioned who would be held responsible for worker safety and health on DOE-leased sites in those areas outside the control of the contractor but where the contractor may perform work. One commenter (Ex. 49) suggested that under the rule, facility worker safety and health requirements should not apply to leased facilities to the extent they are regulated under State or local regulations. However, the commenter argued, the rule's program requirements should continue to apply to DOE contractors at these leased facilities. DOE intends for all contractors on a work site to establish and maintain a worker safety and health program for the workplaces for which each contractor is responsible as required in final rule section 851.11(a)(2)(ii). In addition, contractors on a site must coordinate with other contractors responsible for work at the covered workplaces to ensure that there are clear roles, responsibilities and procedures that will ensure the safety and health of workers on multi-contractor workplaces. DOE further intends to develop Enforcement Guidance Supplements based in part on OSHA's multi-employer worksite policies to guide enforcement efforts on multi-employer worksites. DOE notes that final rule section 851.1(a) clarifies that the rule applies to the conduct of contractor activities at DOE sites, and section 851.3 clarifies that DOE sites include not only locations leased or owned by DOE, but also locations controlled by DOE through the exercise of its regulatory authority.

Two commenters (Exs. 15, 37) expressed concern over application of the rule to subcontractors and favored deleting "subcontractors" from the applicability or reducing the impact of the rule on subcontractors. Subcontractors must implement the requirements of the rule for covered workplaces for which they are responsible and, in other situations, act consistently with applicable regulations and worker safety and health standards.

One commenter (Ex. 39) suggested that the rule could be interpreted as applying to employees of DOE tenant organizations performing work on a DOE site. The commenter observed that contractors cannot impose or enforce the worker safety and health requirements of this rule on tenants if they do not maintain a contractual relationship with them. DOE does not intend the rule to cover persons who are not performing work in furtherance of a DOE mission. To clarify this intent, DOE has revised the definitions of "covered workplace" and "contractor" to limit their scope to situations in which work is being performed in furtherance of a DOE mission. Thus the rule does not apply to a person restocking a vending machine. Likewise, the rule does not apply to DOE tenant organizations, except to the extent it had a contractual obligation to perform work in furtherance of a DOE mission.

One commenter (Ex. 39) sought clarification of whether "work done on public or private property off the reservation by a DOE Prime Contractor" is covered under the rule. The rule applies to work performed at a DOE site. DOE has clarified in the definition of "DOE site" to include a location that DOE controls through exercise of its AEA authority, even if DOE does not own or lease the location. If DOE does not exercise control under the AEA, section 4(b)(2) exemption of the OSHA Act would not apply and OSHA would be responsible for regulating safety and health. DOE has also clarified the scope section to make clear that off-site transportation is not covered by the rule.

One commenter (Ex. 29) sought clarification of whether the rule would apply to Federal employees at a covered worksite. DOE notes that the rule will not apply to Federal employees since Federal employees are covered under OSHA standards at 29 CFR 1960 (Basic Program Elements for Federal Employee Occupational Safety and Health Programs and Related Matters) as well as Executive Order 12196 (Occupational Safety and Health Programs for Federal Employees). Another commenter (Ex. 20) suggested the rule include provisions for resolving conflicts between Part 851 and the Federal occupational safety and health program. DOE sees no cause for concern, however, since both programs stem from DOE Order 440.1A, and there has been no need for such conflict resolution provisions under that order. DOE believes both programs are consistent with and complementary to each other.

One commenter (Ex. 29) raised the question of whether DOE would consider "exempting" management and operating contractors from civil penalties for violations committed by other site contractors. DOE notes that the rule requires identification, evaluation and abatement of identified hazards, so that contractors are aware of the hazards in the covered workplace and respond appropriately. In addition, future enforcement guidance supplements will provide voluntary reporting thresholds. If the Office of Price-Anderson Enforcement becomes involved with a specific noncompliance, they will evaluate the circumstances surrounding the noncompliance, determine responsibility, and take appropriate enforcement actions in accordance with provisions of this rule. The process of discovery and evaluation of evidence has been used in the enforcement of nuclear safety requirements and is conducted in accordance with the rule of law. As a result, there is no need for exemptions from penalties as requested by the commenter.

One commenter (Ex. 40) recommended broadening the applicability of the rule to include construction workers employed by subcontractors that come onto DOE sites for limited periods of time to perform maintenance, renovation, repair and demolition tasks. DOE notes that Appendix A section 1, "Construction Safety" covers construction contractors (including subcontractors) and their employees in situations suggested by exhibit 40.

Section 851.1(b) establishes the purpose of the rule, which is to delineate the requirements and procedures associated with the worker safety and health program. Section 851.1(b)(1) clarifies that the rule establishes the requirements for an effective worker safety and health program, which will reduce or prevent injuries, illnesses, and accidental losses by providing workers with a safe and healthful workplace.

Two commenters (Exs. 36, 42) contended that the purpose of the proposed rule—is to provide "reasonable assurance" that workers are "adequately protected" from identified hazards—is distinctly different from supplemental proposed rule section 851.4(a) which requires a contractor to

"ensure" that the workplace is "free from" recognized hazards. The commenters expressed concern that the phrase "free from recognized hazards" differed from "adequate protection," and favored use of the term "reasonable assurance" as an appropriate and achievable standard. DOE notes, the reference to "adequately protected" is to emphasize that the rule is intended to fulfill DOE's responsibilities under the AEA. The reference to "reasonable assurance" is to identify the standard to be achieved. In revising the rule, DOE has moved these references from the section on purpose to the section on the general rule and specifically to the subsection on the worker safety and health program.

One commenter (Ex. 16) noted that the phrase "a contractor responsible for a covered workplace," which occurs in several proposed rule sections, could result in confusion on sites where DOE uses multiple contractors. The commenter recommended replacing the phrase with the following language, "a contractor responsible for activities in a covered workplace." DOE acknowledges the commenter's concern. The purpose section is revised in the final rule and no longer makes reference to "a contractor responsible for a covered workplace." DOE also notes that applicability of the rule is defined under section 851.1(a), which clarifies that the final rule applies to the conduct of contractor activities at DOE sites.

Two other commenters (Exs. 39, 49) also expressed concern about the reference in supplemental proposed rule section 851.2(a) to a "covered workplace." The commenters noted that the term was not defined, leaving readers to assume that it refers to DOE facilities not excluded from the scope of the rule. One of the commenters (Ex. 49) suggested replacing the term "covered workplace" with "DOE site" since the supplemental proposed rule did not include a definition for "covered workplace." DOE has responded to these comments by including a definition of the term "covered workplace" in final rule section 851.3.

One commenter (Ex. 27) pointed out that while supplemental proposed rule section 851.2(a) made no distinction in the severity of hazards covered by the rule, supplemental proposed rule section 851.4 included references to both "hazards causing or likely to cause serious bodily harm" and "adequate protection from hazards identified in the workplace." As noted previously, the rule is intended to fulfill DOE's responsibility under the AEA to ensure adequate protection from all workplace hazards. The rule also is intended to achieve the objectives in the OSHA Act and DOE Order 440.1 to have workplaces free from hazards causing or likely to cause serious bodily harm or death. DOE views these objectives as complementary and has rewritten the general rule to clearly identify both objectives.

Section 851.1(b)(2) clarifies that the rule establishes appropriate provisions for investigating the nature and extent of a violation of the requirements, for determining whether a violation of a requirement has occurred, and for imposing an appropriate remedy. DOE received no comments on the corresponding provision of the supplemental proposed rule during the public comment period.

Section 851.2—Exclusions

As in the supplemental proposal, section 851.2 continues to emphasize that these regulations apply to activities performed by DOE contractors at DOE sites. Two commenters (Exs.13, 39) sought clarification that transportation was not covered under this rule. As discussed previously, "scope" section (851.1) of the final rule has been modified to make it clear that transportation to or from a DOE site is not covered by the rule.

Section 4(b)(1) of the Occupational Safety and Health (OSH) Act (29 U.S.C. 651 et seq.) provides that OSHA regulations do not apply where another federal agency exercises its statutory authority to prescribe safety and health standards and requirements. DOE currently exercises its statutory authority broadly throughout the DOE complex to provide safe and healthful workplaces. In a few cases, however, DOE has elected not to exercise its authority and to defer to regulation by OSHA under the OSH Act. Final rule section 851.2(a)(1) continues the status quo by excluding from coverage those facilities regulated by OSHA. The OSHA-regulated facilities are: Western Area Power Administration; Southwestern Power Administration; Southeastern Power Administration; Bonneville Power Administration; National Energy Technology Laboratory (NETL), Morgantown, West Virginia; National Energy Technology Laboratory (NETL), Pittsburgh, Pennsylvania; Strategic Petroleum Reserve (SPR); National Petroleum Technology Office; Albany Research Center; Naval Petroleum and Oil Shale Reserves in Colorado, Utah, & Wyoming; and Naval Petroleum Reserves in California. See 65 FR 41492 (July 5, 2000). Work performed on such sites for DOE by DOE contractors, however, would be subject to the applicable contract provisions outlined in the specified contract.

DOE received numerous comments on the exclusion clause for work conducted at OSHA-regulated DOE sites. Several commenters (Exs. 15, 16, 25, 29, 42, 49) proposed that facilities transferred to OSHA jurisdiction in the future should also be covered under the OSHA exclusion of the rule. DOE acknowledges the commenters recommendation and has reworded this provision in the final rule to clarify that the rule does not apply to work at a DOE site that is regulated by OSHA (*i.e.*, as soon as a site is transferred to OSHA, work on that site no longer falls within the scope of the rule).

One commenter (Ex. 5) questioned the appropriateness of the OSHA exclusion and pointed out that the exclusion of contractors regulated by OSHA was "inherently contradictory," and asserted that "DOE's subcontractors have flowdown of PAAA liability protection when they need to work in a nuclear facility. Additionally DOE subcontractors are the responsibility of the prime contractor (per contract) but maintain their own OSHA 300 log because they are required to comply with OSHA regulations (per the industry in which they work, not because they are working at a DOE site)." DOE disagrees. OSHA's jurisdiction over subcontractor work on a DOE site is not based on the other types of workplaces or the industry in which the subcontractor works. Rather, OSHA has jurisdiction only if DOE declines to exercise its statutory authority.

Two commenters (Exs. 36, 29) sought clarification on whether privately-owned or—leased facilities operated by contractors under a DOE contract and otherwise subject to state occupational safety and health regulation are excluded from the rule. One commenter (Ex. 29) specifically requested DOE to clarify if the exclusion applied to sites regulated by State OSHA. DOE notes that the exclusion only applies to regulation by OSHA. However, DOE notes that a location not owned or leased by DOE can be a DOE site only if DOE exercises regulatory control over the location. This is consistent with DOE's current practice. For example, some operations of Nevada Test Site contractors are not conducted on the Mercury Site, which is owned by DOE. DOE operations of these contractors conducted off the Mercury site are subject to DOE nuclear safety requirements. Part 851 will be applied in the same manner.

One commenter (Ex. 19) sought clarification from DOE that the DOE

Mixed Oxide Fuel Fabrication Facility (MFFF) would not be subject to the rule because, section 3134(c) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 mandates that OSHA regulate the MFFF. The commenter cited part of section 3134(c) which states that "any activities carried out under a license required pursuant to section 202(5) of the Energy Reorganization Act of 1974 (42 U.S.C. 5842) * * * shall be subject to regulation under the Occupational Safety and Health Act of 1970." The commenter requested a specific statement that the rule does not apply to a DOE site "to the extent that facilities or activities on such site are subject to licensing pursuant to section 202(5) of the Energy Reorganization Act of 1974, as amended." DOE agrees that activities undertaken pursuant to a NRC license for the MFFF are subject to OSHA regulation to that extent. DOE notes that the exact scope of such activities can only be determined by looking at the terms of the license granted by NRC. DOE further notes that the treatment of the MFFF is not the general practice with respect to DOE facilities licensed by NRC. Since NRC does not regulate non-radiological worker safety and health matters, DOE regulates these matters at DOE facilities subject to NRC licensing and thus preempts regulation by OSHA.

Section 234C of the AEA explicitly excludes activities conducted under the authority of the Director, Naval Nuclear Propulsion, pursuant to Executive Order 12344, as set forth in Public Law 106–65. Accordingly, section 851.2(a)(2) excludes workplaces regulated by the Director, Naval Nuclear Propulsion. DOE received no comments on this provision during the public comment period.

Section 851.2(b) provides that radiological hazards or nuclear explosive operations are not covered by Part 851 to the extent that they are regulated by the existing requirements on nuclear safety and radiological protection set forth in 10 CFR Parts 20, 820, 830, and 835. These existing rules already deal with radiological hazards and nuclear explosives in a comprehensive manner through methods such as the Quality Assurance Program Plan, the Safety Basis, the Documented Safety Analysis, the Radiation Protection Program Plan, and the Nuclear Explosive and Weapons Surety Program. This regulation is intended to complement the nuclear safety requirements. Personnel responsible for implementing worker protection and nuclear safety requirements are expected to coordinate and cooperate in instances where the requirements overlap. The two sets of requirements should be integrated and applied in a manner that guards against unintended results and provides reasonable assurance of adequate worker protection.

Numerous commenters (Exs. 48, 13, 16, 29, 31, 36, 39, 47, 49) pointed out that the exclusion of radiological hazards contained in this provision was not consistent with other sections of the supplemental proposed rule, which included the term "radiological hazards" in describing certain rule provisions. Inclusion of radiological hazards was intended to stress the need to examine hazards in a wholistic context rather than in isolation. To avoid confusion, DOE has removed the term, but this should not be interpreted as negating the need to analyze hazards together so that controls do not produce unintended consequences. This is the essence of integrated safety management which is emphasized in section 851.13(b). One commenter (Ex. 28) observed that radiological hazards are "inextricably intertwined with physical, chemical, and biological hazards at most DOE sites"; and favored deletion of the radiological hazard exclusion. DOE recognizes that radiological hazards are intertwined with other workplace hazards; however, radiological hazards have historically been covered under separate programs and through separate requirements both within DOE and external to DOE. DOE believes that current rules addressing radiological safety issues—10 CFR 820, 830, and 835—are sufficient. As a result, DOE retained the exclusion of radiological hazards in the final rule.

Another commenter (Ex. 49) favored deletion of the phrase "* * * to the extent regulated by 10 CFR parts 820, 830 or 835," from the radiological hazard exclusion provision. The commenter asserted that radiological hazards were not within the scope of the rule. DOE acknowledges that existing rules already deal with radiological hazards and nuclear explosives in a comprehensive manner. This regulation is intended to complement the nuclear safety requirements. As discussed above, DOE intends for the two sets of requirements to be integrated and applied in a manner that guards against unintended results and provides reasonable assurance of adequate worker protection. Thus, personnel responsible for implementing worker protection and nuclear safety requirements are expected to coordinate and cooperate in instances where the requirements overlap. For this reason, DOE retains the phrase "* * * to the extent regulated by 10 CFR parts 820, 830 or 835," in the final rule.

One commenter (Ex. 19) suggested that sites regulated by the Nuclear Regulatory Commission (NRC) should be excluded from coverage under the rule, since the NRC regulates some aspects of worker safety and health such as fire protection and certain aspects of chemical safety (in addition to nuclear and radiological safety). As discussed previously, the NRC does not regulate non-radiological occupational safety and health matters. As a result, in most instances, DOE has exercised and intends to continue to exercise its regulatory authority over worker safety and health at DOE facilities licensed by NRC.

One commenter (Ex. 20) recommended adding an exclusion related to nuclear explosive operations: "This part does not apply to nuclear explosive operations to the extent regulated by 10 CFR 10, 820, 830, or 835." DOE agrees with the commenter's proposal, and has incorporated the exclusion for nuclear explosive operations in final rule section 851.2(b). In addition, DOE has included definitions for nuclear explosives and nuclear explosive operations in final rule section 851.3.

Section 851.3—Definitions

Section 851.3 of the final rule defines terms used throughout the rule. Commenters on this section of the supplemental proposed rule typically requested either addition of new terms, clarification or modification of proposed definitions, or deletion of selected terms from the rule. These comments are discussed in detail below and/or in the section-by-section discussion corresponding to the specific rule sections where each term is used.

New terms. In response to public comment, and to assist in further clarification of the provisions of the rule, the following additional terms have been defined in section 851.3: "Affected worker," "closure facility," "closure facility hazard," "construction," "construction contractor," "construction manager," "construction project," "construction worksite," "covered workplace," "DOE Enforcement Officer," "Head of DOE Field Element," "interim order," "nuclear explosives," "nuclear explosives operation," "occupational medicine provider," "permanent variance," "pressure systems," "safety and health standard," "temporary variance," "unauthorized discharge," and " variance." A discussion of each term is included in the alphabetical listing of definitions below.

Terms and definitions deleted. In response to public comment, the following definitions in the supplemental notice are deleted in the final rule: "Activity-level hazard analysis," "hazard control," "Site Manager," "workplace safety and health programmatic requirement," "workplace safety and health requirement," and "workplace safety and health standard." The deletions are explained in the section-by-section discussion of the rule provisions in which the terms were previously used.

Section 851.3 defines key terms using traditional occupational safety and health and Departmental terminology, as well as terminology used by the OSHA in its regulations and interpretations, in establishing and clarifying the provisions of this rule. The use of such terminology is consistent with DOE's increased emphasis on safety and health compliance through the use of accepted occupational safety and health requirements and procedures. The following discussion defines and explains each of the terms in the rule. Although some of these terms are commonly used, DOE believes these definitions will help ensure that their meaning as used in the context of the rule is clear. Section 851.3(a) presents definitions of terms as used in this part.

AEA is the Atomic Energy Act of 1954. DOE did not receive any comments on this proposed definition during the public comment period.

Affected worker is an employee who would be affected by the granting or denial of a variance, or any authorized representative of the employee, such as a collective bargaining agent. DOE added this definition to the final rule to assist in clarifying worker rights associated with the variance process.

A *closure facility* is a facility that is non-operational and is, or is expected to be, permanently closed and/or demolished, or title to which is expected to be transferred to another entity for reuse. DOE added this definition to the final rule to assist in clarifying which facilities qualify for the flexibility provisions established in final rule section 851.21(b).

A closure facility hazard is a workplace hazard within a closure facility covered by a requirement of final rule section 851.23 for which strict technical compliance would require costly and extensive structural/engineering modifications to be in compliance. DOE added this definition to the final rule to assist in clarifying the types of hazards that qualify for the flexibility provisions established in final rule section 851.21(b).

The *Cognizant Secretarial Officer (CSO)* is the Assistant Secretary, Deputy Administrator, Program Office Director, or equivalent DOE official who has primary line management responsibility for a contractor, or any other official to whom the CSO delegates in writing a particular function under this part. One commenter (Ex. 32) sought clarification of the definition for the term Cognizant Secretarial Officer due to the inconsistency between the proposed rule definition of a CSO having "primary line management responsibility for a contractor" and how CSOs were assigned in DOE Manual 411.1–C, Safety Management Functions, Responsibilities, and Authorities Manual, by site or organization. The commenter recommended that the definition be made consistent with DOE Manual 411.1–C. In response, DOE modified the definition of CSO in the final rule to include reference to a DOE official with primary line management responsibility for a contractor and any other official to whom the CSO delegates a particular function under this part.

A *compliance order* is an order issued by the Secretary to a contractor that mandates a remedy, work stoppage, or other action to address a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part. This provision merely codifies the Secretary's authority under the AEA to take immediate action where necessary to ensure an adequate level of safety. While the Secretary might use this authority where there is a persistent pattern of non-compliance by a contractor that warrants Secretarial intervention, a compliance order is not intended to be used as a routine enforcement device by the Office of Price-Anderson Enforcement. DOE received no comments specifically related to this definition during the public comment period. Comments on the compliance order provisions of the rule are addressed in detail in the section-by-section discussion for final rule section 851.4.

A *consent order* is any written document, signed by the Director and a contractor, containing stipulations or conclusions of fact or law and a remedy acceptable to both DOE and the contractor. DOE did not receive any comments on this proposed definition during the public comment period.

Construction means any combination of erection, installation, assembly, demolition, or fabrication activities involved to create a new facility or to alter, add to, rehabilitate, dismantle, or remove an existing facility. It also includes the alteration and repair (including dredging, excavating, and painting) of buildings, structures, or other real property, as well as any construction, demolition, and excavation activities conducted as part of environmental restoration or remediation efforts. DOE added this definition to the final rule in response to public comments discussed in the section-by-section discussion for Appendix A section 1, "Construction Safety."

The *construction contractor* is the lowest tiered contractor or subcontractor with primary responsibility for the execution of all construction work described within a construction procurement or authorization document (e.g., construction contract, work order). DOE added this definition to the final rule in response to public comments discussed in the section-by-section discussion for Appendix A section 1, "Construction Safety."

The *construction manager* is the individual or firm responsible to DOE for the supervision and administration of a construction project to ensure the construction contractor's compliance with construction project requirements. DOE added this definition to the final rule in response to public comments discussed in the section-by-section discussion for Appendix A section 1, "Construction Safety."

The *construction project* refers to the full scope of activities required on a construction worksite to fulfill the requirements of the construction procurement or authorization document. DOE added this definition to the final rule in response to public comments discussed in the section-by-section discussion for Appendix A section 1, "Construction Safety."

The *construction worksite* is the area within the limits necessary to perform the work described in the construction procurement or authorization document. It includes the facility being constructed or renovated along with all necessary staging and storage areas as well as adjacent areas subject to project hazards. DOE added this definition to the final rule in response to public comments discussed in the section-by-section discussion for Appendix A section 1, "Construction Safety."

A *contractor* is any entity under contract with DOE, including a subcontractor, with responsibility for performing work at a DOE site in furtherance of a DOE mission. This term does not apply to contractors or subcontractors that provide only "commercial items" as defined under the Federal Acquisition Regulations (FAR). Such contractors would not be

performing work in furtherance of a DOE mission.

Several commenters (Exs. 16, 28, 31, 37, 39, 45, 48, 51) requested clarification of the role of affiliated entities, like parent corporations, in the definition of "contractor." One commenter (Ex. 39) questioned the legal justification for including parent organizations within the scope of these regulations. Noting that well-established legal precedents regarding separation of parent corporations and their entities existed, a commenter (Ex. 16) recommended that DOE excise references to parent organizations or review each use of the term in the rule for unintended or inappropriate implications to ensure compliance with legal precedents.

Another commenter (Ex. 37) requested clarification of DOE's expectations of affiliates under the rule. A few commenters (Exs. 28, 45, 51) sought clarification of the circumstances under which an enforcement action may be brought against a parent corporation or affiliated entity. Some other commenters (Exs. 31, 39, 48) took issue with what they perceived as DOE's attempt to expand the scope of DOE enforcement authority to entities that are established under State laws as wholly independent of their affiliates (e.g., C corporations, S corporations and LLCs) and operate outside the liability space of DOE authority. Many commenters (Exs. 31, 39, 48, 49, 51) recommended elimination of language referring to any affiliated entity, such as "parent organization" in the proposed definition. Lastly, two commenters (Exs. 45, 51) noted that parent companies are expressly set up to limit liability, so it was inappropriate to attempt to circumvent established corporate structures by including them in the definition. DOE appreciates these concerns. Nevertheless, to ensure that responsible parties such as an affiliate are held responsible for the safety and health of workers, and to maintain consistency with the duties and responsibilities set forth in 10 CFR Part 820, DOE has determined not to delete the reference to affiliated entities in the definition.

Several commenters (Exs. 20, 28, 33, 42, 45, 49, 51) also sought clarification and modification of the proposed definition for contractors with respect to the inclusion of subcontractors. Some commenters (Exs. 28, 33, 45, 51) felt that the term contractor was inconsistently applied throughout the rule and variously referred to prime contractors, subcontractors, or suppliers, when distinctions were required. One commenter (Ex. 33) recommended that the definition be modified to limit applicable entities or that the usage of the term in the rule be reviewed closely to eliminate inconsistencies, or alternatively that separate definitions be provided for "subcontractor" and "supplier." DOE has modified the definition in the final rule to make clear it covers contractors and subcontractors at any tier. DOE also has made several other revisions to the regulatory language to eliminate potential ambiguities as to which contractor(s) would be subject to a particular provision in a particular situation.

Another commenter (Ex. 28) proposed that "contractor" be defined as any entity under contract (or its subcontractors or suppliers) with DOE that has entered into an agreement of indemnification under section 170d of the AEA. As discussed previously, DOE made the decision to cover all of its contractors to ensure consistency in the protection of workers and enforcement. As a result, the definition of contractor in the final rule does not limit the term to those contractors covered by an agreement of indemnification.

Several other commenters (Exs. 20, 45, 49, 51) recommended limiting the definition of "DOE contractor" to any entity under contract to DOE whose responsibility it would be to flow-down requirements to subcontractors. Two of these commenters (Exs. 49, 51) favored eliminating references to subcontractors since they lack authority to conduct or direct work at DOE sites. Section 3173 of the NDAA requires DOE to include subcontractors within the framework of the rule. Accordingly, the Department does not have the discretion to exclude subcontractors from the rule.

A *covered workplace* is a place at a DOE site where work is conducted by a contractor in furtherance of a DOE mission. Several commenters (Exs. 1, 13, 29, 32, 39, 42) requested greater clarification of the term "covered workplace" and strongly supported its inclusion in the list of definitions in proposed section 851.3. For instance, one commenter (Ex. 13) sought elucidation of which workplaces were covered by the regulation (e.g., whether the term included contractor owned or leased facilities). Another commenter (Ex. 32) recommended that the definition distinguish between DOE sites and non-DOE locations. The commenter noted that non-DOE locations could include contractor-owned or -leased locations, vendor locations, or other areas where DOE contractors performed activities (viz., research, installation of equipment, business, and travel). One commenter (Ex. 39) pointed out that in proposed rule section 851.2(a), the regulations referred to a "covered workplace," but that term was not defined in proposed rule section 851.3. Consequently contractors would be left to assume that the term referred to DOE facilities not excluded from the scope of the rule. Two commenters (Exs. 36, 42) observed that supplemental proposed rule section 851.1 would limit application of the rule to contractor activities at "DOE sites" (which is defined in supplemental proposed rule section 851.3), but the term "covered workplace" was used rather than "DOE sites" throughout the rule language. In response to these concerns, DOE added a definition for "covered workplace" in final rule section 851.3. The use of "covered workplace" is intended to make clear that the focus of the rule is the specific areas where work is performed. In addition, as discussed previously, the definition of "DOE site" has been revised to provide further clarity on the scope of the rule.

One commenter (Ex. 48) also requested clarification of the term "covered workplace" with respect to the term "worker." In reference to the use of "worker," the commenter questioned whether a contractor would be held responsible for ensuring that all the work of vendors, suppliers, and fabricators not located at the contractor's work location, but who were providing goods, services, and materials for DOE work, was in compliance with the rule. As discussed elsewhere, DOE has clarified what constitutes a "DOE site" and has defined "worker" to be a contractor employee performing work in a covered workplace at a DOE site in furtherance of a DOE mission.

A *Director* is a DOE Official to whom the Secretary has assigned the authority to investigate the nature and extent of compliance with the requirements of this part. This function has been assigned to the current Director of the Office of Price-Anderson Enforcement in the Office of Environment, Safety and Health, who is the person to whom the Secretary has assigned the responsibility for enforcing the DOE nuclear safety regulations in 10 CFR parts 20, 820, 830, and 835. DOE did not receive comments on this definition during the public comment period.

DOE is the United States Department of Energy, including the National Nuclear Security Administration. One commenter (Ex. 39) sought a clarification of which entities were included under the DOE acronym. The commenter questioned if the term referred to the local site or field office or the DOE Office of Price-Anderson Enforcement. In response, DOE notes

that DOE is defined in final rule section 851.3 and includes any DOE headquarters, field, area, or site office. Where a specific office has a specific role or responsibility with respect to this rule, the specific office is referenced under the corresponding provision of the rule.

A *DOE Enforcement Officer* is a DOE Official to whom the Director has assigned the authority to investigate the nature and extent of compliance with the requirements of this part. DOE added this definition to assist in clarifying enforcement authorities under the final rule.

DOE site means DOE-owned or -leased area or location or other location controlled by DOE where activities and operations are performed at one or more facilities or locations by a contractor in furtherance of a DOE mission. This definition was revised to include all sites where DOE exercises regulatory control under the AEA, even if DOE does not own or lease the site.

One commenter (Ex. 5) suggested a modification of the definition of "DOE site" to include the idea that some DOE sites have multiple contractors working on them. DOE disagrees that a modification to this definition is needed to clarify this point. The current definition does not limit the meaning of the term to areas where only one contractor works.

Two commenters (Exs. 19, 48) questioned ownership and geographical issues with respect to a DOE site. One commenter (Ex. 48) suggested that DOE site should be defined as being strictly DOE-owned or directly DOE-leased areas/locations. The other commenter (Ex. 19) had contractor specific concerns about the definition's applicability, requesting clarification that the rule only intended to cover sites owned or leased by DOE as opposed to DOE sites not owned or leased where contract work is performed. DOE considered these comments in revising the definition of "DOE site."

A *final notice of violation* is a document that determines a contractor has violated or is continuing to violate a requirement of this part. Such document includes:

(1) A statement specifying the requirement of this part to which the violation relates;

(2) A concise statement of the basis for the determination;

(3) Any remedy, including the amount of any civil penalty; and

(4) A statement explaining the reasoning behind any remedy.

A *final order* is a DOE order that represents final agency action and, if appropriate, imposes a remedy with which the recipient of the order must comply.

General Counsel refers to the General Counsel of DOE.

A *Head of DOE Field Element* is the highest-level DOE official in a DOE field or operations office who has the responsibility for identifying the contractors and subcontractors covered by this part and for ensuring compliance with this part. DOE added this definition to assist in clarifying program review and approval authorities under the final rule by identifying the DOE official responsible for these actions under the rule.

An *interpretation* refers to a statement by the General Counsel concerning the meaning or effect of a requirement of this part that relates to a specific factual situation but may also be a ruling of general applicability if the General Counsel determines such action to be appropriate. DOE received several comments regarding the interpretation provision of the rule. These comments are addressed in detail in the section-by-section discussion for final rule section 851.6.

NNSA is the National Nuclear Security Administration.

A *nuclear explosive* is an assembly containing fissionable and/or fusionable materials and main charge high-explosive parts or propellants capable of producing a nuclear detonation (e.g., a nuclear weapon or test device). DOE added this definition (see, e.g., 10 CFR section 712.3) to further clarify the exclusion provisions of section 851.2 of the final rule.

A *nuclear explosive operation* is any activity involving a nuclear explosive, including activities in which main charge high-explosive parts and pit are collocated. DOE added this definition to further clarify the exclusion provisions of section 851.2 of the final rule.

An *occupational medicine provider* is the designated site occupational medicine director (SOMD) or the individual providing medical services.

A *permanent variance* is relief from a safety and health standard, or portion thereof, to contractors who can prove that their methods, conditions, practices, operations, processes provide workplaces that are as safe and healthful as would result from compliance with the workplace safety and health standard required by this part. DOE added this definition to further clarify the variance process established in Subpart D of the final rule.

A *preliminary notice of violation (PNOV)* is a document that sets forth the preliminary conclusions that a contractor has violated or is continuing to violate a requirement of this part. Such a document includes:

(1) A statement specifying the requirement of this part to which the violation relates;

(2) A concise statement of the basis for alleging the violation;

(3) Any remedy, including the amount of any proposed civil penalty; and

(4) A statement explaining the reasoning behind any proposed remedy.

Pressure systems are all pressure vessels, and pressure sources including cryogenics, pneumatic, hydraulic, and vacuum. Vacuum systems should be considered pressure systems due to their potential for catastrophic failure due to backfill pressurization. Associated hardware (e.g., gauges, and regulators), fittings, piping, pumps, and pressure relief devices are also integral parts of the pressure system. DOE added this definition to clarify the scope of the pressure safety provisions of Appendix A section 4 of the final rule.

A *remedy* is any action (included, but not limited to, the assessment of civil penalties, the reduction of fees or other payments under a contract, the requirement of specific actions, or the modification, suspension or rescission of a contract) necessary or appropriate to rectify, prevent, or penalize a violation of a requirement of this part, including a compliance order issued by the Secretary pursuant to this part. One commenter (Ex. 28) proposed a modification of the definition for the term "remedy" and suggested the definition should read as: "any action (included, but not limited to, the assessment of civil penalties, the requirement of specific actions, request to the DOE contracting officer for a reduction of fees or other payments under a contract, or the modification, suspension or rescission of a contract." The commenter pointed out that the DOE contracting officer was the entity that had the authority to implement contract actions. While DOE agrees that contracting officers have the authority to take contract actions, the Director has been delegated the authority to enforce Part 851. In that role, the Director coordinates with the contracting officer in effecting the appropriate contract action. DOE has determined that the definition being adopted for "remedy" is appropriate because it provides the Department the flexibility to determine the most appropriate remedy to a violation of a relevant safety and health provision.

A *safety and health standard* is a standard that addresses a workplace hazard by establishing limits, requiring conditions, or prescribing the adoption or use of one or more practices, means,

methods, operations, or processes, reasonably necessary or appropriate to provide safe and healthful workplaces. Two commenters (Exs. 15, 29) sought clarification of and favored elimination of the term "workplace health and safety programmatic standards" from the proposed rule since it appeared to be redundant with the terms "workplace health and safety standards" and "workplace health and safety requirements." As requested, DOE has eliminated the term "workplace health and safety programmatic standards" and also, the term "workplace health and safety requirements" from the final rule.

One commenter (Ex. 11) questioned why DOE issued a separate definition for the term "safety and health standard," which is commonly used in the safety and health community. The commenter cited the definition of an occupational safety and health standard in section 3(8) of the OSH Act 29 U.S.C. 652(8) in support of the argument and sought clarification on DOE's omission of language similar to OSHA's with respect to standards being "necessary or appropriate to provide safe or healthful employment and places of employment." DOE agrees, in general, with this comment. However, DOE has revised the definition of "safety and health standard," in the final rule to make clear that, for purposes of this rule, it includes all the standards or requirements included or referenced in subpart C.

Secretary means the Secretary of Energy.

A *temporary variance* is a short-term relief from a new safety and health standard when the contractor cannot comply with the requirements by the prescribed date because the necessary construction or alteration of the facility cannot be completed in time or when technical personnel, materials, or equipment are temporarily unavailable. DOE added this definition to further clarify the variance process established in Subpart D of the final rule.

An *unauthorized discharge* is the discharge of a firearm under circumstances other than: (1) During firearms training with the firearm properly pointed down range (or toward a target), or (2) the intentional firing at hostile parties when deadly force is authorized. DOE added this definition to further clarify provision of Appendix A section 5, "Firearms Safety," in the final rule.

A *variance* is an exception to compliance with some part of a safety and health standard granted by the Under Secretary. DOE added this definition to further clarify the variance process established in Subpart D of the final rule.

A *worker* is an employee of a DOE contractor who performs work for DOE at a covered workplace in furtherance of a DOE mission. A few commenters (Exs. 16, 31, 39, 48) suggested that DOE modifying the proposed definition for "worker" to exclude the phrase "or any other person." Specifically, two commenters (Exs. 16, 31) remarked that the definition of worker could be interpreted to include work conducted off-site and at non-DOE locations. Furthermore, all types of activities on a DOE site (including non-DOE-related ones like those of a UPS courier delivering packages, copier service person, vending machine maintenance person, or office supply delivery driver) could be misconstrued as work under the regulation. One of these commenters (Ex. 16) further suggested the definition should be re-worded as "persons who perform work for or on behalf of DOE at a covered workplace * * *". Additionally, the commenter argued the term "work" should be defined for the purposes of the rule. In response to these comments, DOE revised the definition to make clear it applies only to contractor employees, including subcontractor employees, who are performing work at a covered workplace in furtherance of a DOE mission.

Another commenter (Ex. 39) sought clarification on whether the definition of "worker" included private tenants present on a DOE site under a lease arrangement and cautioned that the phrase "* * * or any other person who performs work at a covered workplace" could be broadly interpreted to include work not being performed by a DOE contractor. Final rule section 851.1(a) clarifies that the rule applies to the conduct of contractor activities at DOE sites and final rule section 851.3 clarifies the definition of "DOE site."

A *workplace hazard* is a physical, chemical, biological, or safety hazard with any potential to cause illness, injury, or death to a person. DOE received numerous comments (Exs. 5, 13, 16, 20, 29, 31, 39, 45, 47, 49, 51) on the inclusion of radiological hazards in the supplemental proposed definition. Most favored the elimination of radiological hazards from the definition, citing a need for consistency across the rule and noting that radiological hazards are addressed under other existing regulations like 10 CFR Parts 820, 830, and 835. DOE acknowledges these concerns and has removed reference to radiological hazards from this definition in the final rule. However, as previously discussed, this change should not be interpreted to eliminate the need to analyze all hazards in an integrated manner.

Many commenters (Exs. 15, 20, 28, 39) expressed concerns about the use of the term "potential" in the definition for workplace hazards. Some commenters (Exs. 15, 20, 28) suggested replacement of the proposed language "with any potential to cause illness," with the language "with the potential to cause illness" or "with any potential to cause imminent illness" in the definition for workplace hazards; this, they asserted, would account for the fact that many chemical, biological, and radiological exposures resulting from chronic exposures can, after decades, cause illness, injury, and death. Another commenter (Ex. 39) cautioned that the proposed definition of "workplace hazard" could be interpreted to preclude the mere presence of a hazardous material with any potential to cause illness and hence should be modified. DOE believes a broad definition of "workplace hazard" is appropriate to ensure that all hazards are considered in determining how to provide a safe and healthful workplace.

Section 851.3(b) provides that if a term is defined in the AEA but is not defined in this rule, it has the meaning defined in the AEA for the purpose of this rule.

Section 851.4—Compliance Order

Section 161 of the AEA grants the Secretary broad authority to order those actions deemed necessary by the Secretary to protect facility workers and the environment from any injury because of activity under the Act. Section 851.4(a) makes it clear that the Secretary has the authority to issue a compliance order to any contractor for a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of Part 851 or the AEA. The compliance order will state the action or remedy that the Secretary deems necessary and the reasons for the action or remedy. One commenter (Ex. 20) inquired how compliance orders would be reconciled with contract obligations and limitations and funding. In response to this question, DOE notes compliance orders represent an exercise of Secretarial authority under the AEA and are not dependent on contractual provisions.

One commenter (Ex. 54) recommended that this provision also require posting of the compliance order as well as employer responses, corrections, or requests for rescission or modification. DOE agrees and has revised final rule section 851.4(d) to require posting of compliance orders. This provision stipulates that the

posting must remain in place until the violation is corrected. In addition, final rule section 851.42(e) requires posting of preliminary notices of violations (PNOVs) once they become final. The rule does not, however, require posting of employer responses to compliance orders or requests for recessions.

Section 851.4(a)(1) establishes that the Secretary may issue to any contractor a Compliance Order that identifies a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part. Two commenters (Exs. 15, 42) took issue with the reference to potential violations and the phrase "otherwise is inconsistent with" in this supplemental proposed provision. The commenters expressed concern that given the gravity of a compliance order and the progressive nature of enforcement described in Appendix B section IX, compliance orders should require a more definitive determination of violation. The commenters recommended that the phrase "potentially violates, or otherwise is inconsistent with" be deleted from the provision. One commenter (Ex. 42) pointed out that OSHA does not cite employers for potential violations or inconsistencies and recommended adoption of a process similar to OSHA. DOE disagrees. This language, including the phrase "potentially violates," is consistent with the Department's longstanding procedural requirements set forth at 10 CFR 820.41. Given that these provisions have worked well in practice, DOE has determined that it would be inappropriate to modify this language.

Another commenter (Ex. 27) suggested that the phrase "violates, potentially violates, or otherwise inconsistent with" was vague (as was language throughout the rule). The commenter recommended that the entire rule be rewritten to eliminate vague standards and criteria. Although the referenced phrase is broad, DOE does not agree that it is vague, and it is retained in the final rule. As to the broader comment about vagueness in the rule, DOE has carefully reviewed the rule in light of all comments received during the public comment period and has attempted to address those requesting clarification or further detail. DOE also intends to publish appropriate guidance materials to further help contractors with implementation.

Section 851.4(a)(2) establishes that the Secretary may issue to any contractor a compliance order that mandates a remedy, work stoppage, or other action. Section 851.4(a)(3) establishes that any compliance order issued by the Secretary to any contractor will state the reasons for the remedy, work stoppage, or other action. DOE received no comments on these provisions during the public comment period.

Section 851.4(b) establishes that the compliance order will be a final order that is effective immediately unless the order specifies a different effective date. Section 851.4(c) grants the recipient of a compliance order the right to ask the Secretary to rescind or modify the compliance order within 15 days of its issuance. The filing of a request for an appeal under this section will not automatically stay the effectiveness of such an order. The Secretary, however, could issue a compliance order that would provide an effective date after the issuance date, allowing a longer period to appeal the terms of the order.

Two commenters (Exs. 5, 31) expressed concern that the 15-calendar day appeal period was not long enough. They argued that "it takes a month for a document issued by DOE-Headquarters to reach a DOE contractor." One commenter (Ex. 31) proposed 15 calendar days from receipt of the compliance order as an alternative to this provision. One commenter (Ex. 39) felt that the appeal provision was a moot point if the contractor had to take immediate action because the Order was not stayed upon submittal of the appeal. The commenter recommended that compliance orders be stayed during the 15-day window (or upon a decision of the Secretary) unless a stay posed significant safety and health consequences. In response DOE notes that a primary purpose of a compliance order is to address situations that require immediate action. DOE believes that it is inappropriate to delay corrective action unless extenuating circumstances exist. In such cases, final rule section 851.4(c) allows the Secretary to stay the Compliance Order, if appropriate, pending review of the contractor's request to modify or rescind the Order. In addition, these time frames are consistent with the procedures set forth in 10 CFR Part 820.

Section 851.5—Enforcement

This section establishes enforcement provisions for the rule. Like other Departmental regulations that apply to DOE contractors, this provision allows DOE to employ contractual mechanisms such as reduction in fees, or to assess a civil penalty when a contractor fails to comply with the provisions of this rule. These mechanisms help the Department ensure that workers receive an appropriate level of protection while performing Departmental activities that involve exposure or the potential for exposure to workplace safety and health hazards.

DOE received two general comments recommending changes to aspects of the rule that are mandated by section 3173 of the NDAA. One commenter (Ex. 6) pointed out that DOE has already successfully incorporated OSHA requirements into its workplaces. Stating that "enforcement appears to be a DNFSB issue," the commenter recommended that "OSHA enforcement be worked/addressed between DOE and OSHA and not driven by DNFSB (except on Defense Nuclear Facilities)." The second commenter (Ex. 5) suggested that DOE "pick one way to fine the contractor" and suggested that DOE not "dilute penalty authority." DOE believes the two penalty methods give the Department greater flexibility in determining the appropriate enforcement mechanism to address specific violations of the rule. While DOE intends to use civil penalties for most enforcement actions, contract penalties will be reserved for egregious violations that indicate general worker safety and health program failure. When appropriate, the Director will coordinate with the DOE Field Element to select the most effective penalty approach.

Other commenters stated that penalties should not be imposed for an employer's own observations. One of these commenters (Ex. 16) suggested that behavior-based safety systems (in which employers report observations on at-risk behaviors) should not be subject to enforcement action. DOE notes that contractors may employ various means and methods to identify and abate noncompliances, such as behavior-based safety programs, and that noncompliances of greater significance may be reported into the Noncompliance Tracking System (NTS). Furthermore, DOE recognizes the value that an initiative such as behavior-based safety can add to the development and implementation of a comprehensive safety and health program. Therefore, such an initiative should be an integral part of the contractor's approved safety and health program, which is subject to DOE review. During the performance of onsite inspections, for instance, the Office of Price-Anderson Enforcement may evaluate the approved safety and health program to determine the degree and depth of compliance measures taken by contractors. A second commenter (Ex. 42) believed that penalties for safety and health issues that are self-identified via NTS "will have a chilling effect on contractor's self disclosing issues." DOE agrees and intends to create reporting guidelines that will help ensure contractors

understand and are more comfortable with DOE's expectations. Future enforcement guidance supplements (EGSs) will establish reasonable NTS reporting thresholds. It is in the contractor's best interest to report self-identified noncompliances above the NTS reporting thresholds since the contractor may receive up to 50% mitigation of the base penalty for self-reporting—as specified in Appendix B section IX.b.3.

DOE received a number of comments requesting clarification regarding how various aspects of enforcement will proceed under section 851.5. For example, several commenters (Exs. 20, 29, 45, 28, 51) wondered against whom enforcement action would be directed if a subcontractor to a management and operating contractor violated a requirement. These commenters inquired how the rule would apply under several specific circumstances, such as if the subcontractor had a direct contract with DOE (Ex. 29). In general, DOE will consider enforcement actions against any and all contractors associated with a violation. All subcontractors and suppliers of an indemnified contractor are considered indemnified contractors, and as such are subject to either civil penalties or contract penalties. In order to clarify the matter, DOE expects to publish an EGS based on OSHA's multi-employer worksite policy to guide enforcement efforts on multi-employer worksites.

Another commenter (Ex. 25) wondered how the enforcement process would view legacy issues. DOE believes the provisions on "closure facilities" and "variances" provide sufficient flexibility to deal with legacy issues. A commenter (Ex. 16) suggested that, because section 851.2(a)(1) excludes applicability of this rule to sites regulated by OSHA, the OSHA-regulated sites are being held to a different level of requirements and a different enforcement structure than non-OSHA-regulated sites. As an example, the commenter pointed out that OSHA does not mandate compliance with the entire set of consensus standards included in Subpart C of the supplemental proposal, nor does OSHA require the formal exemption process of proposed Subpart D. DOE acknowledges these concerns and has significantly reduced the number of consensus standards mandated under Subpart C of the final rule to be more consistent with the standards required under DOE Order 440.1A. These standards have been evaluated by the DOE safety and health community and determined necessary to address worker safety and health hazards on DOE sites. DOE notes, as discussed above, that these requirements may be applied to DOE contractors excluded from this rule through contract mechanisms, if DOE determines that the standards are applicable to the work performed by the contractor. In addition, DOE has revised Subpart D of the rule to establish a variance process modeled after the OSHA variance process established in 29 CFR Part 1905.

Concerned about the possibility of willful employee misconduct beyond the control of the contractor, one commenter (Ex. 29) recommended that the enforcement language of the rule should include a responsibility for employees to comply, similar to section 5(b) of the OSH Act. This commenter suggested that the added provision mirror the "unpreventable employee misconduct" defense recognized by OSHA. DOE agrees with this comment and has added section 851.20(b) to the final rule to prohibit workers from taking actions that are inconsistent with the rule. In addition, DOE intends to develop enforcement guidance for the rule that will include provisions similar to OSHA's unpreventable employee misconduct defense outlined in OSHA's Field Inspection Reference Manual in Chapter III, Paragraph C.8.c(1).

In another comment related to how the section applies to subcontractors, the commenter (Ex. 33) suggested that DOE revise DEAR 952.250–70 (either through this rulemaking or a separate rulemaking) to inform contractors with an indemnification agreement that they are subject to civil penalties under the rule and to require them to flow this notice down to all lower-tier subcontractors. The commenter indicated that a similar revision was also made "when Congress added formal regulation by DOE of nuclear safety matters." DOE recognizes the commenter's concern, but notes that section 3173 of the NDAA mandates that DOE promulgate a rule to enforce worker safety and health program requirements. The statutory mandate does not stipulate nor are its provisions contingent upon rulemaking related to the DEAR. Accordingly, such a change would be beyond the scope of this rulemaking.

Section 851.5(a) implements the statutory provision of section 234C paragraph b of the AEA which provides that "a person (or any subcontractor or supplier thereto) who has entered into an agreement of indemnification under section 170d of the AEA (or any subcontractor or supplier thereto) that violates (or is the employer of a person that violates) any regulation promulgated under [section 234C] shall be subject to a civil penalty of not more than $70,000 for each such violation." For continuing violations, section 234C further provides that each day of the violation shall constitute a separate violation for the purposes of computing the civil penalty to be imposed. Specifically, under section 851.5(a) a contractor (or any subcontractor or supplier thereto), whose contract with DOE contains an indemnification agreement and that violates (or whose employee violates) any requirement of the regulations will be subject to a civil penalty of not more than $70,000 for each such violation. In the case of a continuing violation, this provision of the rule clarifies that each day of the violation constitutes a separate violation for the purpose of computing the amount of the civil penalty.

DOE received several comments related to the penalty structure described by section 851.5(a). These commenters (Exs. 16, 27, 37, 14, 39, 46) argued that the civil penalty structure under the rule, with its $70,000 per violation maximum penalty, is 10 times higher than the OSHA penalty structure, and thus disproportionately sanctions DOE contractors compared to other U.S. industries. These commenters believed OSHA's penalty structure should be used and felt the DOE structure was excessively burdensome given the increased frequency of inspection that tends to be associated with DOE facilities. DOE points out that the penalty structure is not determined by DOE, but rather is established by statue. As a result, the Department is not free to deviate from these provisions. The Director may, however, use discretion in determining what enforcement actions may be taken and in establishing the final penalty amounts. DOE also points out that it is the responsibility of the contractor to identify and abate noncompliances, thus avoiding penalty.

One of these commenters (Ex. 27) also submitted a related suggestion that DOE should establish enforcement thresholds. DOE agrees. Since violations have varying degrees of safety and health significance, DOE has established severity level thresholds that distinguish on the basis of possible consequence and have appropriate sanctions. Such thresholds and guidance were established in supplemental proposed Appendix A and are retained in Appendix B section VI to the final rule.

Other comments on section 851.5(a) related to the definitions and obligations of contractors and subcontractors. One commenter (Ex. 48) expressed concern that language in supplemental proposed

section 851.9(a)—e.g., "contractor * * * (or any subcontractor or supplier thereto) that violates (or whose employee violates)"—expands the definitions of "contractor" and "worker" beyond those in supplemental proposed section 851.3 and beyond the scope of the rule stated in supplemental proposed section 851.1. The commenter thought that this "expanded" definition might be interpreted as including work done by suppliers and vendors on sites far removed from DOE sites. DOE disagrees with this comment. Section 851.3 defines terms such as "contractors" and "workers," while section 851.1 of the final rule describes which contractors are subject to the rule and section 851.5 describes enforcement provisions that apply to those contractors that are subject to the rule (as defined in section 851.1.). Sections 851.3 and 851.5 do not change (and are not intended to change) the scope of the rule. Furthermore, section 851.1(a) states that the rule applies to the conduct of contractor activities at covered workplaces.

Believing that "small business subcontractors are exempt from OSHA requirements," the same commenter (Ex. 48) was concerned that this rule would make small business subject to OSHA requirements, as well as DOE enforcement and penalties, and would thus have a serious impact on small businesses. DOE notes that this commenter's belief that small businesses are exempt from OSHA requirements is inaccurate. Although employers with 10 or fewer employees are exempt from most OSHA recordkeeping requirements for recording and reporting occupational injuries and illnesses, small businesses must comply with OSHA requirements and are subject to inspections (such as for accident investigations, complaint inspections, and other reasons). Because small businesses do not have the same resources as larger establishments, businesses do receive penalty reduction based on employer size. The commenter (Ex. 48) also asked for clarification regarding whether contractor employees are subject to civil penalty under the rule. DOE confirms that contractor employees are not subject to civil penalty; however, under section 851.20(a)(3) contractors are required to assign worker safety and health responsibilities, evaluate personnel performance, and hold personnel accountable for worker safety and health performance.

One commenter (Ex. 5) inquired about a specific situation in which OSHA had inspected facilities and found issues that would take a long time to resolve, so long that the corrective action plan would extend beyond the implementation date of the final rule. In this case, the commenter wondered, would the remaining violations be considered "continuing violations" and be subject to penalty for each day the condition goes uncorrected? The House Committee directed that $25,000,000 be transferred from the Departmental Administration account to the Science Laboratories Infrastructure to begin addressing the safety deficiencies at the Science laboratories. In addition, the Committee directed the Department to request sufficient funding in the budget requests for fiscal years 2005 and 2006 to correct the remainder of the safety deficiencies. In such cases, DOE will consider the contractors abatement plan as well as the presence of interim control measures when assessing the penalty. One should note that there are no provisions for grandfathering existing noncompliances.

DOE received two comments suggesting specific changes in the wording of the civil penalty enforcement provision in the supplemental proposal. In the first, the commenter (Ex. 5) suggested revising the second parenthetical phrase in section 851.5(a) to read "* * * whose employee or subcontractor violates." DOE disagrees with this editorial suggestion. The rule applies directly to subcontractors. A contractor is not automatically liable for a subcontractor's violations. To provide clear guidance on the subject, DOE will publish and implement an EGS on DOE's multi-employer worksite policy (similar to OSHA's policy) to clarify appropriate enforcement for subcontractor violations.

The second commenter (Ex. 37) recommended that DOE add a provision stating that civil fines will not be imposed unless the contractor knew of the hazard and employees were injured or endangered. DOE disagrees that these criteria should protect a contractor from civil penalty; however, the Department does agree that these criteria should be considered in determining the appropriate level of penalty. DOE also notes when a contractor is not aware of a hazard, the question becomes "Should they have been aware of the hazard?" That is, did the contractor implement effective workplace assessment and inspections procedures as required under final rule section 851.21?

Section 851.5(b) implements the provisions of section 234C.c. of the AEA. Section 234C.c. of the AEA requires DOE to include provisions in its contracts for an appropriate reduction in the fees or amounts paid to the contractor if the contractor or a contractor employee violates the regulations issued pursuant to section 234C. The Act requires these provisions to be included in each DOE contract with a contractor that has entered into an agreement of indemnification under section 170d of the AEA (the Price-Anderson Amendment Act). The contract provisions must specify the degrees of violations and the amount of the reduction attributable to each degree of violation.

DOE is implementing this statutory mandate to include provisions for the reduction in fees in contracts for violations of this part pursuant to the contract's "Conditional Payment of Fee" clause. Most DOE management and operating contracts currently contain such a clause providing for reductions of earned fee, fixed fee, profit, or share of cost savings that may otherwise be payable under the contract if performance failures relating to environment, safety, and health occur. See 48 CFR 970.5215–3, "Conditional Payment of Fee, Profit, or Incentives" (applicable to DOE management and operating contracts and other contracts designated by the Procurement Executive). DOE amended this clause to set forth the specific criteria and conditions that may precipitate a reduction of earned or fixed fee, profit, or share of cost savings under the contract. The clause establishes reduction ranges that correlate to three specified degrees of performance failures relating to environment, safety, and health. In the final rule, DOE clarifies that the term "environment, health, and safety," as applied in the context of the rule, includes matters relating to "worker safety and health." Under the rule, DOE will apply the same reduction ranges and degrees of performance failure specified in the "Conditional Payment of Fee, Profit, or Incentives" clause to worker safety and health. In a parallel provision to section 234C.c., section 851.5(b) implements this statutory mandate by making a contractor that fails to comply with the requirements of Subparts B and C of the rule subject to a reduction in fees or other payments under a contract with DOE pursuant to the contract's "Conditional Payment of Fee" clause.

Several of the comments that DOE received on section 851.5(b) related to how and by how much, fees could be reduced under this provision. Three commenters (Exs. 28, 45, 51) believed that reduction in fee is always an option for DOE and should not be a part of the rule, but instead should be included in appropriate contracts. DOE does not agree with these commenters. While

contract penalties are always applicable to provisions of a contract, they may or may not be directly linked to specific safety and health provisions of a contract. DOE believes that the rule strengthens enforcement options by specifying that contract penalties may be applied to violations of the requirements of the rule. Further, including this provision in the regulation is consistent with the underlying purpose of section 234C of the AEA.

Two other commenters (Exs. 29, 47) were concerned whether the reduction in fee could exceed the $70,000 maximum established for civil penalties. One of these commenters (Ex. 47) thought that, to be consistent with section 234C(b) of the AEA, DOE needed to specify a maximum of $70,000 contract fee reduction to ensure "legal equity" between the civil penalty and the contract fee reduction mechanism. DOE notes that except where a violation is considered a continuing violation, and each day is considered a separate day for the purposes of computing the penalty, the maximum civil penalty for each violation will not exceed $70,000. However, for contract penalties DOE will follow the *Conditional Payment of Fee Clause*. Other commenters suggested additional language and definitions for this section. One commenter (Ex. 47) suggested modifying the rule to state "The Director (e.g., principal enforcement officer) must approve invocation of the Conditional Payment of Fee Clause." This commenter believed that supplemental proposed Appendix A section IX(1)(f) only required "coordination" of all violations with the DOE contract official responsible for administering the Conditional Payment of Fees Clause when considering invoking the provisions for reducing contract fees. DOE does not agree and notes that the Director has been delegated the responsibility for determining the appropriate type of penalty to be applied to a given violation. When contract penalties are used in lieu of civil penalties, the Director coordinates with the responsible contracting official since the selected remedy is within the purview of the contracting officer.

Two other commenters (Exs. 28, 51) presumed that a reduction in fees under this provision could not be brought against a subcontractor due to "privity of contract" (*i.e.*, DOE does not have a relationship with the subcontractor). These commenters found this somewhat confusing because the term "contractor" was defined to include "subcontractor." DOE requires contractors to flow the requirements of this rule down to their subcontractors. Thus, if DOE elects to reduce the contractor's fee, the contractor could in turn penalize the subcontractor. As noted previously, however, a more likely scenario is that DOE would simply choose the civil penalty option.

As a general matter, DOE intends to use civil penalties as the remedy for most violations where DOE may elect between remedies. DOE expects to invoke the provisions for reducing contract fees only in cases involving especially egregious violations or that indicate a general failure to perform under the contract with respect to worker safety and health. Such violations would call into question a contractor's commitment and ability to achieve the fundamental obligation of providing safe and healthy workplaces for workers because of factors such as willfulness, repeated violations, death, serious injury, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls. Because such violations indicate a general failure to perform under the contract with respect to worker safety and health, where both remedies are available and DOE elects to use a reduction in fee, DOE would expect to reduce fees substantially under the *Conditional Payment of Fee* clause.

Section 234C.d. of the AEA imposes three specific limitations on DOE's authority to seek monetary remedies. Specifically, DOE may not (1) both reduce contract fees and assess civil penalties for the same violation of a worker protection requirement; (2) with respect to those nonprofit contractors specifically listed as exempt from civil penalties for nuclear safety violations in subsection d. of section 234A of the AEA, assess an aggregate amount of civil penalties and contractor penalties in a fiscal year in excess of the total amount of fees paid by DOE to that nonprofit entity in that fiscal year; and, (3) assess both civil penalties authorized by section 234A (nuclear safety and radiological protection regulations) and those authorized by section 234C (worker safety and health regulations) for the same violation. These statutory limitations are set forth in sections 851.5(c), (d) and (e) of the rule.

DOE received six comments on section 851.5(c), two comments on section 851.5(d), and no comments specific to section 851.5(e). Several of the comments on section 851.5(c) relate to the imposition of civil or contract penalties. One commenter (Ex. 15) pointed out that DOE is prohibited from using both civil penalties and contract penalties thus supplemental proposed section 851.9(c) should replace the word "may" with "shall" in the phrase "DOE shall not penalize a contractor * * *" DOE disagrees with this commenter since "may not" means "is not permitted."

Another commenter (Ex. 13) felt that the criteria used to make the determination for imposing the civil penalty rather than reducing contract fees should be embedded in the rule. DOE has not adopted this suggestion. Under the final rule, the decision to use either civil penalties or contract penalties is at the discretion of the Director and is subject to the specific circumstances of each situation. The Director will coordinate with the appropriate contracting official when deciding upon the appropriate penalty method. DOE believes that attempting to predict and develop mandatory criteria encompassing all potential circumstances in this rule would be unnecessarily restrictive and counter to the provision of the statutory requirement for flexibility and discretion in the enforcement of this rule.

Another commenter (Ex. 48) recommended revising this section to state that a contractor cannot be penalized under sections 851.5(a) and (b) for the same violation even if such violation is addressed under another DOE rule, regulation, or order contained in the contractor's contract. The commenter suggested that although supplemental proposed section 851.9(c) attempts to prevent dual (contract and civil) penalties for the same violation, such "double jeopardy" could exist if DOE codifies DOE Order 440.1A. DOE believes this commenter's concern is unfounded. The statute is clear on this issue and the final rule retains the original provision to prevent the use of civil and contract penalties for the same violation.

One commenter (Ex. 54) questioned DOE's decision not to subject contractors to both civil and contract fee reduction penalties for the same violation. The commenter cited the National Academy of Public Administration (NAPA) studies, which show that bonuses were not effectively linked to safety and health performance. DOE notes that, as was described previously, the statute specifically prohibits DOE from imposing both contract and civil penalties for the same safety and health violation.

A second commenter (Ex. 37) suggested expanding supplemental proposed section 851.9(c) in the final rule to avoid imposing a fine when a

contractor earns less than the available fee as a result of a safety and health incident. DOE does not believe an expansion of the limitation is needed. A civil penalty can only be applied if violation of the rule exists. If this violation resulted in an injury, final rule section 851.5(c) would prevent DOE from implementing both civil and contract penalties for the same violation. DOE notes, however, that if an injury resulted from a violation, DOE would consider this fact, as well as the severity of the injury, in determining the amount of penalty.

Referring to the section 851.3 definition of "contractor" as it applies to section 851.5(c), the same commenter (Ex. 37) inquired what DOE expects of "affiliates." To ensure that responsible parties such as an affiliate are held responsible for the safety and health of workers, and to maintain consistency with the duties and responsibilities set forth in 10 CFR part 820, DOE is retaining the reference to affiliated entities in the definition. It is important to note, however, that DOE will consider enforcement actions against any and all contractors associated with a violation. All subcontractors and suppliers of an indemnified contractor are considered indemnified contractors, and as such, are subject to either civil penalties or contract penalties.

The two comments related to section 851.5(d) were both received from the same commenter (Ex. 29). One of the comments requested that the provision state that penalties "shall" (rather than "may") not exceed the contract fee. DOE notes that the language in the final rule "may not exceed" is consistent with the enacting legislation. DOE understands (and intends for) this language to mean that the Department is not permitted to assess an aggregate amount of civil and contract penalties against a non-profit entity under the rule in excess of the total amount of fees paid by DOE to that non-profit entity for the given fiscal year. The second comment (Ex. 29) suggested that, to the extent that DOE may assess both nuclear safety (under 10 CFR 820) and worker safety penalties (under this rule), this final rule should clarify that the penalty limit applies to an aggregate of both types of assessments. DOE notes, that the statute authorizing the assessment of civil penalties for violations of the rule does not require a limit based on total annual penalties assessed for violations of nuclear safety requirements. Therefore, this final rule does not limit total annual penalty amounts due to penalties assessed under 10 CFR 830. DOE will, however, consider this recommendation in developing an enforcement guidance supplement (EGS) for worker safety and health enforcement.

DOE notes that enforcement actions cannot be brought until the rule becomes effective, which is one year after publication in the **Federal Register**. Moreover, enforcement actions must be based on violations that take place after the effective date of the rule. Furthermore, compliance with certain requirements (such as submission of a worker safety and health program) is not required immediately upon the effective date of the rule. Of course, nothing in the rule affects the possibility of enforcement of contractual provisions in effect prior to the effective date of the rule.

Section 851.6—Interpretation

Supplemental proposed section 851.6(a) established that the Office of General Counsel would be responsible for formulating and issuing any interpretation concerning a requirement in this part. Several commenters (Exs. 11, 15, 16, 31, 36, 39, 42, 48, 54) were critical of this supplemental proposed provision which gave the DOE Office of General Counsel an exclusive role in issuing interpretations of this part. They expressed concern that DOE's interpretations of OSHA standards would conflict with existing OSHA interpretations. The commenters stated that the codes and standards of Subpart C require interpretation by a competent technical authority and suggested that DOE adopt technical interpretation procedures similar to OSHA's—that is, these commenters felt the Assistant Secretary for Environment, Safety and Health should issue all technical interpretations. Two commenters (Exs. 31, 48) suggested that DOE use the Field Office staff to assist in developing interpretations and a few commenters (Exs. 15, 16, 48) recommended that DOE adopt already existing OSHA interpretations where possible. Yet, another commenter (Ex. 29) questioned whether interpretations could be captured in the contractor worker safety and health program and approved by virtue of the CSO approval of the program.

Although DOE is of the view that the distinction between legal interpretations and technical interpretations is too vague for those terms to be used in part 851, DOE has responded to the comments by elaborating on the procedures available to members of the public who want to ask for an interpretation or who want to ask for amendments to part 851 to clarify or alter regulatory provisions. DOE has revised proposed section 851.6 and added new sections 851.7 and 851.8. Section 851.6 of the final rule, sets forth procedures for petitions to initiate generally applicable rulemaking to amend the provisions of part 851. Section 851.7 of the final rule provides for requests for interpretive rulings applying the regulations to a particular set of facts and providing an interpretation that is binding on DOE.

Section 851.8 of the final rule provides for requests for information on the standards in part 851, which may be directed to the Office of Environment, Safety and Health, Office of Health (EH–5). The responses given by EH–5 would be advisory only and would not be binding on DOE. In addition, to assist the DOE community in understanding the technical meaning or application of a specific requirement, EH–5 would continue to operate its safety and health response line to provide information on technical safety and health requirements, requirements published by OSHA, and other adopted standards. In cases where the information is related to OSHA standards, EH–5 would continue to consult the existing body of OSHA interpretations on these regulations. EH–5 would also consult with OSHA representatives if OSHA interpretations did not address a unique DOE question or circumstance.

B. Subpart B—Program Requirements

Subpart B of the final rule establishes general administrative requirements to develop, implement, and maintain a worker protection program. The worker safety and health program would serve as the blueprint through which DOE contractors can communicate a cohesive vision for how various elements making up their overall program interrelate.

As a general suggestion, one commenter (Ex. 6) recommended that supplemental proposed Subpart B be cross-walked against OSHA's 29 CFR 1910 and 29 CFR 1926 to identify potential overlaps and deviations between the OSHA standards and the proposed rule. DOE has considered the commenter's concern but believes such an effort would serve no useful purpose, as the OSHA standards do not establish provisions for a safety and health program.

Section 851.10—General Requirements

Section 850.10 establishes the general requirements for the worker safety and health program. These requirements outline the basic duties of a contractor to maintain a safe and healthful workplace, to comply with the requirements of this rule, and to develop and implement a written program. A few commenters (Exs. 37, 48, 49, 51) expressed concern that the

worker safety and health program would result in increased costs and burden of additional paperwork due to the extensive requirements of the rule. They were particularly concerned that supplemental proposed section 851.100 introduced new requirements above and beyond what is expected under existing DOE directives and felt that these requirements, along with a complicated exemption process, would result in increased costs. DOE acknowledges the concerns of these commenters and notes that the final rule has been revised to closely follow the requirements in DOE Order 440.1A. Hence, DOE believes that implementation of the final rule will result in minimal (if any) additional costs.

DOE also received comments on the subject of limited-duration contractors onsite. One commenter (Ex. 40) sought clarification that the worker safety and health program requirements applied to all contractors, including those brought in for limited-duration and limited-scope work or tasks. DOE notes that final rule section 851.1 clarifies that the worker safety and health requirements of the rule govern the conduct of contractor activities at DOE sites. This includes limited-duration contractors along with all others (with the exception of contractors performing work covered under the exclusions in final rule section 851.2).

Another commenter (Ex. 37) pointed out that limited-duration contractors will have to become familiar with a safety program foreign to them. In response to this concern, DOE believes the program is based on sound worker safety and health principles designed to protect the safety and health of workers on DOE sites. DOE sees no reason to hold one group of DOE contractors to a lesser standard of safety and health protection than others. DOE also believes that the complexity and level of effort needed to develop and implement worker safety and health program under this rule will be greatly dependent on the complexity, duration, and scope of the activities covered. As a result, DOE would expect that a limited duration contractor performing a task of limited scope would require a much simpler program than would a management and operating contractor on a large DOE facility.

A few commenters (Exs. 3, 4, 45) took issue with the requirement in supplemental proposed section 851.100(b)(3)(iii) for contractors to achieve national security missions of the DOE "in an efficient and timely manner" and deemed it inappropriate in a rule governing worker safety and health. Further, one commenter (Ex. 20) believed that implementation of the rule itself would have an adverse effect on its ability to "achieve national security missions of the Department of Energy in an efficient and timely manner." In response to these concerns, DOE modified the language to eliminate this requirement from the program provisions of Subpart B. Instead, final rule section 851.31(c)(3) provides for a national defense variance where a deviation from the letter of a safety and health standard may be necessary and proper to avoid serious impairment of national defense.

Section 851.10(a)(1) provides that, with respect to a covered workplace for which a contractor is responsible, the contractor must provide a place of employment that is free from recognized hazards that are causing or have the potential to cause death or serious physical harm to workers. A similar provision established in section 5(a)(1) of the OSH Act of 1970 (29 U.S.C. 654) is commonly referred to as the General Duty Clause and states that each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. Both OSHA and DOE currently apply this provision to workplaces covered under their respective jurisdictions.

A few commenters (Exs. 3, 4, 16) expressed concern that the phrase "responsible for a covered workplace" as applied to contractors in supplemental proposed section 851.4 could lead to confusion regarding applicability of the rule to both contractors and subcontractors. DOE has retained the language in the corresponding section 851.10(a)(1) of the final rule. DOE believes that final rule section 851.1 clearly establishes that the rule applies to contractor activities on DOE sites, and the revised definition of contractor in final rule section 851.3 is clear as to what entities are considered to be contractors.

Several commenters (Exs. 12, 16, 37) expressed concern that the DOE General Duty Clause lacked supporting guidance language, thus potentially resulting in the risk of this obligation being interpreted more severely than OSHA's General Duty Clause. These commenters suggested that guidance and case law developed by OSHA should be relied upon for determining violations and penalties under the DOE rule with defenses commonly available in OSHA enforcement proceedings equally available to DOE contractors. One commenter (Ex. 16) favored deleting the General Duty Clause altogether because, the commenter asserted, it is unattainable as a stand-alone mandatory requirement. As an alternate suggestion, if the Clause was not deleted, the same commenter concurred with two other commenters and recommended including the "full context of the General Duty Clause as used by OSHA" in the rule. Specifically, the commenter felt the provision should state that the Clause only applies where there is no standard and should list the four elements required by OSHA to prove a violation. DOE believes that the language used in final rule section 851.10(a)(1) for the General Duty Clause is consistent with the language established in the OSH Act and parallels that used in DOE Order 440.1A. As a result, DOE believes that its contractors are intimately familiar with this provision. However, to address these comments and to assist in consistent enforcement of the rule, the DOE Office of Price-Anderson Enforcement intends to prepare enforcement guidance supplements (EGSs) to provide guidance on interpretation of the General Duty Clause, consistent with OSHA guidance on the topic.

DOE received several comments on the terminology used in supplemental proposed section 851.100(a) to refer to hazards. The majority of the commenters on this issue (Exs. 11, 28, 29, 39, 45, 49, 51) favored retention of the term "identified hazards" to describe hazards that were within the rule. But some of these commenters (Exs. 11, 29, 39, 49) suggested inclusion of additional terminology like "potential hazards," "unprotected hazards," and "inherent hazards that are controlled" to ensure a better understanding of the types of hazards covered under the provision. A few commenters (Exs. 28, 45, 51) favored deleting the term "recognized hazards" from the text asserting that workers could only be protected from "identified hazards." One commenter (Ex. 27) recommended that DOE provide a list of specific hazards that a place of employment should be free of to preclude subjective interpretations of the types of recognized workplace hazards that could cause or be likely to cause death or serious bodily harm.

DOE has carefully considered these comments and has simplified section 851.10(a)(1) of the rule to require contractors to provide a workplace free of recognized hazards that are causing, or have the potential to cause, death or serious physical harm. Also, as discussed previously, DOE has removed the provision in supplemental proposed section 851.100(a)(2). Final rule sections 851.21(a) and 851.22(a) further clarify

that, as part of the contractor's worker safety and health program, procedures must be established that contractors will use to identify existing and potential workplace hazards and evaluate, prevent, and abate associated risks.

With respect to hazard protection implications of the General Duty Clause, several commenters (Exs. 20, 31, 36, 39, 42, 49) asserted it was impossible to provide a workplace "free" of hazards without stopping work. Some of these commenters (Exs. 31, 36, 39, 42) suggested rewriting the provision to require the workplace to be "free from uncontrolled or unmitigated hazards." DOE has elected to retain the original language consistent with the provisions of DOE Order 440.1A and OSHA's General Duty Clause and will provide appropriate implementation and enforcement guidance. Two other commenters (Exs. 20, 42) questioned the definition of the term "adequately" in the context of the phrase "adequately protected from identified hazards" in supplemental proposed section 851.100(a)(2) and similar language in section 851.4(b). As previously discussed, DOE believes "adequate protection" is a clear standard that has been used in other context and recognizes the need to protect workers from all identified hazards.

Several commenters (Exs. 5, 16, 29, 48) took issue with the phrase, "likely to cause death or serious bodily harm" in section 851.10(a)(1). One commenter (Ex. 5) felt that the phrase, as used in supplemental proposed sections 851.100(a) and 851.4(a), implied that only violations that could result in death or serious bodily harm would result in fines or penalties. This of course is not the case. Section 851.5 of the final rule clarifies that contractors are subject to civil or contract penalties for any violations of any requirements of this rule. As specified in Appendix B section IX.b.2 and 3, however, DOE will consider the severity of the hazard posed to workers in determining the amount of the penalty imposed. The other commenters (Exs. 16, 29, 48) argued that the phrase was too subjective and had posed enforcement problems for OSHA in the past. These commenters felt that a change in language or a definition of the term "serious bodily harm" was needed to avoid confusion. DOE has modified this language slightly in final rule section 851.10(a) to replace "serious bodily harm" with "serious physical harm." This change in terminology is consistent with the language in DOE Order 440.1A. DOE believes that this provision (and language) has been applied successfully through the Order for the past decade and that, as a result, contractors are intimately familiar with the language.

Section 851.10(a)(2) requires the contractor to ensure that work is performed in accordance with all applicable requirements of Part 851 and with the worker safety and health program for the workplace. One commenter (Ex. 37) expressed concerns about potential penalties that could result from failure to comply with the worker safety and health program. Specifically, the commenter was concerned that non-compliances with any component of a contractor's worker safety and health program (even those outside the requirements of the rule) could result in civil penalties. This commenter believed that enforcement against provisions of a contractor's program that go above and beyond the requirements of the rule will lead contractors to adhere only to the minimum requirements outlined in the rule and will result in a watered-down worker safety and health program. This commenter argued that only non-compliances with specific worker safety and health requirements in the rule should result in civil penalties. DOE disagrees and believes that the requirement for contractors to develop and implement an approved program makes compliance with the provisions of the program enforceable under the rule. DOE expects that not enforcing these requirements would result in ineffective programs that are not fully implemented. DOE also notes that a contractor's proactive safety and health efforts will be considered in determining the level of penalty associated with a violation and believes that this will continue to compel contractors to develop and implement effective programs.

Section 850.10(b)(1) specifies that the written program must describe how the contractor will comply with the requirements in Subpart C that are applicable to the hazards associated with the contractor's scope of work. Two commenters (Exs. 16, 48) expressed concern that excess paperwork would be generated due to the Subpart C requirements to develop numerous functional area sub-plans in the worker safety and health program. The commenter suggested that these Subpart C requirements duplicated the Subpart B requirement specifying effective implementation of supplemental proposed Subpart C in the written worker safety and health program. DOE agrees with these comments. Section 851.10(b)(1) of the final rule requires contractors to establish a written worker safety and health program that must describe how the contractor will comply with the requirements in Subpart C that are applicable to its scope of work. In addition, final rule section 851.24 requires contractors to take a structured approach to their worker safety and health program and include provisions for the applicable functional areas in the worker safety and health program. DOE believes that this integration of requirements will reduce excess paperwork.

One commenter (Ex. 16) expressed concern that the language, "requirements * * * applicable to the hazards identified for the workplace" in supplemental proposed section 851.4(c) was confusing. The commenter noted that the standards incorporated into Subpart C already included a clear statement of scope and questioned whether the statement in supplemental proposed section 851.4(c) referred to these scope statements or to some other different scope determinations, such as an agreed-upon set of Work Smart Standards. DOE intends for this phrase—revised in section 851.10(b)(1) of the final rule to read, "applicable to the hazards associated with the contractor's scope of work"—to refer to the individual scope of the standard or regulation for those standards specified in the final rule section 851.23. In the case of the functional area requirements specified through final rule section 851.24, this phrase applies to the specific topic covered in the functional area (e.g., pressure safety requirements apply only to worksites with pressure hazards). All other provisions of final rule Subpart C apply to all work sites within the scope of the rule as specified in final rule section 851.1.

Another commenter (Ex. 54) suggested that this section should require that contractors comply with provisions of the rule establishing worker rights to information. In response to this commenter's concern, DOE notes that final rule section 851.10(b) requires contractors to comply with the requirements of Subpart C of the rule. Worker rights provisions are established in Subpart C and thus are included in this broad requirement. To further address this comment, DOE also added final rule section 851.20(a) to clarify management responsibilities and ensure worker rights.

The same commenter (Ex. 54) also suggested that the "General Requirements" section of the rule should include requirements to post appeals, variance requests, orders and all communications between the employer and DOE. DOE notes that requirements (1) a requirement to post compliance orders is established in final rule section 851.4(d); (2) requirements

to post and inform employees of variance requests are addressed in final rule sections 851.31, 851.32, and 851.33; and (3) management requirements regarding health and safety related information and communication with workers are established in 851.20(a). The rule does not establish a requirement to post appeals.

One commenter (Ex. 49) stated that the supplemental proposed requirement to identify and document situations for which an exemption is needed within the worker safety and health program in addition to identifying and documenting the same situations through the exemption process represented an unnecessary duplication of effort which should be eliminated. DOE agrees and has removed this provision from the final rule.

Several commenters (Exs. 16, 39, 42, 45, 51) sought clarification on the tailoring of worker safety and health requirements required by supplemental proposed section 851.100(b)(3). One commenter (Ex. 16) suggested it was impractical for the rule to invoke specific requirements (in Subpart C) and then specify that implementation of the specific requirements was to be tailored. The commenter pointed out that the specific requirements were either met or not met. The commenter also alluded to a potential conflict: other provisions implied that formal exemptions were needed for deviations from specific requirements of Subpart C (tailoring was included in the special circumstances for exemption criteria in supplemental proposed section 851.301). The commenter recommended that much of the required flexibility/tailoring could be built into the safety and health requirements themselves. Two other commenters (Exs. 45, 51) requested clarification on the intent and application of the tailoring with respect to enforcement actions for non-compliances. Another commenter (Ex. 42) requested that DOE provide specific criteria to determine what would constitute effective implementation of tailored worker safety and health requirements in supplemental proposed section 851.100(b)(3). One last commenter (Ex. 39) suggested that the actual level of safety protection (e.g., fire protection) be specified by DOE at the start of a contract, not refined through the exemption process by the contractor well into the contract. In response to these concerns, DOE has modified the language in the final rule to eliminate the requirement for tailoring of worker safety and health programs in Subpart B. In addition, the variance process described in Subpart D of the rule no longer includes tailoring a requirement as a rationale for a variance.

Section 850.10(b)(2) specifies that the written program must comply with any compliance order issued by the Secretary pursuant to section 851.4. One commenter (Ex. 16) objected to previous wording requiring that contractors comply with compliance orders that are "applicable to the workplace" and questioned why DOE would issue a compliance order under this rule that is not applicable to the workplace. DOE acknowledges the validity of the observation and has removed the phrase "applicable to the workplace" from the corresponding provision in final rule section 851.10(b)(2).

Section 851.11—Development and approval of worker safety and health program

Section 850.11 establishes the procedures for the development and approval of the worker safety and health program. One commenter (Ex. 27) expressed concern that vague language in the supplemental proposal did not lend itself to an enforceable rule. The commenter pointed to the provision of supplemental proposed section 851.101(a)(2)(ii) requiring contractors to "ensure worker safety and health programs are integrated and consistent" as an example to illustrates this point. DOE acknowledges the commenter's concern and has made every attempt to eliminate vague language from the final rule. However, DOE has retained certain commonly understood words and terms in order to allow interpretive latitude to suit differing situations of different DOE contractors.

One commenter (Ex. 47) stated that the establishment of standards, such as the OSHA standards, based on well-defined Federal regulations was preferable to the approved safety and health program approach proposed in the rule. The commenter noted that the OSHA approach takes advantage of over 30 years of workplace safety and health and reflects responses to hazards found in general industry. The commenter believed such an approach would also promote consistency across the DOE complex as well as accountability for specific compliance requirements. DOE acknowledges that there are some advantages to having a single set of regulations applicable to all DOE contractors. Nevertheless, there are offsetting disadvantages to having a "one-size-fits all" approach. DOE believes that the approach adopted in the final rule that includes both requirements of general applicability, supplemented by additional requirements tailored to the specific needs and concerns of a specific contractor is the superior approach to providing the optimal level of worker safety and health.

DOE received numerous comments on perceived increased costs and administrative burden that would result from establishing written worker and safety health programs. The majority of the commenters (Exs. 3, 4, 16, 19, 25, 31, 37, 38, 42, 47, 48, 49, 57) expressed concern that the requirements to develop a new discrete written program; integrate and implement that program on the worksite; and maintain, update, and regularly audit the program would result in significantly increased costs and administrative burden. Two commenters (Exs. 31, 48) specifically requested that these impacts be considered prior to codification. Several commenters (Exs. 3, 4, 37, 42, 47, 49) suggested that approval of the program should be sufficient to meet the intent of the rule without further requirements to maintain, update, and audit the program. Two commenters (Exs. 19, 57) favored elimination of these requirements from the rule altogether. Another commenter (Ex. 38) argued that these requirements were redundant, duplicating DOE's existing review and approval of contractors' environment, safety, and health activities like the Work Smart set. DOE agrees and has provided in final rule section 851.13 that in the event a contractor has established a written safety and health program, an Integrated Safety Management System (ISM) description pursuant to the DEAR Clause, or an approved Work Smart Standards (WSS) process before date of issuance of final rule, the contractor may continue to use that program, description, or process as the required worker safety and health program if the appropriate Head of the DOE Field Element approves such use on the basis of written documentation provided by the contractor that identifies the specific portions of the program, description, or process, including any additional requirements or implementation methods to be added to existing program, description, or process, that satisfy the requirements and that provide a workplace as safe and healthful as those required by the final rule requirements.

Several commenters (Exs. 39, 45, 51) stated that processes described in supplemental proposed section 851.101 represented an expansion of the scope of contractor obligations compared to current DOE contractual requirements and orders. A few commenters (Ex. 36, 39, 42) expressed concern that development of the worker safety and health plan and delays in waiting for

approval would result in increased costs. Several other commenters (Exs. 28, 37, 45, 49, 51) concurred and sought clarification from DOE on whether costs incurred by contractors and subcontractors in developing and implementing the DOE-approved worker safety and health program were allowable in accordance with FAR Part 31 and DOE Acquisition Regulation Subpart 931 principles. Costs of compliance with Part 851 are usually going to be allowable costs under the contract under FAR Part 31 and DEAR Part 970.31. Contractor costs in developing and implementing a DOE-approved worker safety and health program are routine costs that are typically allowable. An exception to cost allowability might exist, however, if the action or inaction of contractor managerial personnel is the original cause of the non-compliance, particularly if the non-compliance violates an approved integrated safety management system.

One commenter (Ex. 51) voiced the concern that the worker safety and health rule would require documentation and implementation strategies separate from those for DOE Order 440.1A and the Integrated Safety Management (ISM) Program. In response, DOE notes that the final rule is based on DOE Order 440.1A and replaces Attachment 2, "Contractor Requirements Document of the order. In addition, final rule section 851.11(a)(3) requires that the written program describe how the contractor will integrate all requirements of Part 851 with other related site-specific worker protection activity and with the Integrated Safety Management Systems (ISMS). Section 851.13(b) of the rule clarifies that contractors who have implemented a written worker safety and health program, ISM description, or Work Smart Standards process prior to the effective date of the final rule may continue to implement that program/system so long as it satisfies the requirements of Part 851. Hence, DOE believes that the integration of these existing programs with the worker safety and health program will eliminate any duplication of effort and limit any additional burden associated with the rule.

Section 850.11(a) requires contractors to prepare and submit a worker safety and health program that provides methods for implementing the requirements of Subpart C to the appropriate Head of DOE Field Element for approval within 380 days publication of the final rule in the **Federal Register,** February 26, 2007. Some commenters (Exs. 5, 13, 19, 38, 57) took issue with the need to prepare, submit, and obtain DOE approval of the written safety and health program. Three of these commenters (Exs. 19, 38, 57) asserted that the requirements for submittal, review, and approval of worker safety and health programs were not necessary to allow DOE to meet its statutory obligation under section 3173 of the National Defense Authorization Act (NDAA). One commenter (Ex. 5) suggested that the imposition of core requirements in supplemental proposed sections 851.10 and 851.100 should preclude the need for DOE to approve worker safety and health plans and supported simply adding the rule to the DOE list of applicable standards provided in management and operating contracts and other DOE contracts. Another commenter (Ex. 13) recommended that these provisions be revised to allow the worker safety and health program to be written as an overview or roadmap document, illustrating the integration of current infrastructure documents (previously created under DOE Orders 440.1A and 420 and DOE Notice 450.7). This commenter suggested that the level of oversight DOE already maintains over programs under existing contract structures justifies the submission of merely the overview document, without any of the supporting safety management program documents. DOE believes that the provisions for submission, review and approval of the written safety and health program plans are necessary to permit the Department to meet its responsibilities under section 3173 of the NDAA and the AEA to ensure a safe and healthful workplace. DOE further notes that the process strikes an appropriate balance between allowing contractors and workers to have input into the requirements, while recognizing that DOE management must be satisfied with their implementation. These programs will also be useful to DOE's enforcement office to evaluate compliance with the rule. Further, the final rule recognizes that programs are already in place and are consistent with the existing mechanism for the submission and approval of worker safety and health plans under Part 851.

DOE received numerous comments on the proposed time schedule for submission of worker safety and health programs by contractors. The general concern expressed by the commenters (Exs. 3, 4, 5, 16, 28, 29, 31, 35, 36, 39, 42, 47, 51, 57) was that the supplemental proposed section 851.101(a) requirement allowed insufficient time for an adequate submission of the written worker safety and health programs by the July 25, 2005, due date. The commenters also generally recommended modification of the due date depending on the date of issuance of the final rule. Many commenters (Exs. 13, 28, 29, 31, 33, 37, 45, 47, 49, 51, 57) offered various suggestions for the time contractors would need to prepare and submit the written worker safety and health program, ranging anywhere from 90 days to 12 months after publication of the final rule in the **Federal Register.** DOE acknowledges the validity of the commenters' concerns regarding the specific date published in the supplemental proposal and has modified the corresponding final rule section 851.11(a) to require contractors to prepare and submit the worker safety and health program within 380 days after the date of publication of the final rule in the **Federal Register.** In selecting this date, DOE took into account that the NDAA prohibits the rule from becoming effective until twelve (12) months after issuance. DOE expects contractors to begin work on their worker safety and health program immediately upon publication of the final rule and to consult with DOE during the period before the rule becomes effective. Accordingly, DOE believes it is reasonable to require submission of the worker safety and health programs no later than 380 days after publication in the **Federal Register.** In a related matter, DOE believes it is reasonable to require contractors to be in compliance with their worker safety and health programs no later than 470 days after publication.

DOE also received several questions and comments on contractor-subcontractor obligations and relationships with respect to development of the worker safety and health program. Several commenters (Exs. 13, 20, 28, 29) questioned whether subcontractors, vendors, and delivery contractors needed to submit their own worker safety and health programs or whether they were covered under the programs of their prime or management and operating contractors. One of these commenters (Ex. 20) further questioned whether employees of a subcontractor with a worker safety and health program would be covered under the subcontractor's program or that of the prime management and operating contractor. DOE generally expects that contractors with primary responsibility will develop the health and safety programs and subcontractors will follow the programs pursuant to 851.11(a)(2) and (3). However, in some cases in which a subcontractor has primary responsibility, it may be necessary and

appropriate for them to provide a supplemental program. In situations involving such overlap, contractors need to coordinate so there are clear rules, responsibilities, and procedures that result in an integrated approach to worker safety and health. As discussed previously, vendors and delivery contractors are not contractors for purposes of the rule and in general, their employees are subject to programs developed by the contractor under OSHA's regulatory authority. Nevertheless, when employees of such vendors are on DOE sites, they will benefit from the requirements put in place under Part 851.

With respect to changes in contractors due to contract competition, two commenters (Exs. 25, 27) voiced concern about the effects of a change in laboratory prime contractors and noted there was no provision in the proposed rule dealing with such an event. One of these commenters (Ex. 27) specifically suggested that given DOE's current approach of re-competing contracts, Subpart B of the rule should be modified to address potential changes in management and operating contractors—especially during the period between the effective date of the rule and the one year anniversary. Pursuant to the statutory requirements, the rule contemplates that a new contractor is required to submit and gain approval for its worker safety and health program. As a practical matter, if a prior contractor had a workable program, DOE expects that the new contractor's burden would be minimal because it could submit a similar program.

Section 851.11(a)(1) describes contractor requirements in cases where a contractor is responsible for more than one covered workplace. Under such conditions, the rule requires the contractor to establish and maintain a single worker safety and health program for the covered workplaces for which the contractor is responsible. One commenter (Ex. 5) expressed the opinion that this requirement contradicts the requirement for contractors to integrate health and safety programs with other site DOE contractors. The commenter suggested that one contractor should be responsible for the whole site, with all other users conforming to that contractor's worker safety and health program. DOE disagrees, given the complexity and diversity at some DOE sites, each contractor responsible for work at covered workplaces should coordinate with the other contractors to ensure that there are clear roles, responsibilities and procedures that will ensure the safety and health of workers at multi-contractor workplaces.

Section 851.11(a)(2) describes contractor requirements if more than one contractor is responsible for a covered workplace. This section clarifies that in such cases, each contractor must establish and maintain a worker safety and health program to cover its activities and must coordinate with the other contractors responsible for work at the workplace to ensure that individual roles, responsibilities, and procedures are established to ensure worker safety and health at multi-contractor workplaces.

One commenter (Ex. 15) recommended that the terms "integrated and consistent" in supplemental proposed section 851.101(a)(2)(ii) be replaced with "reflect a common approach and level of protection" to allow greater latitude in situations where multiple contractors are responsible for different activities in a workplace. The commenter was of the opinion that this flexibility was essential to ensure a focus on safety instead of the administrative burden of integration of multiple prime contractors. DOE agrees with this commenter and has revised section 851.11(a)(2)(ii) of the final rule to require that contractors "coordinate with the other contractors responsible for work at the covered workplaces to ensure that there are clear roles, responsibilities, and procedures that will ensure the safety and health of workers at multi-contractor workplaces."

Several commenters (Exs. 13, 28, 45, 51) sought clarification on this provision, asking which contractor would be responsible for submission of the written worker safety and health program on multi-contractor sites requiring integration and coordination. Three of these commenters (Exs. 28, 45, 51) recommended that each contractor must maintain a worker safety and health program for the workplaces for which each is responsible at a DOE site where multiple contractors are responsible for covered workplaces. DOE agrees with these three commenters that this was the intent of the supplemental proposal. DOE notes that the final rule in section 851.11(a)(2) requires each contractor with responsibility for a covered workplace to establish and maintain a worker safety and health program for the workplaces for which they are responsible. Hence, at multi-contractor sites, each contractor is responsible for submitting its own worker safety and health program for the covered workplaces for which it is responsible.

Some commenters raised concerns about site responsibility issues at multi-contractor sites. Two commenters (Exs. 3, 4) asserted that the stipulation that there may be more than one contractor responsible for a covered workplace contradicts other provisions of the rule and will lead to confusion in application. Two other commenters (Exs. 29, 49) questioned whether the management and operating contractor at any given work place would have any oversight, reporting, or other responsibility for work conducted at that site by another organization under direct contract to DOE. Another (Ex. 40) sought clarification of the issue of decentralized vs. centralized responsibility on DOE work sites and DOE assignment of contractor responsibilities for health and safety requirements (e.g., traffic safety) across entire DOE sites. To address these concerns, DOE expects to publish enforcement guidance supplements (EGSs) as discussed in the section-by-section discussion for Subpart E to describe DOE's planned enforcement approach on multi-employer sites. DOE will base these EGSs on similar OSHA multi-employer worksite enforcement policies implemented in private industry.

DOE received numerous comments on the subject of consistency of worker safety and health programs on multi-employer worksites. The main issues of concern included establishing a basis for ensuring consistency and the lack of contractual and legal relationships between contractors. The main recommendations offered to DOE by commenters in resolving these concerns were for DOE to act as the coordinating authority and for DOE to review and make use of the OSHA Multi-Employer Policy in the DOE rule. Each of these issues is discussed in more detail below.

With respect to establishing a basis for ensuring consistency of worker safety and health programs on multi-employer work sites, one commenter (Ex. 45) expressed concern that the language in the proposed rule was subjective, lacked measurement, and was an expectation, not an enforceable requirement. The commenter was of the opinion that consistency should arise from the workforce and be handled in good faith by employers. The commenter further remarked that invoking consistency on multi-employer worksites through enforcement of a standard left the employer at risk for compromising their safety program and made DOE responsible for the success or failure of implementation and performance.

Several other commenters (Exs. 16, 39, 47, 48, 49, 58) raised the issue of the

inherent difficulty in coordinating and integrating worker safety and health plans at multi-employer sites due to lack of contractual relationships between contractors or the legal authority to modify another contractor's program. The same commenters (Exs. 16, 39, 47, 48, 49, 58) recommended that the coordination, accountability, and authority for various worker safety and health plans among multiple contractors on a site should rest with DOE since DOE directly contracts with these entities and maintains contractual authorities. Alternatively these commenters were in favor of deletion of this provision from the rule altogether. One commenter (Ex. 48) specifically requested definition of and guidelines for integration and consistency and suggested that the final rule establish who would determine when integration and consistency requirements were adequately met on multi-employer sites.

Other commenters (Exs. 49, 58) specifically recommended that issues such as those described in the preceding paragraphs would best be addressed through the application of OSHA's Interpretation of Multi-Employer Worksite Citation Policy regarding creating, controlling, exposing, and correcting employers. As discussed elsewhere, DOE intends to prepare an enforcement guidance supplement that will provide guidance on multi-employer worksites that is consistent with current OSHA policy.

One commenter (Ex. 39) felt that the requirement to coordinate programs with other contractors responsible for work on the covered workplace did not address the issue of application of worker safety and health requirements to private entities benefiting from reuse of former Federal facilities on DOE sites. For instance, the DOE site contractor may still provide emergency response and security services to the private entity, but the private entity would not be subject to the rule. The commenter sought clarification of how the emergency response and security personnel would be protected in such instances. In response, DOE notes that emergency response and security personnel would be covered by their respective worker safety and health program regardless of their location on a DOE site. In facilities leased to community reuse organizations and their tenants, safety and health provisions of the lease agreement would apply to the leasee.

Two commenters (Exs. 31, 35) expressed concern about the potential conflict between the proposed rule's requirement to tailor the worker safety and health program and the need to integrate the contractor's worker safety and health programs at a DOE site. One commenter (Ex. 31) was of the opinion that the requirement for integration between contractors, which would intrinsically seek a majority consensus, was in conflict with the requirement to tailor the worker safety and health program to the work environment. The other commenter (Ex. 35) offered the observation that even though the purpose and basis of the worker safety and health programs of different contractors may be the same, the details of each worker safety and health program must be tailored to the specific work to ensure effective implementation. DOE recognizes that the proposed requirement to "integrate" worker safety and health programs created some confusion during the public comment period. As a result, the term has been removed from final rule section 851.11(a)(2)(ii). This section now clarifies that contractors must coordinate with other contractors onsite to ensure clear delineation of roles, responsibilities, and procedures.

DOE also received numerous comments that argued that the requirement for integration and coordination would result in increased costs and additional administrative burden. The commenters (Exs. 13, 19, 31, 35, 36, 39, 42, 48) expressed concern that integration and coordination between different contractors on a DOE site would be costly and burdensome due to differing missions and management systems and complex inter-relationships. One commenter (Ex. 39) specifically requested that DOE modify standard contract terms to include the requirement to coordinate with other onsite contractors in order to allow contractors to be reimbursed for costs associated with the coordination activity. DOE disagrees that contract modifications are required since contractors on a site currently operate their worker safety and health programs with or without conflict. Conflicts are normally resolved when they occur. DOE expects that the level of adjustments needed to coordinate worker safety and health programs will be minimal and that wide-scale modifications will not be necessary.

DOE received several comments on the issue of ensuring subcontractor compliance as required by supplemental proposed section 851.100(b)(9). These commenters (Exs. 16, 28, 31) raised concerns regarding adequate means of enforcing compliance, potential increased costs, and accountability concerns. One commenter (Ex. 16) voiced the concern that flow-down requirements and monitoring and penalizing subcontractors for failure to comply were insufficient to ensure compliance. The commenter recommended that the rule section be "rewritten to include quantifiable intent." Two commenters (Exs. 28, 31) asserted that the requirement for contractors to ensure subcontractor compliance would result in the need to re-negotiate legal contracts between prime contractors and subcontractors and lead to increased costs. As discussed above, DOE intends to address these questions in appropriate EGSs on multi-employer worksites consistent with current OSHA policy. However, DOE notes that all contractors, including subcontractors, are responsible for complying with Part 851 to the extent they are responsible for a covered workplace.

In another area related to subcontractor compliance, two commenters (Exs. 37, 47) were concerned that increased contractor oversight and the potential penalties would have a negative impact on subcontractors and could discourage some subcontractors from performing work on DOE sites. DOE is required by statute to implement a worker safety and health program that covers all contractors, including subcontractors.

One commenter (Ex. 29) requested clarification that the need to coordinate and integrate programs applied only to multi-employer sites, not contractor/subcontractor relationships. This commenter argued that contractors should require subcontractors to conform to their programs. They should not be required to integrate their programs with their subcontractors'. DOE's intent with this provision is not to limit the contractor's contractual authority, but rather to ensure that safety and health program roles, responsibilities, and procedures are clearly understood by all contractors on a covered worksite. In fact, DOE recognizes that requiring subcontractors (through appropriate subcontract mechanisms) to conform to the contractor's safety and health program is an effective way to meet the intent of final rule section 851.11(a)(2)(ii).

Section 851.11(a)(3) describes the required components of the contractor's worker safety and health program. Specifically the section requires that the program describe how the contractor will comply with the requirements of Subpart C of the final rule and how they will integrate these requirements with other related site-specific worker protection activities and with the ISMS.

Several commenters (Exs. 13, 16, 25, 28, 35, 45, 51, 57) sought clarification on the nature and extent of the worker

safety and health program document and requested that DOE develop more detailed guidance on what constituted an acceptable worker safety and health program. Many of the same commenters (Exs. 27, 28, 35, 45) also questioned whether existing worker protection initiatives such as the ISM descriptions, Work Smart Standards, and "B-List" contract requirements could be used to fulfill new program requirements. Some were concerned with a potential duplication of effort and the resulting cost. One of these commenters (Ex. 28) specifically sought clarification on whether the new program was to be developed based on the outline in Subpart C and whether a collection of existing safety procedures, plans, guides, and manuals would be sufficient to meet the requirement. To address these concerns, final rule section 851.11(a)(3) requires the worker safety and health program to describe how the contractor will integrate the requirements of Subpart C of the rule with site-specific worker protection activities and with ISMS. Subpart C provides more detailed direction on the required content of the program. This required content is closely aligned with the program requirements of DOE Order 440.1A. In addition, final rule section 851.13(b) allows contractors who have implemented a written worker safety and health program, an ISM description (pursuant to the DEAR Clause), or a Work Smart Standard process prior to the issuance of the final rule, to continue to implement that program, description, or process so long as it satisfies the requirements of Part 851 and is approved by the appropriate Head of DOE Field Element. Further, the existing series of implementation guides developed to assist DOE contractors in implementing the provisions of DOE Order 440.1A also can assist in implementation of the rule. Shortly after publication of this rule, DOE anticipates publishing updated implementation guides revised to specifically address the provisions of the final rule.

Section 851.11(b) of the final rule delineates the responsibilities of the Head of DOE Field Element with respect to evaluation and approval of worker safety and health programs within 90 days of receipt of a contractor submission. This provision further establishes that the worker safety and health program and any updates will be deemed approved 90 days after submission, if not specifically approved or rejected by DOE within the approval timeframe.

One commenter (Ex. 49) sought clarification from DOE on the value of the formal worker safety and health program approval process. The commenter suggested that the requirements enforceable via the penalty process should be promulgated in the rule and other contractual requirements enforced via contractual mechanisms. The commenter also noted that each contractor's program would differ, which could lead to enforcement inconsistencies. DOE notes that the enabling legislation makes both civil and contract penalty options available to DOE. Civil penalties can be used only to enforce regulatory requirements. As discussed in connection with implementation, regulatory enforcement necessarily takes into account whether a contractor has undertaken necessary and sufficient actions to implement the requirements established by the rule.

Two commenters (Exs. 5, 51) sought clarification on the reason for DOE approval of contractor worker safety and health programs. One commenter (Ex. 5) asserted that if DOE must approve all worker safety and health programs and supplemental proposed Subpart E provides that only a violation of 10 CFR 851 could result in an enforcement actions, then DOE would be liable if it approved a program that inappropriately excluded an element of the health and safety program. Another commenter (Ex. 51) did not agree that DOE approval of the health and safety plan was required, since DOE did not adopt responsibility or liability for the content of the plan but instead would force contractors to make changes to plans and field actions. The commenter suggested that submission of a comprehensive safety and health program should be sufficient and should include construction health and safety issues. The commenter also noted that DOE approval of lower-tier implementing documents should not be mandated or codified. DOE believes that approving worker safety and health plans is an essential element in carrying out its statutory responsibilities concerning worker safety and health. DOE notes the rule does not require approval of "lower-tier" implementation decisions. As previously discussed, if these contractor decisions do not result in proper implementation of the rule, the contractor will be subject to enforcement actions, including the imposition of civil penalties.

Two commenters (Exs. 13, 42) sought the inclusion of criteria in the rule for DOE review and approval of the written worker safety and health programs. These commenters felt that such criteria were needed to ensure consistent worker safety and health programs across the DOE complex, to ensure a consistent review and approval processes by DOE field offices, and to minimize the level of effort required to develop and obtain program approval. These commenters sought specific guidance on the DOE Field Office review and approval process; the criteria for determining the appropriate standards needed to achieve the required level of protection; and clarification regarding who had the burden of demonstrating "equivalency." DOE notes that Subpart C of the final rule now provides more specific detail on the required content of the program. This detail is consistent with DOE Order 440.1A and, as a result, is familiar to DOE contractors. In addition, DOE will develop and publish appropriate implementation guidance to supplement these requirements and to assist DOE Head of Field Elements.

One commenter (Ex. 48) sought clarification of the role of local DOE field offices in the approval and maintenance of the worker safety and health program. DOE has clarified this point in final rule section 851.11(b), which states that the appropriate Head of DOE Field Element is responsible for review and approval of the submitted worker safety and health program. For further clarification, DOE has defined the term "Head of DOE Field Element," as used in this rule in final rule section 851.3.

Several commenters (Exs. 13, 28, 29, 39, 45, 51) suggested that the submitted program should be considered approved if DOE does not act within the 90-day time frame allotted for approval, and the program should be implemented as submitted. One commenter (Ex. 13) specifically provided 10 CFR 830 as a model for language in this provision. This commenter noted that, according to 10 CFR 830, if DOE fails to approve or reject the required plan within the prescribed period, the existing plan is by default approved. Another commenter (Ex. 48) proposed an alternate time period for approval and suggested that plans should be considered approved by the Cognizant Secretarial Officer if they are not specifically rejected within 180 days of submission. A few commenters (Exs. 25, 29, 45, 48) raised the doubt that even if a contractor submitted a worker safety and health program on schedule, any inability of DOE to approve the program could translate to a site or laboratory being completely shut down which in turn would place a significant risk upon the contractors. In response to these comments DOE has modified the final rule to clarify in section 851.11(b) that worker safety and health programs will deemed approved 90 days after

submission if not specifically approved or rejected by the appropriate Head of DOE Field Element.

One commenter (Ex. 5) expressed concern that if DOE required approvals and annual updates to the worker safety and health program, then the Voluntary Protection Program (VPP) should be eliminated since there would be no voluntary portion of the safety and health program. DOE disagrees with the commenter. The DOE VPP status requires contractors to go beyond simply complying with the requirements of this rule. VPP promotes effective, comprehensive worksite safety and health and encourages employers to perfect existing programs (continuous improvement). In the VPP, management, labor, and DOE establish cooperative relationships at workplaces that have implemented a comprehensive safety and health management system. Approval into VPP is DOE's official recognition of the outstanding efforts of employers and employees who have achieved exemplary occupational safety and health programs.

Yet another commenter (Ex. 37) questioned how the prime contractor would obtain timely DOE approval of changes to the worker safety and health program when unforeseen emergencies were involved. The commenter referred to the aging infrastructure of some DOE facilities, which may necessitate emergency repairs to utilities and immediate mitigation under direct onsite safety coordination without the luxury of written safety planning. In response to this concern, DOE notes that the intent of its program is to establish implementation procedures for identifying and controlling hazards. The program itself does not list of all hazards with control mechanisms for each hazard. Therefore, the program does not need to be updated each time a new hazard is identified; rather, it must be updated only when a new process is added or a different type of hazard is introduced (or another significant change occurs) that is not effectively addressed through the procedures established in the program.

Section 851.11(b)(1) of the final rule stipulates that beginning one year after the date of publication of the final rule, no work may be performed at a covered workplace unless an approved worker safety and health plan program is in place for the workplace. DOE received numerous comments about work stoppage on sites due to lack of approval of worker safety and health programs. Two commenters (Ex. 5, 29) questioned if the "entire contractor work ceases" if DOE does not approve a contractor's worker safety and health program. One of these commenters (Ex. 5) sought clarification of what would occur while approvals were pending. The rule makes it clear that a contractor cannot proceed, if it has not obtained approval for its program. This is necessary to ensure workplace safety and health. Nevertheless, to decrease any unreasonable burden, the rule provides transition for existing programs.

Several commenters (Exs. 33, 39, 38, 47, 57) expressed concern that the proposed requirement for a complete work stoppage on sites due to a lack of an approved worker safety and health program failed to take several important issues into consideration. Two of these commenters (Exs. 38, 57) asserted that a complete work stoppage would be an untoward response to a limited set of pending issues requiring resolution (such as an application for an exemption) prior to program approval. These commenters felt that the supplemental proposal ignored the need to continue certain site activities to ensure that facilities and equipment were maintained in a safe configuration. The same commenters also noted that complete work stoppage would give rise to shutdown, maintenance, and startup costs, with no benefit to DOE or the workers. Two commenters (Exs. 38, 47) recommended substituting a more reasonable and graded approach for the proposed ban on all work activities should the provision be maintained. DOE has carefully considered these comments, but has not revised this provision of the rule. Contractors should already have a worker safety and health program in place under existing contract requirements. DOE believes that 470 days is sufficient for contractors to come into compliance with the rule, including adjusting their existing programs if needed.

A few commenters (Exs. 33, 39, 45, 47) expressed the concern that this provision of the rule fails to acknowledge that many sites have approved ISM, Voluntary Protection Program, and human performance programs already in place that meet or exceed DOE requirements for worker protection. The commenters recommended that a mechanism for approving programs that have undergone ISM verification should be included in the rule. DOE agrees with these commenters and has clarified in final rule section 851.13(b) that contractors who have implemented a written worker safety and health program or ISM description or Work Smart Standard process prior to the effective date of the final rule may continue to implement that program/system so long as it satisfies the requirements of Part 851 and is approved by the appropriate Head of DOE Field Element.

One commenter (Ex. 37) suggested that provision should be made in the rule to give contractors more time if their worker safety and health program approvals were delayed due to a DOE backlog in granting exemptions. This commenter felt that supplemental proposed section 851.100(b)(5) required approved exemptions as a component of the worker safety and health program. The commenter questioned how Congress would respond to a facility shutdown even though the facility was in full compliance with all standards existing when the 2002 legislation was passed. DOE does not intend for program approval to be contingent upon approval of variances. To clarify this point, DOE has removed the provision of the supplemental proposal that required that contractors identify conditions that require an exemption in the program. Further, as discussed in detail in the section-by-section discussion of Subpart D, DOE does not anticipate that a large number of variances will be requested under this rule.

Some commenters (Exs. 6, 29, 31) questioned whether EH had the resources to review and concur or comment on contractor programs from across the DOE complex in time to preclude work stoppage. One commenter (Ex. 29) requested that the Cognizant Secretarial Officer (CSO) approval process be detailed in the rule, and questioned whether there would be onsite review and validation by an external DOE team similar to the ISM verification process. This commenter also questioned how the contractor would be notified if the Cognizant Secretarial Officer delegated approval authority to the Site Manager. DOE acknowledges these concerns and has streamlined the approval process in the final rule. Specifically, final rule section 851.11(b) establishes the Head of DOE Field Element as the approval authority for worker safety and health programs. The rule no longer requires review and consultation by the Assistant Secretary for Environment, Safety and Health, nor does it provide for delegation of approval authority; however, contractors must send copies of their approved programs to the Assistant Secretary under final rule section 851.11(b)(2). DOE does not envision the use of external DOE onsite review and validation teams as part of the program approval process. As discussed in the section-by-section discussion for Subpart E, DOE will use onsite inspections as a tool to verify program

implementation and compliance with other provisions of the rule.

Many commenters (Exs. 28, 39, 45, 51) sought clarification on the specific contract provision DOE expects to use to direct a contractor to stop work, pointing out that a contractor may not stop performance on a contract without direction from the DOE contracting officer per DEAR 970.5204–2(g). DOE notes that the stop work authority in the regulation is independent from the contract's provisions. Compliance orders by the Secretary represent an exercise of AEA authority, while stop work authority in subpart C is a regulatory mechanism.

Section 851.11(b)(2) of the final rule describes contractor responsibilities with respect to distribution of the approved worker safety and health program to the DOE Assistant Secretary for Environment, Safety and Health. As discussed above, this provision replaces the proposed rule's provision requiring the Assistant Secretary's consultation during the program approval process.

Section 851.11(b)(3) of the final rule describes contractor responsibilities with respect to distribution of the approved worker safety and health program to affected workers or their designated worker representatives upon written request. DOE's intent with this requirement is to facilitate implementation and enforcement of the rule. In addition, this section ensures that workers and their representatives have access to information related to the protection of their health during the performance of DOE activities. DOE added this provision to the final rule in response to commenters' requests to clarify the management responsibilities and worker rights specified in final rule section 851.20. These commenters' concerns are discussed in greater detail in the section-by-section discussion for final rule section 851.20.

Section 851.11(c)(1) of the final rule describes contractor requirements for submission of periodic updates to the worker safety and health program to the Head of DOE Field Element for review and approval whenever a significant change or addition to the program is made or a change in contractors occurs.

One commenter (Ex. 29) requested clarification of what would constitute "significant changes or additions" to the worker safety and health program. The commenter inquired whether worker safety and health programs had to be submitted if significant changes occurred before the annual review cycle. In response, DOE notes that these terms are subjectively applied in determining if an update to the program is needed. DOE does not envision a "cookbook" list of changes that would automatically trigger a program update. Rather, DOE intends for contractors to consider work-site or process changes in light of their current programs and determine if their programs effectively address the change. If the answer is no, then the change would be considered "significant" and thus necessitate an update to the program.

DOE received numerous comments on the supplemental proposal requirement for triennial (36-month) internal audits of the worker safety and health program. One commenter (Ex. 30) supported the provision but noted that the results should also be transmitted to employees and their representatives. The majority of the commenters (Exs. 5, 13, 16, 28, 29, 31, 35, 36, 39, 42, 48, 49), however, disagreed strongly with the need for this requirement citing reasons ranging from a lack of a clear specification of the required scope of the audit to concerns regarding administrative burdens and increased costs. DOE has considered and agrees with many of these concerns; accordingly, DOE has deleted the provision requiring 36-month internal audits and audit report submission from the final rule.

Section 851.11(c)(2) of the final rule describes contractor requirements for annual submission of updates to the worker safety and health program or, alternatively, a letter stating no changes are necessary in the currently approved program. One commenter (Ex. 49) recommended that the requirement for an annual submission be eliminated from the rule. The commenter argued that once a worker safety and health program is developed, there should be no requirement to submit an annual update. The commenter also felt this requirement was inconsistent with 10 CFR 835, which only requires DOE approval of the Radiation Protection Program if changes decrease the effectiveness of the program. The commenter asserted this requirement appeared to be a purely paperwork requirement, which added no safety and health benefit to the process. DOE does not agree with this comment. The scope of the radiological work environment is very specific and controls are well-defined. On the other hand, the non-radiological work environment is transitory in nature and covers a wide range and large number of hazards. For this reason, DOE contractors must annually assess the nature of the workplace and the effectiveness of their programs. Two other commenters (Exs. 3, 4) asserted that the requirement for annual evaluation and updating of the worker safety and health program was inconsistent with practices in general industry. DOE disagrees with these commenters and points out that while there is no standard that requires private sector employers to update their safety and health programs annually, it is a common practice among responsible employers and is consistent with the protection DOE wants to afford its contractor employees.

One commenter (Ex. 29) requested clarification on whether the annual submittal was based on the calendar or fiscal year. Unless otherwise specified, annual updates should coincide with the anniversary date of the initial approval. This will alleviate having all updates being submitted at the same time.

Two commenters (Exs. 36, 42) sought clarification of whether the rule required DOE approval of the annual submission and if so, within what time periods. The commenters expressed concern that the requirement for annual approval could result in work stoppages as contractors wait for approvals. One of these commenters (Ex. 36) proposed that the rule should require DOE approval within 30 days after contractor submittal. Under 851.11(b) of the final rule, any updates must be approved 90 days after submission. Until the updates are approved, a contractor should continue to operate under its prior plan.

Several commenters (Exs. 19, 31, 36, 39, 42, 48) expressed concern that additional substantial costs would be associated with meeting the requirement for annual reviews. These commenters recommended that impacts be considered prior to codification. DOE prepared an Economic Analysis for the final rule. The analysis was conducted at 8 DOE sites (representatives of each type facility) and based its cost estimation methodology on a comparison of the requirements of this Part (10 CFR 851) with DOE Order 440.1A. Overall, the bulk of these costs are attributable to requirements for converting medical records to electronic format, the compiling and submitting of written safety and health plans, and the submission of annual updates. Several sites indicated substantial costs for maintenance of complete and accurate hazard and exposure information, for communication of safety information to labor unions, and for implementation of the electrical safety program. It is estimated that the annualized costs for 25 DOE contractor sites to comply with the final rule are, therefore, likely to fall in the range between $9.7 million (low estimate) to $24.8 million (high estimate). Other commenters (Exs. 5, 45, 51) proposed use of the Voluntary Protection Program Star site annual report and ISM annual self-evaluations

to meet the requirement for annual evaluations. The commenters also proposed integration of the submissions associated with the worker safety and health program proposed in this rule with the requirements of these other programs in order to reduce costs. DOE notes that a contactor may use these programs if they meet the requirements of this rule, and are approved by the Head of DOE Field Element.

Section 851.11(c)(3) of the final rule describes contractor requirements for incorporating changes, conditions, or standards into the worker safety and health program as directed by DOE. Two commenters (Exs. 15, 27) suggested that to ensure consistency between this provision and existing DEAR clauses and contract terms and conditions, the following language should be added to the final rule: "* * * consistent with DEAR 970.5204–2, Laws, Regulations and DOE Directives (December, 2000) and associated contract clauses." Similarly, other commenters (Exs. 16, 36, 42, 49) questioned the appropriateness of this provision in a regulatory enforcement document. DOE notes that Part 851 establishes regulatory requirements and is independent of any contractual requirements. Accordingly, the obligation of a contractor to implement the regulatory requirements in Part 851 is not dependent on the existence of a contractual obligation. In response to the comments, DOE has modified final rule section 851.11(c)(3) to make it clear that any contractual action directed by the Department must be consistent with these regulatory requirements.

A few commenters (Exs. 16, 42, 48) sought clarification of how the potential changes envisioned in this section of the rule would be directed. One commenter (Ex. 42) recommended that changes to the worker safety and health program plan be agreed to by both the contractor and DOE. Another commenter (Ex. 48) questioned whether only the Cognizant Secretarial Officer would be authorized to direct the incorporation of standards into the contractor's worker safety and health program. A third commenter (Ex. 16) sought clarification of whether DOE direction would emanate from the same organizational level that is specified for approval of exemptions. DOE acknowledges these concerns and clarifies its intent with the provision under final rule section 851.11(c)(3) that the Head of the DOE Field Element will direct the incorporation of changes into contractors' worker safety and health programs consistent with the approval authority established in section 851.11.

Section 851.11(d) of the final rule requires the contractor to notify any associated labor organizations of the development and implementation of the worker safety and health plan and updates and, upon request, bargain with the labor organizations on implementation of Part 851 in a manner consistent with Federal labor laws. This section is included to ensure that worker safety and health programs are developed and implemented consistent with the requirements imposed by the National Labor Relations Act (NLRA) on employers in this context, and not to create obligations in excess of those that would be found in such circumstances under the NLRA.

DOE included this provision in the final rule in response to concerns raised about the need for involvement of workers or worker representatives in the development and implementation of contractor worker safety and health programs. Specifically, one commenter (Ex. 54) expressed concern that supplemental proposed section 851.101 did not include the means for workers or their representatives to be involved in the development of worker safety and health programs. The means for workers or their representatives to be involved in the development and implementation of the worker safety and health programs are noted in the following sections.

Section 851.12—Implementation

Section 850.12(a) of the final rule requires contractors to implement the requirements of Part 851. Three commenters (Exs. 28, 45, 51) suggested that the worker safety and health program should include an implementation schedule, since all activities required by the program cannot be implemented upon approval—especially with respect to subcontractor implementation of the contractor's approved program. In response to the commenters' concern, DOE notes that final rule section 851.11(a) requires contractors to submit the worker safety and health program for approval within 380 days of the final publication date of the rule; final rule section 851.11(b) ensures DOE approval of the plan within 90 days of receipt of the contractor's submission; and final rule section 851.13(a) allows contractors to achieve compliance with the approved worker safety and health program within 470 days of the publication date of the rule. DOE believes this implementation schedule provides sufficient time for contractors to achieve compliance with the final rule requirements, particularly since the rule closely mirrors DOE Order 440.1A, an order that has been in place for over a decade, and contractors are familiar with its requirements.

One commenter (Ex. 42) suggested that any DOE implementation guidance to be developed for the rule should only be enforceable if a contractor elects to place those requirements in the worker safety and health program plan submitted to DOE. DOE agrees with this suggestion and confirms that worker safety and health guidance materials would only be enforceable against a DOE contractor if included in the contractor's approved program. DOE notes that a guidance document is intended to be informative but not mandatory. However, while a contractor need not follow the approach in a guidance document, the contractor does have an obligation to regulatory requirements in the rule and the worker safety and health programs approved by DOE by taking actions that are necessary and sufficient to achieve full compliance. Failure to take such action could be grounds for an enforcement action.

Section 851.12(b) of the final rule further notes that nothing in Part 851 precludes contractors from taking additional protective action determined necessary to protect the safety and health of workers. This section recognizes that, depending on the circumstances of the work, responsible employers may have to take other actions to protect their workers. DOE does not intend to preclude such actions by the provisions of the rule. DOE recognizes that individuals responsible for implementing worker safety and health must use their professional judgment in protecting the safety and health of workers; nothing in the rule should be viewed as relieving these individuals of their professional responsibility to take whatever actions are warranted to protect the health and safety of the workforce.

Section 851.13—Compliance

Section 850.13(a) of the final rule requires contractors to achieve compliance with all requirements of Subpart C of Part 851 and their approved worker safety and health programs no later than 470 days after the date of publication of the final rule in the **Federal Register**.

Several commenters expressed concern over the supplemental proposal requirement for compliance with the rule by January 26, 2006, suggesting that the date be modified (Exs. 13, 25, 29, 36, 42, 45, 51, 57) and recommending alternate lengths of time for implementation from 180 days after plan approval (Ex. 47) to one year following rule promulgation (Exs. 28, 49). DOE has clarified in final rule section 851.13(a) that contractors must

achieve compliance within 470 days after the date of publication of the rule.

Section 850.13(b) of the final rule allows contractors who have established written worker safety and health programs, ISM descriptions pursuant to the DEAR Clause, or an approved Work Smart Standards process before the date of issuance of the final rule to use them to meet the worker safety and health program requirement of this part if those programs, descriptions, and processes are approved by the Head of the DOE Field Element. This approval by the Head of the DOE Field Element is contingent upon the contractor providing written documentation which identifies the specific portions of these programs, descriptions, and processes that are applicable, and additional requirements or implementation methods to be added in order to satisfy the requirements of this Part to establish a safe and healthful workplace. If an existing program is used to meet the requirement for a worker safety and health program, the contractor has a regulatory obligation to comply with that program.

One commenter (Ex. 27) requested that a grandfather provision be added for existing programs developed under the Work Smart Standards program. DOE notes that a grandfather provision for existing programs is established under final rule section 851.13(b). This provision was added to address comments (Exs. 15, 20, 26, 27, 29, 45, 51) regarding DOE's intent to acknowledge or accept contractor efforts related to existing worker protection initiatives within the DOE community as part of the worker safety and health program required under this rule.

C. Subpart C—Specific Program Requirements

Section 851.20—Management Responsibilities and Workers Rights and Responsibilities

Section 851.20 establishes management responsibilities and workers' rights related to worker safety and health in the workplace. Contractor managers must commit to the safety and health of their workforce. Section 851.20(a) codifies managers' responsibilities, while final rule section 851.20(b) codifies workers' rights. DOE received a substantial number of comments on section 851.20 (previously supplemental proposed section 851.10). Although many of the comments were couched in terms of workers' rights, a large proportion actually related to a combination of workers' rights and management responsibilities toward worker safety and health. Other comments touched on issues with broader implications that were applicable to this section, as well as to other requirements established elsewhere in this final rule (or other rules). Modifications made to section 851.20 in this final rule complicated categorization of the comments on a provision-by-provision basis. Thus, comments on this section are grouped by general topic or sentiment and are preceded by the following summary of both sections 851.20(a) and 851.20(b) in the final rule.

Section 851.20(a) requires a contractor to ensure its managers at a covered workplace (1) establish written policy, goals, and objectives for the worker safety and health program; (2) use qualified worker safety and health staff (e.g., a certified industrial hygienist) to direct and manage the program; (3) assign worker safety and health program responsibilities, evaluate personnel performance, and hold personnel accountable for worker safety and health performance; (4) provide a mechanism to involve workers and their elected representatives in the development of the worker safety and health program goals, objectives, and performance measurement and in the identification and control of hazards in the workplace; (5) provide workers with access to information relevant to the worker safety and health program; (6) establish procedures for workers to report, without reprisal, job-related fatalities, injuries, illnesses, incidents, and hazards and make recommendations about appropriate ways to control those hazards; (7) provide for prompt response to such reports and recommendations; (8) provide for regular communication with workers about workplace safety and health matters; (9) establish procedures to permit workers to stop work or decline to perform an assigned task because of a reasonable belief that the task poses an imminent risk in circumstances where there is insufficient time to use normal hazard reporting and abatement procedures; and (10) inform workers of their rights and responsibility by appropriate means, including posting the DOE-designated Worker Protection Poster.

Workers at DOE sites currently have a number of rights related to ensuring a safe and healthful workplace as specified under DOE Order 440.1A. Section 851.20(b) codifies these rights and makes it clear that workers may exercise them without fear of reprisal. Specifically, the regulations maintain the rights of workers to (1) participate in activities described in section 851.20 on official time; (2) have access to DOE safety and health publications; the DOE-approved worker safety and health program for the covered workplace; the standards, controls and procedures applicable to the covered workplace; the safety and health poster that informs the worker of relevant rights and responsibilities; recordkeeping logs (to a limited extent); and the appropriate DOE form that contains the employee's name as the injured or ill worker; (3) be notified when monitoring results indicate the worker was overexposed to hazardous materials; (4) observe monitoring or measuring of hazardous agents, and have the results of their own exposure monitoring; (5) have an employee-authorized representative accompany DOE personnel during an inspection of the workplace or consult directly with the DOE personnel if no representative is available; (6) request and receive results of inspections and accident investigations; (7) express concerns related to worker safety and health; (8) decline to perform an assigned task because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious bodily harm coupled with a reasonable belief that there is insufficient time to seek effective redress through the normal hazard reporting and abatement procedures; and (9) stop work on discovering employee exposures to imminently dangerous conditions or other serious hazards, provided that any stop work authority is exercised in a justifiable and responsible manner in accordance with established procedures.

The comments provided to DOE on section 851.20 covered a wide range of issues. Most related directly to the management responsibility and workers' rights provisions of this section. Certain comments, however, related only tangentially to section 851.20 (usually on the basis of workers' rights) and sometimes resulted in modifications to other sections of this rule. For example, several commenters (Exs. 10, 30, 40, 54, 55, 60) requested the incorporation of various worker rights related to the variance process. In general, DOE agrees that workers should be involved in the variance process and has included specific rights related to this process in subpart D to the final rule. A more detailed discussion of these comments and DOE's responses appears in the section-by-section discussion for Subpart D. Similarly, a commenter (Ex. 11) believed that worker rights should include the right to receive and participate in training required by OSHA standards and other requirements. The commenter expressed

concern that no provision exists in the rule to train workers in hazard recognition such that they can recognize hazards posing "imminent risk of death or serious bodily harm." The final rule as specified in section 851.23 requires compliance with OSHA standards (including standards that specify training requirements). In addition, the final rule contains more detailed provisions for training, in final rule section 851.25, which requires employers to implement a training program for workers.

The same commenter (Ex. 11) believed that worker rights should also include the right to contact the National Institute for Occupational Safety and Health (NIOSH) to request a health hazard evaluation (HHE) based on concerns about toxic effects of a workplace substance. DOE notes that 42 CFR 85 allows employers or authorized representatives of employees to request HHEs by NIOSH under section 20(a)(6) of the Occupational Safety and Health Act of 1970. Hence, DOE feels it is not necessary to separately address this issue in this rule.

Another commenter (Ex. 29) questioned whether supplemental proposed section 851.10 on worker rights would conflict with 10 CFR 708 (DOE Contractor Employee Protection Program). The commenter also wondered whether 10 CFR 708 would continue to apply to worker rights with respect to nuclear and radiological safety issues once supplemental proposed section 851.10 was in effect for all other safety and health issues. DOE believes that the final rule has no impact on the applicability of 10 CFR 708. Specifically, 10 CFR 708 still applies to complaints of reprisals against DOE contractor employees under certain conditions. In particular, it applies for employee disclosures, participations, or refusals related to safety and health matters, if the underlying procurement contract (described in 10 CFR section 708.4) contains a clause requiring compliance with all applicable safety and health regulations and requirements of DOE (48 CFR 970.5204–2c). Furthermore, 10 CFR 708 provides employees with a mechanism to obtain restitution from the contractor in the event of a finding of a reprisal under the 10 CFR 708 rule, but does not allow for civil or contract penalty against the contractor for violation of the workers' safety and health rights. This final rule provides DOE with the mechanism to assess civil or contract penalties against contractors in such cases.

As was mentioned previously, DOE received numerous comments that relate to section 851.20 as a whole, or that relate to multiple provisions of this section. In one such comment (Ex. 30), the commenter requested that the term "worker" be defined as an hourly worker who performs line functions in areas to be inspected. Additionally, the commenter believed that the definition of "worker" should not include lawyers, supervisors, and managers for the contractor, since managerial and legal personnel have an interest in minimizing penalties and cannot best represent worker interests during inspections. As discussed previously, worker has been defined to be contractor employees performing work at a covered workplace in furtherance of a DOE mission.

A few commenters (Exs. 40, 47, 55) asserted that the rule should incorporate worker involvement in the development of worker safety and health programs. One of the commenters (Ex. 47) believed that supplemental proposed section 851.10 should be revised to indicate that it is not just a workers' right, but also their responsibility to comply with the provisions in supplemental proposed section 851.10. The commenter recommended that the section be renamed "Worker rights and responsibilities." DOE agrees with this comment and has renamed section 851.20 of the final rule "Management responsibilities and worker rights and responsibilities" to highlight the collaborative nature of the worker safety and health process. As a related modification, DOE has named the subsection on workers rights—section 851.20(b)—"Workers Responsibilities and Rights." Furthermore, final rule section 851.20(a)(4) requires management to provide a mechanism to involve workers and their elected representatives in the development of the worker safety and health program goals, objectives, and performance measures and in the identification and control of hazards in the workplace. DOE also included provision 851.20(a)(8), which requires managers to provide for regular communication with workers about workplace safety and health matters.

Also concerned with worker rights, one commenter (Ex. 11) suggested that workers be given the right to provide comments or testimony on possible toxic effects of substances in the workplace. DOE agrees that workers should be able to provide input on matters that affect them, and this final rule contains provisions to further this objective. Section 851.20(a)(4) requires management to provide a mechanism to involve workers and their elected representatives in the development of the worker safety and health program goals, objectives, and performance measures, and in the identification and control of hazards in the workplace. Additionally, section 851.20(b)(7) establishes the right for workers to express concerns related to worker safety and health. For issues that involve rulemaking regarding worker exposure to a hazardous substance, the Administrative Procedures Act gives the public (including workers) the right to comment on rulemaking activities; DOE does not believe it necessary to address this issue more specifically in the rule.

DOE received several comments related to retribution and reprisal as a result of workers exercising their rights. Seven commenters (Exs. 11, 21, 30, 40, 44, 60, 62) expressed concern over retribution against workers who report violations, injuries, and unsafe work conditions and felt the regulation should preclude discrimination against any employee for notifying DOE or requesting an investigation. An eighth commenter (Ex. 15) qualified a similar concern by suggesting that security- and confidentiality-related issues be considered in granting worker rights. This commenter suggested that section 851.20(b) include language that allows the worker rights without reprisal, as long as their actions are "consistent with non-disclosure, confidentiality and security requirements." One commenter (Ex. 62) supported anonymous notifications and complaints by workers to DOE enforcement staff without fear of disclosure of identity to non-enforcement personnel. This commenter suggested that standardized forms to be created for this purpose with an explicit option for the complainant to select anonymity. Furthermore under the Privacy Act the commenter proposed that penalties should apply to individuals who breach the employee's right to confidentiality in making a complaint. This commenter argued that such breaches should be considered as civil violations. DOE addresses these concern related to retribution and reprisal in the final rule by including sections 851.20(a)(6), 851.20(b)(7), and 851.20(b)(9). The first of these three requires management to establish procedures for workers to report, without reprisal, job-related fatalities, injuries, illnesses, incidents, and hazards and make recommendations about appropriate ways to control those hazards. Sections 851.20(b)(7) and 851.20(b)(9) give workers the right, again without reprisal, to express concerns related to worker safety and health and to stop work if they discover employee exposures to imminently

dangerous conditions or other serious hazards. DOE notes that each of these provisions are enforceable under the rule and that contractors are subject to both civil and contract penalty for noncompliance with these provision. Further, provision 851.40(c) allows workers or worker representatives to remain anonymous upon filing requests for investigation or inspection. Notwithstanding a worker's right to remain anonymous, DOE notes that penalties could not be assessed under the Privacy Act. Such a complaint would not be a part of a system of records and would not be placed in any sort of file identifiable by name, employee number or other unique identifier. Without those two qualifications, such a complaint would not be covered by the Privacy Act.

Several commenters asked DOE to clarify or expand the rule to improve the flow and exchange of information and documentation. For example, one commenter (Ex. 54) requested that the rule require communication pathways between contractors, workers, DOE, and worker representatives. DOE agrees with this comment and the final rule includes section 851.20(a)(8), which requires contractors to provide for regular communication with workers about worker safety and health matters. DOE will also provide guidelines to assist contractors in developing appropriate communication methods in guidance materials to be published shortly after promulgation of this final rule. DOE believes, however, that stipulating the exact means and methods for achieving this communication in an enforceable regulation would be unnecessarily restrictive, could undermine existing communication mechanisms, and could hinder contractor creativity in future program development efforts.

Several commenters (Exs. 13, 16, 29, 30, 36, 37, 54, 62) expressed concern over worker rights to various forms of information, as well as manager obligations to provide workers with certain information. One commenter (Ex. 62) requested that employers should be required to post a DOE Safety Rule Notification Poster describing Part 851 that would inform workers of rule provisions, the penalties of non-compliance, how to obtain more information and an 800 toll-free number to call. In addition, the commenter supported the idea of informative workshops to explain the rule to workers as part of training programs. DOE addresses this concern in the final rule by including section 851.20(a)(10), which requires contractor managers to inform workers of their rights and responsibilities by appropriate means, including posting the DOE-designated Worker Protection Poster in the workplace where it will be accessible to all workers. Although the contractor may provide electronic access to the poster, it must still post the poster in areas accessible to workers. DOE further strengthened workers' right to information through final rule section 851.20(b)(6), which allows workers to request and receive results of inspection and accident investigations.

Two commenters (Ex. 29, 60) thought it important that the worker safety and health program be available to workers. In response to these comments, final rule section 851.20(a)(5), DOE requires that management provide workers with access to information relevant to the worker safety and health program. DOE leaves to the contractor the discretion to determine the appropriate format, which must be accessible to all workers. DOE considers electronic means accessible, provided that all employees have access to, and the knowledge to use, computers.

Still considering the flow and exchange of information, two commenters (Exs. 16, 29) requested clarification on what DOE considers to be the "DOE safety and health publications" and the "standards, controls, and procedures" that were specified in supplemental proposed section 851.10(b)(1). In a related question, one of these commenters (Ex. 29) asked whether the documents to which workers must be provided access, as specified in supplemental proposed section 851.10(b)(1), may be provided "on request" or whether they must always be available. The commenter noted that the documents sometimes include costly ANSI standards. DOE intends the documents to be available and provided upon request to employees for review. DOE does not intend for the employer to provide each employee with his/her own copy of the standards. Note that DOE would expect the contractor to have access to (or copies of) all the standards with which the contractor must comply.

In a more general comment about the right of worker representatives to have the same access to information as workers, two commenters (Exs. 11, 54) recommended that the rule clearly state that disclosure affects workers and their unions. Specifically, these commenters believe that worker representatives should have the right to request information, observe monitoring, request relevant exposure and medical records and receive results within 15 days, participate in the worker safety and health process, or create joint worker safety and health committees. DOE, through final rule section 851.20(a)(4), requires management to provide a mechanism to involve workers and their elected representatives in the development of the worker safety and health program goals, objectives, and performance measures, and in the identification and control of hazards in the workplace. Further, the final rule, as specified in section 851.11(d), requires contractors to give labor organizations representing workers for collective bargaining timely notice of development and implementation of the worker safety and health program and any updates, as well as bargain on implementation issues in a manner consistent with federal labor laws upon timely request.

Several commenters (Exs. 11, 30, 44, 60, 62) requested that workers have the right to participate in enforcement actions. Three of these commenters (Exs. 44, 60, 62) recommended that citations be posted and that employees be given the opportunity to comment on proposed enforcement actions. One of these commenters (Ex. 62) argued that such provisions were comparable to worker rights related to OSHA enforcement actions. Another commenter (Ex. 30) asked that DOE incorporate worker participation as a party in settlement agreements. The fourth commenter (Ex. 11) asserted that workers should have the right to be involved in any meetings or hearings to discuss objections the employer has to allegations of safety and health violations, the assessment of penalties, and/or discussions or changes in abatement plans, procedures, or deadlines. DOE notes that Part 851's enforcement process is based on one that has been successfully used for over ten years with respect to the DOE Nuclear Safety Requirements, a process which does not contemplate such participation. DOE further notes that the OSHA enforcement process does not involve employee participation to the degree requested by the commenters. In addition, section 851.40(c) does provide worker representation, such as the right to request the initiation of an inspection or investigation. DOE concludes that the degree of employee participation in the enforcement process is appropriate and that the specific commenter requests for additional worker involvement in the enforcement process would not be appropriate.

DOE received several comments regarding multiple issues related to exposure monitoring. Three commenters (Exs. 16, 54, 55) worried that the language in supplemental proposed section 851.10(b)(3), which would give

workers the right to observe monitoring or measuring of hazardous agents, could be misinterpreted. Specifically, the commenters believed this section could be interpreted as implying that specific monitoring is required for each individual worker (instead of allowing representative sampling), or as suggesting that contractors do not have to share monitoring results with unmonitored workers performing the same job. These commenters felt that representative sampling results should be provided to all affected workers. However, two other commenters (Exs. 26, 49) disagreed, asserting that the requirement should be limited to providing workers with only their own results, in keeping with the Privacy Act. The commenters believed that workers are unlikely to be qualified to interpret monitoring results for the whole workplace. To ensure timely transfer of information, one commenter (Ex. 16) recommended that DOE specify a time frame within which a contractor should provide employees with exposure results (e.g., results of applicable exposure monitoring must be provided to employees within 90 days following analysis). Further, one commenter (Ex. 49) believed that allowing workers to enter operational areas "to observe monitoring" conflicts with the exposure reduction and minimization aspects of Part 850 and RADCON As Low As Reasonably Achievable Principles. With respect to Privacy Act concerns, DOE notes an individual's test results would be protected. The only way that test results could be disseminated to all workers in an aggregated manner is if they are complied with the following language pursuant to 5 U.S.C. 552(b)(5): Disclosure may be made to a recipient who "* * * has provided the agency with advance written assurance that the record will be solely used as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable."

DOE received two comments on the use of the term "overexposure" as it relates to employee notification of results exceeding allowable exposure levels. One of these commenters (Ex. 54) suggested that the phrase "was overexposed to hazardous materials" in supplemental proposed section 851.10(b)(2) be replaced with "exposure exceeded limits established by OSHA." DOE disagrees, that a change in wording is necessary since the term overexposed is commonly understood to mean exposures above an established limit (whether set by OSHA, ACGIH, or DOE). The other commenter (Ex. 11) believes that employees should be informed of all potential hazards before they are exposed, and not only when there is overexposure as specified in supplemental proposed section 851.10(b)(2). DOE notes that the reference to "overexposure" in final rule section 851.20(b)(3) applies specifically to notification of monitoring results. Other sections of the rule—sections 851.20(b) and 851.25—require employee training and access to information on workplace hazards and controls.

The right of workers to participate in monitoring and inspection activities attracted several comments. DOE received several comments (Exs. 13, 16, 29, 36, 42, 49, 57) expressing the general concern that workers would abuse the rights afforded to them in sections 851.20(b)(1), (b)(4), and (b)(5), which give workers the right to participate in activities, observe monitoring results, and accompany DOE personnel during an inspection. The commenters felt that these activities could result in disruption of work. DOE notes the commenters concerns and has modified the language in the final rule.

Worker rights and employer responsibilities during inspections also attracted a number of comments. Many commenters (Exs. 11, 13, 29, 36, 39, 42, 47, 49, 54, 57) expressed concern about a worker's right to accompany DOE personnel during an inspection of the workplace. The commenters believed that the rule should include access requirements to be met in order to accompany DOE personnel on inspection. For example, commenters recommended that a designated employee representative or an appropriate safety person, organization, or entity should accompany DOE on inspections. DOE agrees that the individual accompanying inspectors should not be selected arbitrarily. In the final rule, section 851.20(b)(5) requires that an "employee-authorized representative" be allowed to to accompany DOE on inspections. When no representative is available, the inspector must consult with employees on matters of worker safety and health. Further, section 851.40(c) of the final rule establishes the right of worker representatives to request an inspection or investigation, with supporting documentation, based on criteria outlined in the section.

In a related comment, two of the same commenters (Exs. 13, 29) suggested that allowing workers to go on DOE inspections raises implementation concerns (for example, regarding worker and contractor notification of inspections and inspector qualification standards to ensure consistency of inspections across facilities). DOE notes that workers are entitled to reasonable assurances that the inspections are carried out in an appropriate manner and notes that in final rule section 851.40(d) includes provisions for notifying contractors of an enforcement inspection. DOE believes, however, that establishing qualification standards for DOE federal staff is beyond the scope of this rule; instead, DOE will follow appropriate personnel qualification standards for federal staff. DOE also believes that establishing detailed provisions on how contractors must implement specific provisions of the rule (such as how to notify workers of an inspection) would be too prescriptive. DOE believes that contractors are the entities best able to determine appropriate implementation procedures for their own sites and workforce. Of course, contractor failure to comply with the worker rights provisions of the final rule could subject the contractor to an enforcement action under the rule.

DOE also received comments related to worker rights after inspections are completed. Two commenters (Exs. 36, 49) expressed concern about a worker's right to request and receive results of inspection and accident investigations. One of these commenters (Ex. 36) described the current policy of some facilities to allow workers to obtain such results on a need-to-know basis only. The other commenter (Ex. 49) believed that workers can only request and receive results that are not exempt from disclosure under the Privacy Act or the Freedom of Information Act. An additional commenter (Ex. 29) questioned whether these "results" include DOE records or just contractor records. DOE notes that a worker can only receive information or results, for his or her own personal record. The worker must designate in writing a representative to receive personal information.

One commenter (Ex. 11) believed that worker rights should include the right to request action from an employer to correct hazards or violations even if the hazards are not violations of specific OSHA standards or other specific requirements. DOE notes that final rule section 851.20(b)(7) gives workers the right to express concerns about worker safety and health issues. DOE intends for this section to include all health and safety concerns, not just hazards addressed by specific OSHA standards.

DOE received two comments related to proposed provisions, retained as sections 851.20(a)(9) and 851.20(b)(9) in this final rule, which respectively cover managers' responsibilities and workers' rights to stop work when a serious

hazard is discovered or believed to be present. One commenter (Ex. 28) objected to the use of the word "discover" in supplemental proposal section 851.10(b)(8), believing that such a term suggests willful deceit or ignorance on the part of managers. The commenter stated that while stop work authority is needed, it should be implemented in a controlled manner in accordance with "established procedures, which include but should not be limited to pre-work briefings of prevailing working conditions." DOE intends for the term "discover" in final rule section 851.20(b)(9) to imply that the hazard was not previously identified through workplace assessment and hazard identification procedures. DOE also expects that any identified hazards would have been mitigated and controlled prior to allowing workers to proceed with activities in a work area. DOE agrees that the rights granted under this provision should be exercised in a controlled manner. Hence, section 851.20(a)(9) of the final rule requires contractors to develop appropriate procedures to implement stop work authority.

In related comments, three commenters (Exs. 11, 28, 48) thought that the language in supplemental proposed section 851.10(b)(8) was too vague, broad, or subjective. DOE notes that this stop work authority provision is similar to the provisions in DOE Order 440.1A. DOE is not aware of any problems with the implementation of this provision under 440.1A and therefore, has retained this provision in the final rule.

Another commenter (Ex. 54) believed that worker representatives should be allowed to participate in a review of stop work conditions. The commenter suggested that such issues are resolved more quickly and effectively when employer and employee representative (as well as external experts such as OSHA and DOE Environment, Safety and Health) are involved. DOE acknowledges these concerns and believes the concerns are addressed by existing provisions of the final rule. Specifically, section 851.20(a) establishes a wide array of management responsibilities for ensuring worker rights under and involvement in the safety and health program. Final rule section 851.20(a)(9) further requires contractors to develop appropriate stop work procedures for workers and section 851.20(a)(7) requires contractors to provide prompt response to worker reports of workplace hazards. DOE believes that these combined provisions provide DOE contractors an adequate framework to develop appropriate stop work provisions. Within this framework, DOE contractors are free to develop stop work procedures that they feel most effectively protect workers (and empower workers to protect themselves) and allow for prompt corrective action in the event of an imminent danger situation. Since this provision has been required of DOE contractors under DOE Order 440.1A for the past 10 years, DOE would expect contractors to apply existing stop work procedures with slight modifications if deemed necessary based on lessons learned from 10 years of experience implementing this provision.

Section 851.21—Hazard Identification and Assessment

Section 851.21 establishes the contractor's duty to enact procedures for identifying hazards and assessing the related risks in the workplace. This section lists activities contractors must perform as part of their hazard and risk assessment procedures (e.g., conducting workplace monitoring, evaluating operations). Under this section, contractors must also provide a list of closure facility hazards and associated controls to the Head of DOE Field Element, who will accept the controls or direct specific additional actions described in this section.

DOE received a number of comments that expressed concern about the subjectivity of the supplemental proposed section 851.100(b) language concerning identification and evaluation of workplace hazards, and particularly the requirement in section 851.100(b)(1)(iii) to evaluate potential hazards that may arise from unforeseeable conditions. A number of commenters (Exs. 13, 15, 16, 20, 25, 27, 31, 36, 42, 49) recommended that the supplemental proposed requirement to evaluate potential hazards from unforeseeable conditions be eliminated or replaced, based on their opinion that this is an ambiguous, general requirement that unreasonably puts contractors in the position of trying to foresee the unforeseeable. DOE has eliminated the requirement in the final rule. DOE also has modified the final rule to include section 851.21, which provides specific requirements to guide contractors' hazard identification and risk assessment activities.

Section 851.21(a) requires contractors to establish procedures to identify existing and potential workplace hazards and assess the risk of associated workers' injury and illness. These procedures must include methods to: (1) Assess worker exposure to chemical, physical, biological, or safety workplace hazards through monitoring; (2) document assessment for workplace hazards using recognized exposure assessment and testing methodologies and using accredited and certified laboratories; (3) record observations, testing and monitoring results; (4) analyze designs of new facilities and modifications to existing facilities and equipment for potential workplace hazards; (5) evaluate operations, procedures, and facilities to identify workplace hazards; (6) perform routine job activity-level hazard analysis; (7) review site safety and health experience information; and 8) consider interaction between workplace hazards and other hazards such as radiological hazards.

Most of the comments that DOE received on this section relate to the scope of the required hazard assessment procedures. Two commenters (Exs. 42, 47) suggested that it is not feasible to consider all hazards, as specified in supplemental proposed section 851.100(b)(1)(v), and that only relevant hazards should be considered. DOE believes that to be effective, a worker safety and health program must establish and implement procedures that will identify potential workplace hazards and evaluate the associated risks. In the final rule, section 851.21(a) requires that such procedures be established. Contractors are to identify hazards that are to be identified by assessing worker exposures to chemical, physical, biological and safety hazards identified through appropriate workplace monitoring and job activity level hazard analysis. These methods are designed to identify the hazards to which workers may be exposed. Through this process, DOE expects that contractors will be able to determine which hazards are relevant to specific work situations.

Two other commenters (Exs. 42, 47) expressed concern that supplemental proposed section 851.100(b)(1)(vii) to (ix) went beyond the scope of the ISMS. While the commenters believed that these provisions were beneficial and appropriate for a worker safety and health program, they did not believe that these provisions should be part of the rule. DOE believes that these provisions are necessary requirements for a contractor's worker safety and health program. In the final rule, however, DOE has reorganized these provisions to be more consistent with the requirements of DOE Order 440.1A, which have been in use for the past 10 years. Accordingly, final rule section 851.21(a), requires contractors to develop procedures using specified methodologies (mirroring those established in DOE Order 440.1A) to assess and document the risk of worker

injury and illness associated with existing and potential hazards.

A number of commenters were concerned about the extent to which Part 851 would apply to radiological hazards. Several commenters (Exs. 16, 20, 31, 36, 42, 47, 48, 49) believed that there is no utility in addressing radiological hazards in the worker safety and health program document since they are already considered, and controlled through a contractor's Radiation Protection Program and Radiation Protection Manual in compliance with Price-Anderson Nuclear Safety Regulations such as 10 CFR 835. Two other commenters (Exs. 13, 39) requested that DOE clarify whether Part 851 applies to radiological hazards. If so, one of these commenters (Ex. 13) wondered whether it is DOE's intent to apply this rule to radiological hazards at a lower threshold than regulated by 10 CFR 820, 830, or 835. In section 851.2(b) of the final rule, DOE clarifies that Part 851 does not apply to radiological hazards to the extent they are regulated by 10 CFR Parts 820, 830, and 835. Section 851.21(a)(1) requires contractors to develop procedures that include methods for identifying and assessing hazards related to chemical, physical, biological, and safety work exposures only. Final rule section 851.21(a)(8) makes clear the need to consider other hazards.

DOE received a few comments related to sampling and laboratory analysis. One such commenter (Ex. 16) requested that DOE clarify the language in supplemental proposed section 851.100(b)(1)(vii) by defining what constitutes "appropriate workplace monitoring" (*i.e.*, whether it is in relation to the number of samples, the frequency/timing of samples, qualifications of those conducting the sampling, a comparison of results to limits, etc.). The commenter recommended that "appropriate" either be defined objectively or by reference to OSHA standards used for workplace monitoring. DOE disagrees that more specificity is needed, and believes it is understood that the term "appropriate" in this case means using recognized methods for workplace monitoring such as those published by the American Industrial Hygiene Association or the National Institute for Occupational Safety and Health, etc. DOE notes, however, its intent to develop supplemental guidance material following publication of the final rule to assist contractors in implementation of the rule.

Other commenters (Exs. 5, 16, 27) expressed concern that supplemental proposed section 851.100(b)(1)(viii) would require the use of accredited or certified laboratories. Specifically, one of these commenters (Ex. 5) asked if the provision for "documenting assessments for chemical, physical, biological and safety workplace hazards using recognized exposure assessment and testing methodologies and use of accredited or certified laboratories" also required contractors to use accredited or certified laboratories for performing other related activities. Another commenter (Ex. 16) believed that certain highly contaminated samples may fall outside the capabilities of commercially available laboratories. Therefore, this commenter felt that this provision should be either deleted or modified to clarify which assessments require accredited or certified laboratories, which accreditation or certification authorities should be used, and what the provisions are for frequency and equivalency. Both this commenter (Ex. 16) and another commenter (Ex. 27) believed that any requirement for use of accredited or certified laboratories should be evaluated with respect to potential costs versus benefits, since use of such laboratories could result in increased costs and time. DOE believes that the converse would likely be true, since not using a certified laboratory would involve such efforts as establishing quality control and quantitative analysis processes etc. Therefore, these efforts would likely be more costly than using an established accredited laboratory. DOE also notes that reliance on accredited and certified laboratories is consistent with requirements established under DOE Order 4040.1A, OSHA standards, and accepted industrial hygiene professional practice.

One commenter (Ex. 16) requested that DOE clarify what kinds of "safety and health information" contractors are required to review, as referred to in supplemental proposed section 851.100(b). To clarify this, DOE provides in final rule section 851.21(a)(7) that contractors hazard identification and assessment procedures must include provisions for the review of site safety and health experience information. DOE anticipates that such information could include, but may not be limited to, injury and illness data, inspection results, accident and near miss investigation results and trending data, etc.

Section 851.21(b) requires contractors to submit to the Head of DOE Field Element a list of closure facility hazards and the established controls within 90 days of identifying such hazards. The Head of Field Element, with concurrence by the CSO, will have 90 days to accept the closure facility hazard controls or direct additional actions to either (1) achieve technical compliance or (2) provide additional controls to protect the workers. DOE intends section 851.21(b) to be implemented in a manner that is consistent with the provision in the NDAA on taking into account the special circumstances associated with facilities that are or will be permanently closed, demolished or subject to title transfer and that minimizes the need for variances.

One commenters (Ex. 28) believed that DOE sites within one year of a formal declaration of site closure should be exempt from compliance with Part 851 and a separate exclusion to this effect should be included under section 851.1. Another commenter (Ex. 39) asked for clarification of the types of "special circumstances" that should be considered for a workplace that is (or is expected to be) permanently closed, demolished, or transferred to another entity. This commenter (Ex. 39) also felt that the supplemental proposed section 851.100(b)(3)(ii), needed to be clarified with respect to the types of circumstances considered relevant to a proposal for modified requirements at sites scheduled for closure, demolition, or transfer. DOE agrees that the original supplemental proposed language related to what is now termed "closure facilities" was unclear, and has revised this section of the final rule. In final rule section 851.21(b), DOE requires submission of a list of closure facility hazards that cannot be fully abated or controlled within 90 days after identification of the hazards in a manner that achieves strict technical compliance with applicable regulatory requirements. The Head of DOE Field Element has 90 days to accept the closure facility hazard controls identified by the contractor as sufficient to ensure a safe and healthful workplace or direct additional action to either achieve technical compliance or provide additional controls to protect the workers.

Final rule section 851.21(c), which was supplemental proposed section 851.100(b)(1), requires contractors to perform the activities identified in section 851.21(a), initially to obtain baseline information, and again as often as necessary. The commenter (Ex. 35) inquired whether the intent was to require a baseline hazard assessment to identify hazards for every workplace. The commenter asked whether it might also be acceptable to describe only the basic hazards of the workplace initially, while also providing a method in the worker safety and health program for

detailed real-time, job-specific hazard and safety analysis to be conducted immediately prior to beginning the work. The commenter went on to state that this latter (real-time assessment) would be performed to ensure that changing worksite conditions have not impacted hazards and associated mitigation strategies since the time when the basic hazards were described in the initial assessment. DOE believes the requirements in final rule section 851.21 are appropriate, and declines to accept this commenter's suggestion. It is DOE's intent that within the framework provided in final rule section 851.21(c), the contractor must identify existing and potential workplace hazards using the prescribed methods in section 851.21(a), for new and existing facilities, operations, and procedures. The contractor must establish and implement hazard identification and risk assessment procedures initially to obtain baseline information and again as often as necessary to ensure compliance with the regulation in Subpart C. Section 851.21(a) also requires routine job activity level hazard analyses to be performed. The final rule intends for the contractor to develop and include the process for performing hazard identification in the worker safety and health program, but the contractor is not required to present the full results of the hazard assessment in the worker safety and health program.

Section 851.22—Hazard Prevention and Abatement

Final rule section 851.22 establishes the requirement for contractors to develop and implement a process for preventing, prioritizing, and abating hazards in the workplace. Under this section contractors must abate hazards using a prescribed hierarchy of controls, starting with elimination (or substitution) and ending with personal protective equipment, which is to be used only as a last resort. Hazards must also be considered when contractors purchase equipment. As a general comment on the section as a whole, three commenters (Exs. 28, 45, 51) believed that the term "adequately protected" is ambiguous in supplemental proposed section 851.100(a)(2) and implies that if an injury occurs by any means, the program would not have provided "adequate protection." The commenters believed that the program should provide an acceptable level of worker protection based upon determination of acceptable risks for identified hazards. As discussed previously, DOE believe "adequate protection" is a proper standard. However, in revising this provision, the reference to "adequate protection" has been eliminated.

Section 851.22(a) requires contractors to establish and implement a hazard prevention and abatement process to ensure that all identified and potential hazards are prevented or abated in a timely manner. For hazards identified either in the facility design or during the development of procedures, contractors are required to incorporate controls in the appropriate facility design or procedure. For existing hazards identified in the workplace, contractors are required to (1) prioritize and implement abatement actions according to the risk to workers; (2) implement interim protective measures pending final abatement; and (3) protect workers from dangerous safety and health conditions. One commenter (Ex. 16) requested that the term "imminently dangerous conditions" in supplemental proposed section 851.100(b)(2)(iii) be defined. DOE has modified the language in final rule section 851.22(a)(2)(iii) to read "dangerous safety and health conditions." These terms are commonly understood and need not be defined in Part 851.

Section 851.22(b), which corresponds to supplemental proposed section 851.100(b)(2)(iv), requires contractors to select hazard controls based on the following hierarchy: (1) Elimination or substitution of the hazards where feasible and appropriate, (2) engineering controls where feasible and appropriate, (3) work practices and administrative controls that limit worker exposures, and (4) personal protective equipment. Two commenters (Exs. 16, 27) believed that the hierarchy of hazard controls should acknowledge appropriate economic and technical feasibility, work activity duration, and available technology constraints that are important and practical considerations in compliance. DOE acknowledges these concerns and section 851.22(b) of the final rule has expanded to clarify that substitution or elimination of hazards and the use of engineering controls should be used where feasible and appropriate, and use of work practices and administrative controls to limit worker exposures.

Section 851.22(c) requires contractors to address hazards when selecting or purchasing equipment, products, and services. Two commenters (Exs. 31, 54) expressed concern about the supplemental proposed section 851.100(b)(2)(v). One commenter (Ex. 31) believed that this provision poses a problem because it is difficult to judge the safety of services based on human performance, and that this provision would require review of safety records for service providers to evaluate unsafe work practices. The commenter recommended that the reference to services be deleted. The other commenter (Ex. 54) recommended rewording the provision in light of the concept of inherently safer design to require "reduction in hazards to workers by ensuring that equipment purchase, lease or rental, process and equipment design and all acquired services are selected with worker safety and health as a priority." DOE believes that worker safety and health should be a primary consideration in performing work and should be considered in all aspects of the work, including the selection and purchasing of equipment, products, and services. As a result, this provision is retained in the final rule.

Section 851.23—Workplace Safety and Health Standards

Section 851.23(a) requires that contractors comply with the following standards, if applicable to the hazards at their workplace: (1) Title 10 CFR 850, "Chronic Beryllium Disease Prevention Program"; (2) Title 29 CFR Parts 1904.4 through 1904.11, 1904.29 through 1904.33; 1904.44 and 1904.46, "Recording and Reporting Occupational Injuries and Illnesses"; (3) Title 29 CFR Part 1910, "Occupational Safety and Health Standards," excluding 29 CFR 1910.1096, "Ionizing Radiation"; (4) Title 29 CFR Part 1915, "Shipyard Employment"; (5) Title 29 CFR Part 1917, "Marine Terminals"; (6) Title 29 CFR Part 1918, "Safety and Health Regulations for Longshoring"; (7) Title 29 CFR Part 1926, "Safety and Health Regulations for Construction"; (8) Title 29 CFR Part 1928, "Occupational Safety and Health Standards for Agriculture"; (9) ACGIH "Threshold Limit Values (TLV) for Chemical Substances and Physical Agents and Biological Exposure Indices," when the ACGIH TLVs are lower (more protective) than permissible exposure limits in 29 CFR part 1910 (note that when the ACGIH TLVs are used as exposure limits, contractors must nonetheless comply with the other provisions of any applicable expanded health standard found in 29 CFR Part 1910); (10) ANSI Z88.2, "American National Standard Practices for Respiratory Protection"; (11) ANSI Z136.1, "Safe Use of Lasers"; (12) ANSI Z49.1, "Safety in Welding, Cutting and Allied Processes," sections 4.3 and E4.3 (of the 1994 edition or equivalent sections of sequent editions); (13) NFPA 70, "National Electrical Code"; and (14) NFPA 70E, "Electrical Safety in the Workplace." These mandatory standards establish baseline technical safety and health requirements

for DOE workplace operations. These standards are already required by DOE Order 440.1A, and are enforced through contract mechanisms. Section 851.23(b) provides that Part 851 may not be construed as relieving a contractor from the obligation to comply with any additional specific safety and health requirement that the contractor determines is necessary for worker protection.

DOE received a substantial number of comments on this section, many of which applied to the section as a whole. One commenter (Ex. 28) noted that supplemental proposed sections 851.201 through 851.210 did not include requirements for chemical or radiological protection, and recommended that DOE specifically define "recognized areas of protection." DOE has clarified in final rule section 851.2(b) that Part 851 does not apply to radiological hazards to the extent regulated by 10 CFR 820, 830, or 835. Further, Subparts B and C establish general and specific worker safety and health program requirements that contractors must implement to protect workers from workplace hazards, which as defined in section 851.3 of the final rule include physical, chemical, biological, or safety hazards with any potential to cause illness, injury, or death to a person.

Numerous commenters (Exs. 6, 15, 16, 20, 28, 29, 33, 37, 45, 47, 48, 51) argued that compliance with the DOE-approved contractor worker safety and health program, Work Smart Standards, or Contractors Requirements Document should constitute compliance with this regulation. Three of these commenters (Exs. 6, 15, 28) alternatively suggested that DOE should include in the final rule DOE directives or standards that have already been identified through various DOE approved processes and incorporated into existing contracts, and then define their relationship or functionality within the rule. Two other commenters (Ex. 12, 42) requested that the rule clarify how DOE orders other than DOE Order 440.1A in prime contracts should be addressed in regard to the worker safety and health requirements. DOE has incorporated relevant DOE directives into the appropriate sections of the final rule. As discussed in the section-by-section discussion for Subpart B of the final rule, DOE has also included provisions in section 851.13(b) to allow contractors to use existing worker safety and health programs established under the Integrated Safety Management System, Work Smart Standards process, or other worker safety and health process provided that such programs meet the requirements of this rule and are approved by the appropriate Head of the DOE Field element. Furthermore, DOE notes that the standards included in final rule section 851.23(a) have in fact been reviewed and approved by an existing DOE safety and health process. Specifically, these standards were included in DOE Order 440.1A which was the result of extensive coordination among safety and health professionals throughout the entire DOE community and was concurred on by all DOE Secretarial Officers and approved by the Secretary of Energy.

Several commenters (Exs. 30, 60, 62) believed that 10 CFR Part 850, Chronic Beryllium Disease Prevention Program (CBDPP), should be included as an enforceable standard under the rule or, and another commenter (Ex. 49) asked DOE to clarify its intent in that regard. The latter commenter (Ex. 49) argued that 10 CFR part 850 is a performance-based standard and did not provide an adequate technical basis to ensure consistent enforcement, and believes that DOE should provide implementation guidance for 10 CFR part 850 if the Department intends to enforce that rule under 10 CFR part 851. Another commenter (Ex. 30) asked that DOE expand the scope of 10 CFR part 850 to cover the United States Enrichment Corporation (USEC) facilities in Portsmouth, Ohio and Paducah, Kentucky. DOE has considered these comments and agrees that 10 CFR Part 850 should be enforceable under Part 851. Accordingly, final rule section 851.23(a)(1) requires contractor compliance with 10 CFR part 850. In addition, DOE has included a modification to 10 CFR part 850 as a part of this rulemaking effort to clarify that a contractor's CBDPP should supplement and be an integral part of the worker safety and health program required under 10 CFR part 851. This rulemaking effort does not, however, expand the scope of 10 CFR part 850. DOE's intent with this rulemaking effort, as clarified in final rule section 851.2, is to establish worker safety and health program provisions for contractor workplaces under DOE's jurisdiction, not for those under OSHA's jurisdiction as are the USEC facilities mentioned above. DOE also notes in regards to the commenter's (Ex. 49) request for CBDPP guidance material, that DOE has already published such guidance in DOE G 440.7A. DOE further notes that 10 CFR part 850 is already enforceable through contract mechanisms on DOE sites, and has been since its original promulgation in January, 2001.

DOE received a few comments that recommended additional codes or standards that should be incorporated into this rule. A commenter (Ex. 24) suggested that DOE should adopt by reference the International Code Council (ICC) International Codes as the foundation for DOE rules on facility design, construction, renovation, and worker safety, based on the premise that these codes are consistent with DOE Orders 420.1 and 440.1A and have been widely adopted throughout the United States by other federal facilities, state and local facilities, and the private sector. The commenter believed that to do otherwise would foster non-uniformity and would likely result in increased costs and decreased worker safety. DOE acknowledges the commenter's concern but notes that the final rule only includes those consensus standards originally required by DOE Order 440.1A. DOE believes that this change is consistent with intent of Section 3173 of the NDAA and is appropriate in this regulatory context. DOE will continue to encourage contractors to comply with applicable consensus standards where appropriate and will require compliance with selected standards through DOE directives such as DOE Order 420.1 and DOE contracts where needed. DOE also notes that final rule section 851.23(b) requires contractors to comply with any additional safety and health requirement that they determine to be necessary to protect the safety and health of workers.

Another commenter (Ex. 30) recommended that an indoor air quality standard and an ergonomics standard be included in the rule and made enforceable. DOE notes, however, that both indoor air quality and ergonomic hazards fall within the purview of an industrial hygiene program. Accordingly, DOE expects that contractors will address such hazards through the implementation of their industrial hygiene program established in accordance with Appendix A, section 6 of the final rule. DOE expects to develop guidance material to assist contractors in implementing these and other requirements of the final rule.

Another commenter (Ex. 29) indicated that much of the detailed codes listed in the supplemental proposal should be replaced by reference to the major design codes. As noted above, however, DOE has eliminated all but a handful of consensus standards from the final rule consistent with the standards originally mandated under DOE Order 440.1A. Along similar lines, several commenters (Exs. 2, 16, 20, 24, 31, 33, 37) specifically requested that the

International Building Code (IBC) of the ICC International Codes replace NFPA 5000 since several contractors currently adhere to IBC. DOE agrees and has removed NFPA 5000 from the final rule.

DOE received multiple general comments regarding the inclusion of document edition dates in this section. Many commenters (Exs. 1, 3, 4, 12, 14, 15, 16, 20, 22, 28, 31, 36, 37, 39, 42, 48, 49, 50, 51, 54, 55, 61) expressed concern that supplemental proposed section 851.201 included specific edition dates for standards and codes. The commenters note that many existing facilities are unlikely to be in compliance with these recent editions (presumably because they were constructed to meet earlier standards). Several commenters (Exs. 3, 4, 14, 16, 31, 36, 39, 50, 51) believed that including such dates would result in excess exemptions and increased costs. Some of these commenters (Exs. 14, 16, 31, 36, 50, 51) recommended eliminating the specific edition dates of the consensus standards, while others (Exs. 14, 16, 31, 36) offered an alternative recommendation that DOE indicate "latest revision" in lieu of the specific year. Three commenters (Exs. 15, 31, 37) agreed, but suggested that DOE include a mechanism within the rule that updates these dates to ensure consistency with the changing knowledge and needs of the industries they address. Two other commenters (Exs. 28, 49) indicated that the edition dates go beyond the statutory authority given to DOE by Congress. DOE has carefully considered the forgoing comments about the potential effects of incorporating specified editions of consensus standards. Regulatory requirements must be specific and include the editions of incorporated standards. Therefore, DOE cannot accept the suggestion of requiring compliance with the "latest revision" of standards that are incorporated by reference. However, DOE has reviewed the standards listed in section 851.23(a) to determine if they are appropriate. As a result of this review, DOE has eliminated from the final rule many of the consensus standards that were listed in the supplemental proposal. The standards included in this final rule are consistent with those mandated under DOE Order 440.1A. While contractors must meet the standards listed in section 851.23(a), they are free to comply with more recent editions of the standards as long as the provisions of the more recent standards are at least protective as the edition specified in the final rule. In future rulemakings, DOE will consider the need for updating the referenced standards.

Other comments specifically addressed the problems associated with updating older facilities and systems that were constructed according to previous, rather than current standards. Many of these commenters (Exs. 8, 15, 29, 31, 35, 36, 37, 42, 46, 49) expressed concern that the rule does not include the "grandfathering" of existing facilities (*i.e.*, allowing facilities to meet only the code requirements in effect at the time the facility was built). The commenters believe that it is not feasible to bring older facilities up to all the new codes and that attempting to do so would present insurmountable problems for most facilities. Commenters also believe that failure to allow grandfathering would result in significant costs associated with evaluation, modification, reporting requirements, and the need for exemptions, as well as costs from fines or penalties associated with noncompliance. Some of these commenters requested grandfathering under the Code of Record concept, in which a contractor is not required to implement current editions of codes or standards unless the facility undergoes substantial modifications. The commenters suggested that DOE require modification only in the presence of a significant hazard, in which case the facility would be upgraded to the requirements of the current edition of the code or standard. Another commenter (Ex. 14) also expressed concern that no provision in the proposed rule recognized DOE's use of the risk-based "graded approach" to upgrading aging facilities and correcting deficiencies under current industry codes, regulations, and guidance. This commenter believes that shifting to the proposed compliance-based approach will incur excessive costs at the expense of the DOE program office due to the funds required to bring all facilities into compliance at the same time, to pay civil penalties, or to process exemption requests. The commenter suggested that a possible resolution could be to grandfather known deficiencies with an approved plan for resolution. Another commenter (Ex. 35) recommended that DOE add a provision that allows contractors to use of national consensus standards equivalent to those listed in supplemental proposed section 851.201. It was the commenter's opinion that including the provision would help contractors avoid having to use the exemption relief described in Subpart D. As mentioned previously, DOE has eliminated many of the consensus standards listed in the supplemental proposed rule. The standards mandated in final rule section 851.23(a) are consistent with those required under the existing DOE Order 440.1A, which has been successfully implemented for more than 10 years. Thus, most facilities will be in compliance with the new standards and grandfathering is not necessary. Therefore, DOE does not anticipate a large number of requests for variances, nor does DOE believe that compliance would result in excessive costs.

Several commenters (Exs. 15, 16, 20, 28, 29, 33, 36, 37, 45, 48, 51) noted that conflict exists between many of the consensus standards and codes (e.g., OSHA, NFPA, ASME, and ANSI codes) cited in the supplemental proposal and the codes and standards incorporated into the contracts of many prime contractors and other DOE requirements. Most of these commenters (Exs. 15, 16, 20, 28, 29, 33, 36, 37, 48, 51) suggested that all cited regulations should be reviewed for unintended implications. In the final rule, DOE has aligned the standards in final rule section 851.23(a) with those required under DOE Order 440.1A. Thus, DOE does not anticipate conflict between the standards in the final rule and those in existing contracts and other DOE directives.

Several commenters (Exs. 6, 15, 28, 29, 36, 37, 38, 42, 45, 47, 49, 50, 57) recommended that DOE adopt OSHA standards as the minimum set of requirements, and expressed the opinion that the national consensus standards in the supplemental proposed rule do not provide an appropriate basis for enforcing worker safety and health requirements at DOE facilities. Two of these commenters (Exs. 15, 38) suggested that DOE also adopt other elements of OSHA's regulations, such as interpretations, penalty policies, and appeals mechanism. As previously discussed, DOE has revised the list of standards in response to comments on the supplemental proposal. The standards mandated in final rule section 851.23(a) are consistent with those mandated under the existing DOE Order 440.1A. These standards include OSHA standards as well other consensus standards that have been evaluated by the DOE health and safety community and deemed necessary to address gaps in the OSHA standards and to provide adequate protection to the DOE workforce. DOE also intends to prepare enforcement guidance supplements (EGSs) that will provide enforcement guidance. DOE anticipates that these EGSs will be consistent with and to a great extent based on the equivalent

OSHA guidance. Furthermore, under final rule section 851.6, DOE will continue to issue technical positions that will be based in large measure on the existing body of OSHA interpretations.

Several commenters were concerned by the potential costs of compliance with supplemental proposed section 851.23(a). These commenters (Exs. 14, 16, 20, 27, 29, 31, 34, 36, 37, 38, 42, 48, 49, 57, 58) surmised that implementation of the proposed rule would result in increased costs associated with the increased amount of resources needed to comply with the large number of consensus standards. Further, commenters believed that these costs would divert funds normally spent on safety, which would negatively impact worker safety and health. Two commenters (Exs. 15, 38) also argued that the costs would divert funds from research. One commenter (Ex. 11) felt that DOE should perform an economic impact analysis for the rule. DOE again notes that in the final rule many of the consensus standards listed under the supplemental proposal are eliminated and the remaining standards in final rule section 851.23(a) are those required by the existing DOE Order 440.1A. Most facilities should already be in compliance with these standards and, therefore, DOE does not anticipate increased costs.

DOE received a number of comments on specific standards (or blocks of standards from the same standard-setting organization). Many commenters (Exs. 1, 2, 3, 4, 5, 7, 8, 16, 19, 20, 24, 22, 29, 31, 33, 37, 39, 45, 47, 49, 54, 55, 58, 59, 61) raised concerns about the NFPA codes found in supplemental proposed section 851.201(b), Table 1. The commenters recommended that these codes be eliminated or clarified based on various compliance concerns, including applicability to facilities, increased costs, and excessive variance requests. One commenter (Ex. 61) observed that while the supplemental proposed rule preamble and purpose indicated that the purpose of the rule was worker safety and health, many of the National Fire Protection Association (NFPA) requirements referenced in supplemental proposed rule section 851.201 from DOE Order 420.1A are directed at limiting property damage, not improving worker safety. The commenter inquired if it was the intent of the rule to address property protection in addition to worker safety or whether enforcement of the NFPA standards would be limited to those issues and provisions that specifically affect worker safety. Furthermore, if the latter was the case, the commenter questioned how DOE would document which provisions specifically applied to worker safety and which applied to property protection. DOE acknowledges these concerns and notes that the intent of the rule is worker safety and health. Accordingly, DOE has removed the majority of the specific NFPA standards in the interest of reducing the contractor and site compliance burdens. NFPA 70 and 70E remain in the final rule because they are important for protecting worker safety and health on DOE sites. DOE notes, however, several deleted NFPA standards may be applicable to DOE facilities through DOE fire protection directives, such as DOE Order 420.1A or by contract.

Several of these commenters (Exs. 2, 8, 16, 19, 29, 37, 45, 49) also objected to the American Society of Mechanical Engineers (ASME), ANSI, American Petroleum Institute (API), American Water Works Association (AWWA), and Underwriters Laboratories (UL) codes found in supplemental proposed section 851.201(c), Tables 2 through 5. Commenter concerns related to these codes included increased costs if the codes were retained, compliance issues, legacy construction issues, lack of rationale for omission and inclusion of the codes appearing in the tables (*i.e.*, the included codes were too prescriptive but with numerous gaps in coverage), lack of applicability to DOE sites, potential increase in exemption requests, conflict with cited OSHA regulations in the supplemental proposal, level of specificity not appropriate to a rule of this type, the fact that specified code editions can become quickly outdated, and problems associated with revision of edition dates through rulemaking procedures. Many of these commenters (Exs. 8, 16, 19, 45) suggested that DOE eliminate the specific codes and editions. Finding several of these concerns to be valid, DOE has modified final rule section 851.23(a) by eliminating Tables 2 through 5 and associated codes (*i.e.*, ASME, API, AWWA, UL, and ANSI pressure-related codes).

DOE also received numerous comments related to the standard on TLVs. Many commenters (Exs. 12, 16, 28, 31, 36, 37, 38, 42, 45, 47, 49, 51, 54, 56) expressed concern over supplemental proposed section 851.201(e), which required compliance with the ACGIH standard for TLVs. Several of these commenters (Exs. 16, 28, 31, 36, 37, 42, 45, 51, 56) expressed the opinion that these values are inappropriate and recommended that they be eliminated from the rule or adopted only partially, since they do not take into account economic or technical feasibility. One commenter (Ex. 38) asserted that this provision goes beyond OSHA requirements and creates an unreasonable obligation for contractors to keep employee exposure levels below both OSHA PELs and the ACGIH exposure limits (depending on which value is lower). Conversely, another commenter (Ex. 54) recommended that, to ensure greater worker protection, DOE continue to require contractors to follow ACGIH TLVs where they are more protective than OSHA PELs. DOE agrees with the latter comment on inclusion of ACGIH TLVs. In final rule section 851.23(a)(9), DOE continues to require the use of ACGIH TLVs exposure limits where they are lower and more protective than OSHA PELs. As mentioned earlier in the discussion of this section, this approach is consistent with DOE Order 440.1A, which has been in place and implemented by DOE contractors on DOE worksites for a decade.

Two commenters were concerned about beryllium exposure levels. One commenter (Ex. 49) recommended that the ACGIH TLV for beryllium be excluded from the rule on the basis that DOE has a separate rule 10 CFR 850 that specifically addresses beryllium exposure limits. In contrast, another commenter (Ex. 62) believed that DOE should adopt the ACGIH TLV for beryllium in the rule; the more protective limit currently under consideration by ACGIH would be applicable under this rule upon ACGIH's approval. In 851.23(a)(1) of the final rule, DOE requires contractors to comply with 10 CFR 850, "Chronic Beryllium Disease Prevention Program" (Part 850 CBDPP). In addition, Part 850 CBDPP has been revised to state that it supplements, and is deemed an integral part of, the worker safety and health program under Part 851. Section 851.23(a)(9) adopts the ACGIH TLVs, however, DOE notes that the rule adopts a specific version of the ACGIH standards. Incorporation of any future changes to those standards into 10 CFR 851 could only be accomplished through appropriate rulemaking procedures.

DOE received a few requests for additional specific standards to be included in the rule. One commenter (Ex. 49) recommended that DOE specifically list parts of the referenced ANSI standards that are considered exposure limits and technical requirements and, thus, applicable under the rule. DOE agrees that specificity is helpful and has included 851.23(a)(10), (11), and (12) in the final rule; these list the three specific ANSI standards adopted under the rule.

Three other commenters (Exs. 11, 54, 55) recommended that DOE include the 10 CFR 1904, "Recording and Reporting Occupational Injuries and Illnesses," standard and require participation in the OSHA illness and injury survey in 29 CFR 1904.41. DOE agrees with this comment and in final rule section 851.23(a)(2), DOE includes and requires compliance with the following provisions of 29 CFR 1904: 1904.4 through 1904.11, 1904.29 through 1904.33, 1904.44, and 1904.46, "Recording and Reporting Occupational Injuries and Illnesses."

One commenter (Ex. 5) suggested that DOE include relevant emergency response standards. This commenter noted that Emergency Response Planning Guidelines (ERPGs) and Temporary Emergency Exposure Limits (TEELs) standards, which apply to emergencies and are not covered by other standards, are not referenced in the rule. DOE notes that the specific issue of including emergency response standards is beyond the scope of this rulemaking.

Several commenters (Exs. 25, 27, 28, 31, 39, 42, 48) expressed concern that supplemental proposed section 851.200(b), which gave DOE the authority to impose additional requirements on a contractor, would leave contractor liability open-ended and would exacerbate costs. These commenters believed that the additional requirements that DOE can impose on a contractor should be limited in response to these comments. DOE has eliminated this authority and modified the language in final rule section 851.23(b) to read, "Nothing in this part must be construed as relieving a contractor from complying with any additional specific safety and health requirements that the contractor determines to be necessary to protect the safety and health of workers."

Another commenter (Ex. 15) felt that the intention of the introduction to the supplemental proposal, which indicates that this proposal is intended to "codify a minimum set of safety and health requirements with which contractors must comply," is not carried over into the language of Subpart C, and recommended that supplemental proposed section 851.200(a) be modified to include "A contractor responsible for a covered workplace must, at a minimum comply with the worker safety and health requirements * * *" DOE agrees with this concern but feels that it is addressed in 851.23(b) of the final rule, which states that a contractor is not relieved from complying with additional worker safety and health requirements that they deem necessary to protect their workers.

Section 851.24—Functional Areas

Section 851.24 requires that contractors have a structured approach to their worker safety and health program, which includes provisions for functional areas. Specifically, 851.24(a) requires that contractors, at a minimum, include provisions in the functional areas of construction safety, fire protection, firearm safety, explosives safety, pressure safety, electrical safety, industrial hygiene, occupational medicine, biological safety, and motor vehicle safety. Section 851.24(b) establishes that contractors are subject to all applicable standards and provisions in Appendix A, "Worker Safety and Health Functional Areas." Comments regarding each of the functional areas are addressed in the discussion of Appendix A in this Supplementary Information.

Section 851.25—Training and Information

Section 851.25 describes the contractor requirements for a worker safety and health training and information program. Section 851.25(a) establishes the contractor's obligation to provide training, while section 851.25(b) describes when, and at what frequency, the training must be provided. Specifically, a contractor must provide (1) training and information for new workers, before or at the time of initial assignment to a job involving exposure to a hazard; (2) periodic training as often as necessary to ensure that workers are adequately informed and trained, and (3) additional training when safety and health information or a change in workplace conditions indicates that a new or increased hazard exists. Section 851.25(c) requires contractors to provide training and information to workers with worker safety and health program responsibilities that is necessary for them to effectively carry out those duties.

One commenter (Ex. 30) recommended that proposed section 851.100(b)(7) be eliminated stating that it would result in excess paperwork since contractors already have safety programs and are required to provide a workplace free of hazards. DOE disagrees, believing that training is a basic component of successful worker protection efforts.

Section 851.26—Recordkeeping and Reporting

(a) *Recordkeeping.* Section 851.26 in the final rule addresses contractor recordkeeping and reporting requirements. This section consolidates provisions that were included in sections 851.4(f) and 851.7 of the supplemental proposed rule. After considering public comment, DOE has revised the recordkeeping and reporting requirements.

Section 851.26(a) requires a contractor to maintain complete and accurate records of all hazard inventory information, hazard assessments, exposure measurements, and exposure controls.

Section 851.26(a)(1) requires contractors to ensure that the work-related injuries and illnesses of their workers and subcontractor workers are recorded and reported accurately in a manner consistent with DOE Manual 231.1–1A, "Environment, Safety and Health Reporting Manual." This manual was established under DOE Order 231.1A, the primary directive on environment, safety and health reporting, including occupational injuries and illnesses. The manual requires contractors to record, maintain records on, and report occupational fatalities, injuries, and illnesses among their employees (and subcontractors) arising out of work primarily performed at facilities owned or leased by DOE.

Section 851.26(a)(2) requires contractors to comply with the applicable to occupational injury and illness recordkeeping safety and health standards in section 851.23 of this part at their site, unless otherwise directed in DOE Manual 231.1–1A.

Section 851.26(b) establishes contractors' duty to report and investigate accidents, injuries, and illnesses. Under this section contractors are also required to analyze related data for trends and lessons learned, in accordance with DOE Order 225.1A, "Accident Investigations."

Section 851.26(c) requires that contractors not conceal or destroy any information concerning non-compliance or potential non-compliance with the requirement of this part.

DOE received numerous comments on reporting requirements in supplemental proposed section 851.4(f). That supplemental proposed section would have required contractors to report and investigate each occurrence (including "near miss" incidents) that causes a significant likelihood of death or serious bodily harm. The majority of commenters (Exs. 5, 15, 25, 28, 30, 31, 35, 38, 39, 42, 45, 47, 51, 57) requested definitions for the terms used in the context of supplemental proposed section 851.4(f) (e.g., "near miss" and "significant likelihood"). Some commenters (Exs. 16, 36, 42) favored

deletion of the provision, since the terms were too subjective and lacked a clear definition. In response to these concerns, DOE has removed this provision from the final rule. Final rule section 851.26(a)(2) clarifies that contractors must report and record workplace injuries and illnesses in accordance with DOE Manual 231.1–1A.

The commenters (Exs. 5, 15, 25, 28, 30, 31, 35, 38, 39, 42, 45, 47, 51, 57) also sought clarification on reporting thresholds for occurrences in supplemental proposed section 851.4(f). Two commenters (Exs. 13, 39) specifically inquired where and to whom the report should be submitted. One commenter (Ex. 60) asserted that occurrence reporting should be mandatory and failure to report should be subject to enforcement. Concerned that this section contravened Noncompliance Tracking System reporting requirements in PAAA-related programs, other commenters (Exs. 36, 38, 39, 42, 49, 57) pointed out that supplemental proposed section 851.4(f) was not consistent with supplemental proposed Appendix A(IX)(b)(5). Several commenters (Exs. 15, 16, 20, 27, 31, 42, 49) recommended that the reporting process be aligned with existing DOE reporting systems like the Occurrence Reporting and Processing System or DOE Order 231.1A. As is noted earlier in this discussion, DOE agrees with these comments and has replaced supplemental proposed section 851.4(f) with final rule section 851.26, which references DOE Manual 231.1–1A.

E. Subpart D—Variances

The supplemental proposal contained an exemption process based on the exemption process established in 10 CFR part 820 for exemptions from nuclear safety requirements. DOE selected the exemption process outlined in 10 CFR part 820 for use in the supplemental proposal because it is specific to DOE activities. DOE believed that because DOE contractors had already implemented this process, the process would be easily understood and costs would be reduced. Many commenters (Exs. 10, 11, 15, 16, 20, 21, 29, 31, 33, 36, 37, 38, 39, 40, 42, 46, 49, 54, 60), however, disagreed with this selection, most stating that this process would actually be too costly to implement. Other commenters (Exs. 10, 16, 23, 30, 39, 40, 44, 60, 62) argued that the exemption process in the supplemental proposal was not consistent with the requirement for flexibility specified by Congress in section 3173 of the NDAA. Specifically, these commenters felt that the 10 exemption criteria included in the supplemental proposal exemption process went beyond the flexibility provisions of the NDAA and could allow contractors to inappropriately circumvent many of the requirements of the rule. Several of these commenters (Exs. 16, 58, 62) felt that the flexibility concerns related to closure facilities raised in the NDAA would be more appropriately handled through the worker safety and health program, hazard abatement, and enforcement provisions of the rule.

To address these concerns, several commenters (Exs. 11, 21, 44, 49, 60, 62) suggested that DOE should replace the proposed exemption process with a variance process modeled after OSHA's variance process established in 29 CFR part 1905. These commenters argued that the variance process outlined in 29 CFR part 1905 was developed specifically to address OSHA worker safety and health standards and, thus, was more applicable to the requirements established in the worker safety and health program.

A few commenters (Exs. 28, 45, 51) supported the exemption process in the supplemental proposal but expressed concern that the exemption implementation process would become unwieldy if additional exemption criteria were added. These commenters believed that this could be detrimental to legitimate exemption requests (e.g., facility closure or demolition), and suggested that an initial screening process be established to determine whether an exemption request satisfies criteria for evaluation. One commenter (Ex. 28) suggested that the 10 exemption circumstances be grouped into 4 categories for screening.

DOE has considered each of these comments and concluded that a variance process modeled after the OSHA variance process is more appropriate to address worker safety and health issues. As a result, DOE has adopted a variance process based on the variance process of 29 CFR part 1905. DOE notes that, because section 851.23 requires compliance with OSHA standards, the use of the OSHA variance process as the framework of the DOE variance process will allow DOE to benefit from OSHA's implementation of the process over the past 3 decades. DOE expects that variance requests to OSHA and OSHA responses will be relevant to variance requests that the Department will receive under Part 851.

Many commenters (Exs. 8, 15, 16, 20, 29, 31, 35, 36, 37, 38, 39, 42, 46, 49) argued that the extensive list of standards in supplemental proposed section 851.201 would result in excessive exemption requests and a corresponding increase in compliance costs, since contractors would often be unable to meet the specific editions of standards incorporated by reference. One commenter (Ex. 5) stated that exemptions take an incredible amount of time to prepare and get through the DOE system for review and approval. As previously discussed, DOE has pared back the standards mandated in the final rule to be consistent with those required by existing DOE Order 440.1A. DOE believes that DOE contractors are intimately familiar and largely in compliance with the requirements of these standards. As a result, DOE does not anticipate a large number of requests for variances. As mentioned in the section-by-section discussion for the fire protection provisions of Appendix A section 2 of the final rule, DOE believes that the "equivalency" process established in many of the NFPA standards required under final rule section 851.23 will further reduce the need for variances under the rule.

DOE also intends to apply OSHA's policies regarding de minimis violations in determining the need for a variance and believes that this policy will further reduce the volume of variance requests. Specifically, OSHA practice holds that variances are not needed for conditions that meet the criteria for de minimis violations. These criteria, as described in the OSHA Field Inspection Reference Manual CPL 2.103, Section 7—Chapter III, Sub-section C(2)(g) include conditions where: (1) Violations of the relevant standard has no direct or immediate relationship to safety or health; (2) An employer complies with the clear intent of the standard but deviates from its particular requirements in a manner that has no direct or immediate relationship to employee safety or health; (3) An employer complies with a proposed standard or amendment or a consensus standard rather than with the standard in effect at the time of the inspection and the employer's action clearly provides equal or greater employee protection or the employer complies with a written interpretation issued by the OSHA Regional or National Office; or (4) An employer's workplace is at the "state of the art" which is technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

General examples illustrating potential de minimis conditions that may not require issuance of variances based on the OSHA criteria described above may involve deviations of distance specifications, construction material requirements, use of incorrect

color, minor variations from record-keeping, testing, or inspection regulations. For example, in considering a variance request for 29 CFR 1910.27(b)(1)(ii) which allows 12 inches as the maximum distance between ladder rungs, OSHA determined that a situation involving rungs that were 13 inches apart could be considered de minimis. In another example involving 29 CFR 1910.28(a)(3) which requires guarding on all open sides of scaffolds, OSHA determined that a situation where employees were tied off with safety belts in lieu of guarding, met the intent of the standard and thus, was a de minimis condition and a variance was not needed. In a third example, OSHA determined that a deviation from 29 CFR 1910.217(e)(1)(ii) which, requires that mechanical power presses be inspected and tested at least weekly, was de minimis in a situation where the machinery was seldom used, and was inspected and tested prior to each use.

The following sections provide a detailed discussion of the variance process outlined in the final rule. Because this process differs significantly from the exemption process outlined in the supplemental proposal, the sections below do not correspond directly with the sections of the original proposal.

Section 851.30—Consideration of Variances

Section 851.30 establishes the authorities that will consider requests for variances from specific provisions of the rule. Specifically, section 851.30(a) establishes that the Under Secretary has the authority to grant variances. Under this provision, this authority may not be delegated. A few commenters (Ex. 30, 44, 60, 62) believe that the Secretary of Energy, not the Officer with responsibility for a contractor's activity, should issue the decision for a variance or an exemption. The commenters believe that instead of allowing the NNSA to recommend exemptions and issue final decisions, the Energy Secretary should render decisions on all exemptions, after receiving a recommendation from the EH–1. DOE disagrees, but believes that the appropriate approval level for granting a variance rests with the Under Secretary for Energy and Environment, or the Under Secretary for Science, or the Under Secretary for Nuclear Security/Administrator for National Nuclear Security Administration, and need not be elevated to the Secretarial level. The Under Secretary, in granting the variance must consider the recommendation of the Assistant Secretary for Environment, Safety and Health.

Another commenter (Ex. 11) stated that non-NNSA and NNSA contractors should not have separate systems for the exemption process, and that one process would be appropriate for the consideration of all variances. DOE agrees that a single Department-wide process is appropriate and has designed the variance process so that the Assistant Secretary for Environment, Safety and Health considers all variances requests and makes a recommendation as to whether they should be granted or denied. The decision to grant a variance is made by the Under Secretary with line management responsibility for the contractor requesting the variance. The Under Secretary must consider the recommendation of Assistant Secretary in deciding whether to grant the variance.

One commenter (Ex. 29) argued that the exemption process would function more efficiently if variance requests for standards addressing less significant hazards could be approved at the regional or site level, so as not to overburden the CSO with multiple variance requests. DOE believes, however, that concerns regarding excessive variance requests are no longer relevant since, for the reasons noted above, DOE does not anticipate a large number of requests for variances.

A final commenter (Ex. 47) on this section believed that the provision that the CSO cannot delegate exemption authority contradicts the requirements of supplemental proposed section 851.203(a)(9). This referenced section addressed a fire protection self-assessment program; however, DOE believes this was an erroneous reference and that the commenter intended to reference supplemental proposed section 851.203(a)(12), which addressed the approval of fire protection equivalencies at the site manager level. Although this specific provision has been removed from the final rule, the equivalency process is separate from the variance process outlined in subpart D of the final rule, so no conflict exists within the rule.

Section 851.30(b) establishes that a variance application must contain the requirements specified in final rule section 851.31.

Section 851.31—Variance Process

Section 851.31 of the final rule describes the variance process requirements. Several commenters (Exs. 15, 16, 29, 31, 37, 42, 46, 49) expressed concern over the proposed requirement to resubmit existing exemptions, especially those exemptions involving fire safety (Exs. 31, 37, 42). Commenters stated that this requirement would result in a significant increase in exemption requests, and this, in turn, would result in increased cost including the need for additional resources to manage the risk pending reapproval. A few commenters suggested that the rule be reworded to incorporate previous exemptions and equivalencies (Ex. 16, 31, 37, 49). DOE notes the commenters' concerns and has revised the final rule.

Section 851.31(a) requires contractors desiring a variance from a safety and health standard established in final rule 851.23 to submit a written application to the appropriate CSO. Section 851.31(a)(1) and (2) established that the CSO may forward the application to the Assistant Secretary for Environment, Safety and Health. If the CSO does not forward the application to the Assistant Secretary, the CSO must return the application to the contractor with a written statement explaining why the application was not forwarded.

Final rule section 851.31(a)(3) requires upon receipt of the variance application from the CSO, the Assistant Secretary for Environment, Safety and Health to review the application for a variance, and make a written recommendation to either approve the application, or approve the application with conditions, or deny the application. In this process, the Assistant Secretary for Environment, Safety and Health ensures uniformity in grant variances and provides the consistency needed the variance process.

One commenter (Ex. 49) expressed concern that the proposed rule is unclear as to whether the CSO can grant an exemption if the Assistant Secretary for Environment, Safety Health does disagrees or fails to respond during the 30-day review period. This commenter suggested that the rule include language that states that the CSO may grant an exemption if the Assistant Secretary fails to respond, or even if the Assistant Secretary disagrees, during the 30-day review period. DOE has revised the final rule to elevate approval authority to the appropriate Under Secretary, which requires the appropriate Under Secretary to "consider" the Assistant Secretary's "recommendations." DOE has revised the final rule to elevate approval authority to the appropriate Under Secretary, which requires the appropriate Under Secretary to consider the Assistant Secretary's recommendations.

Two commenters (Exs. 30, 60) expressed concern that the supplemental proposal might be interpreted as allowing exemptions to go into effect within 30 days if EH–1

fails to act on an exemption review. The commenters believed that this maybe an unrealistic deadline if there is a backlog of exemption requests, and could result in unwarranted exemption approvals. DOE notes, the variance process in the final rule does not establish a time limit for EH–1's review of contractor variance requests.

Another question raised by a commenter (Ex. 49) was whether exemptions of rule requirements could be incorporated in the contractor worker safety and health plan and be approved through CSO approval of this plan. The approval authority for a variance is higher than that for a written program. Variances may not be approved by incorporating a variance request in the worker safety and health program, which is reviewed and approved by the Head of DOE Field Element.

A few commenters (Exs. 28, 37, 45, 51) concerned about a potentially lengthy variance approval process, requested that a specific time period (*e.g.*, 45 days) be set for DOE to act on an exemption request. Some of these commenters were concerned that the variance approval process could delay approval of a contractor's worker safety and health program, resulting in a temporary facility shutdown. As noted in the discussion of subpart B of the final rule, DOE does not intend for approval of the contractor's safety and health program to be contingent upon or related to approval of outstanding variance request. To clarify this intent, DOE has removed a provision from subpart B of the final rule that required contractors to identify, in their programs, situations for which exemptions were needed. As a result, action on variance requests alone will not delay approval of a contractor's worker safety and health program.

A few commenters (Exs. 28, 45, 51) argued that exemption relief should not be limited to Subpart C but should be available for relief form provisions in all subparts of the rule. DOE disagrees with the commenter, however, because the standards listed in section 851.23 of the final rule are generally more prescriptive in nature than the other programmatic requirements in the rule. For instance, there may be many ways for a contractor to meet the intent of a programmatic requirement (such as management responsibilities). For this reason, final rule section 851.31(a) specifies that the variance process in the final rule applies only to the safety and health standards prescribed in final rule section 851.23.

Another commenter (Ex. 13) suggested that the DOE expand the exemption process to provide for an exemption of an entire facility from one or more requirements, via a single exemption request. This commenter felt that such a broad exemptions might be appropriate for a facility that is scheduled for closure or transfer of title. DOE disagrees with this commenter. The variance process is intended to provide relief from a specific requirement due to specific circumstances present in a specific work site. The provisions are not intended to provide wholesale exemptions from standards at entire facilities. DOE notes that the standards mandated in final rule section 851.23 are consistent with the standards required by DOE Order 440.1A. The majority of these standards have been applicable to DOE worksites through DOE Order 440.1A and a variety of predecessor orders and contract clauses for decades. In addition, DOE believes that sufficient flexibility for closure facilities is provided through final rule section 851.21(b), which allows contractors to submit to the Head of DOE Field Element a list of closure facility hazards that cannot be fully abated and/or controlled within 90 days of being identified.

Section 851.31(b) establishes procedures for processing defective variance applications. The Assistant Secretary for Environment, Safety and Health can return an application with a written explanation if it does not contain the information required to make a determination.

Section 851.31(c) establishes the required content for a variance application. Like the corresponding sections of the previous supplemental proposed, final rule sections 851.31(b)(1) through (3) specify that a variance application must contain the name and address of the contractor, the address of the DOE site(s) involved, and a specification of the standard from which the contractor seeks a variance.

Several commenters (Exs. 10, 30, 40, 54, 55, 60, 62) expressed concern at the lack of worker notification and involvement in the proposed exemption process and requested that when a contractor applies for an exemption, the exemption request (and any replies to that request) be posted in a designated area in the workplace at the time of the request. These commenters noted that worker input should be required and solicited, and requested that workers and their representatives be fully able to participate in any discussions and appeal any decision. After reviewing these comments, DOE has added several provisions to the final rule to address these concerns. For instance, section 851.31(c)(4) requires that the applications include any requests for a conference, which as clarified in final rule section 851.34 allow contractors and workers to present facts on how they would be affected by the variance. In addition, sections 851.31(c)(5) and (6) require that the application include a statement that the contractor has informed the affected workers of the application through appropriate methods, as well as a description of how workers were informed of the application and of their right to petition the Assistant Secretary of Environment, Safety and Health for a conference. Section 851.31(c)(5) further clarifies that appropriate methods for notifying workers of the application include giving a copy of the application to the workers' authorized representative, posting a statement at the place(s) where notices to workers are normally posted, giving a summary of the application and specifying where a copy may be examined, and other appropriate means.

One commenter (Ex. 62) believes that the rule should clarify the required content for an exemption, and that the required content should be based on OSHA's required content for variances. This commenter, as well as two others (Exs. 44, 60), also suggested that the proposed rule be revised to incorporate OSHA's approach which, according to the commenters, requires a clear demonstration that worker safety will not be negatively affected by the variance and establishes the procedures needed to provide a fair and transparent exemptions process. These commenters argued that OSHA's approach permits employers to apply for variances, but requires notice to affected employees and the public and gives them the opportunity to participate in a hearing. These commenters believed that a review process that provides the public, affected workers and their representatives, with ample notice and the opportunity to have their views considered would help ensure transparency, accountability, and integrity in the DOE rule. One of these commenters (Ex. 62) further requested a 30-day review period for workers and believed that decisions regarding an exemption should be published in the **Federal Register** within 10 days of issuance.

DOE agrees in part with these requests and, as discussed above, has included provisions for worker notification and involvement in the variance process in final rule sections 851.31(c)(4) through (6). DOE does not agree, however, that parties not impacted by the variance request be notified of the application. The final rule, however, does not preclude workers from sharing concerns

with any party regarding workplace safety and health matters at their own discretion.

Section 851.31(d) describes the types of variances for which a contractor may apply. These are: Temporary variances, permanent variances, and national defense variances. Section 851.31(d)(1) defines the purpose of a temporary variance. A temporary variance allows contractors a short-term exemption from a workplace safety and health standard when they cannot comply with the requirements by the prescribed date because the necessary construction or alteration of the facility cannot be completed in time or because technical personnel, materials, or equipment are temporarily unavailable. To be eligible for a temporary variance, a contractor must implement an effective compliance program as quickly as possible. In the meantime, the contractor must demonstrate to the appropriate Under Secretary and the Assistant Secretary for Environment, Safety and Health, that all available steps are being taken to safeguard workers. DOE does not consider the inability to afford compliance costs to be a valid reason for requesting a temporary variance.

Section 851.31(d)(2) of the final rule establishes the requirements for a permanent variance. A permanent variance grants an exemption from a workplace safety and health standard to contractors who could prove that their methods, conditions, practices, operations, or processes provide workplaces that are as safe and healthful as those that follow the prescribed standard. To decide whether to recommend granting a permanent variance to the appropriate Under Secretary, The Assistant Secretary for Environment, Safety and Health reviews the contractor's application and, if appropriate, visits the workplace to confirm the facts provided in the application. If the request has merit, the Assistant Secretary could recommend granting a permanent variance as described in final rule section 851.32. Final permanent variance orders will detail the contractor's specific responsibilities and requirements and explain exactly how the contractor's method varies from the regulation's requirement.

Section 851.31(d)(3) of the final rule establishes the criteria for granting a variance from a workplace safety and health requirement for reasons of national defense. The Department will use national defense variances to grant reasonable exemptions from workplace safety and health standard requirements to avoid serious impairment of national defense. The contractor must submit a statement showing how the conditions, practices, means, methods, operations, or processes used would give workers a safe and healthful place of employment in a manner that is, to the extent practicable taking into account the national defense mission, consistent with the standard form which the variance is requested. A national defense variance will only be granted for a maximum of six months unless a showing is made that additional time is essential to the national defense mission.

One commenter (Ex. 11) believed that the national defense exemption provisions included in the supplemental proposal would create a potential "loop hole" by allowing practices that would result in worker injuries and illnesses in the name of achieving national defense "in an efficient and timely manner." DOE notes that the NDAA mandates flexibility for national defense activities. DOE believes the language in the final rule provides such flexibility without creating the potential for disregarding the standards set forth in subpart C.

Another commenter (Ex. 62) acknowledged that national security exemptions are warranted, but noted that such exemptions should be rare. This commenter believed that national security concerns could be addressed directly in the rulemaking, as with DOE's exemption from OSHA standards on explosives, through careful writing of the rule. While agreeing that national defense variances should be rare, DOE does not agree that the need for variances can be removed by more specific rule drafting. DOE notes that the provision exempting DOE from OSHA standards regarding explosives was included because existing DOE explosive safety requirements are more directly relevant to DOE operations and thus are more protective of the DOE workforce.

Section 851.32—Action on Variance Requests

Section 851.32 of the final rule establishes procedures for an approval recommendation of a variance application. Specifically, section final rule 851.32(a)(1) establishes if the Assistant Secretary for Environment, Safety and Health recommends approval of a variance application, the Assistant Secretary is required to forward the application and the approval recommendation to the Under Secretary. The recommendation must include a discussion of the basis for the recommendation and any terms and conditions proposed for inclusion as part of the approval.

Section 851.32(a)(2) requires that if the Under Secretary approves the variance to notify the Assistant Secretary for Environment, Safety and Health who must notify the Office of Price-Anderson Enforcement and the appropriate CSO. The CSO is required to notify the contractor. Final rule section 851.32(a)(3) requires the Assistant Secretary include in the notification a reference to the safety and health standard or portion thereof, that is the subject of the application, a detailed description of the variance, the basis for the approval and any terms and conditions of the approval.

Section 851.32(a)(4) and (5) establishes that if the Under Secretary denies a variance, the Under Secretary must notify the Assistant Secretary for Environment, Safety and Health and the CSO who must notify the contractor. The notification must include the grounds for the denial.

Section 851.32(b) establishes the approval criteria for a variance application. The Assistant Secretary for Environment, Safety and Health may recommend to the Under Secretary granting a variance only if the variance: (1) Is not inconsistent with section 3173 of the NDAA; (2) Would not present an undue risk to worker safety and health; (3) Is warranted under the circumstances; (4) Satisfies the requirements of § 851.31 of this part for the type of variances requested.

A few commenters (Exs. 28, 45, 51) believed that the wording in the exemption criteria in supplemental proposed rule section 851.301(a)(1) should be changed from "Be consistent with law" to "Be consistent with applicable law." Another commenter (Ex. 29) requested that the proposed language in the supplemental notice of proposed rulemaking section 851.301(a)(1) be changed to "Be consistent with the intent of the law," noting that if a contractor could achieve full compliance with the law, an exemption would not be needed. This basic criterion is clarified in final rule section 851.32(c)(1), which states that DOE may grant a variance only if the variance "is consistent with section 3173 of the NDAA not prohibited by law."

Another commenter (Ex. 44) requested that the proposed rule be revised to explicitly state that there may not be a reduction in worker safety through the granting of an exemption, and that the rule should require a preponderance of evidence that worker safety will not be compromised. The commenter also requested that the rule

allow adequate determination to be made regarding the effectiveness of alternative protective measures and that DOE establish expiration dates for approved exemptions, rather than giving the contractors almost complete leeway to establish their own exemptions. DOE agrees with this commenter and in final rule section 851.32(c)(2) requires a determination that the variance would not present an undue risk to worker safety and health prior to the Under Secretary granting the variance.

One commenter (Ex. 39) requested that the rule make clear that hazards that are inherent to the work being performed are excluded from the provision that states that an exemption must be free of recognized hazards. DOE has removed the language stating that the exemption must be free of recognized from the variance criteria established in the final rule. DOE notes, however, that contractors are required by section 851.32(c) to demonstrate that alternate controls will provide a workplace that is as safe and healthful as that required by the standard and also requires a determination that the variance will not present an undue risk to worker safety and health. These sections clarify the Department's intent that variances not diminish protection provided to the DOE workforce.

Section 851.31(c) establishes procedures for the Assistant Secretary for Environment, Safety and Health to recommend denial of an application. If denial is recommended, the Assistant Secretary is required to give prompt notice to the CSO, who must either notify the contractor that the application is denied or, if the CSO disagrees with the recommendation, forward the application, the recommendation, the statement of the grounds for denial, and a written statement explaining the basis for disagreement with the Assistant Secretary's decision to the appropriate Under Secretary who will review the package and make a decision. All denial notices must include, or be accompanied by, a brief statement of the grounds for the denial, as required by section 851.31(c)(4) of the final rule. A denial of an application pursuant to this paragraph shall be without prejudice to submitting of another application.

Section 851.32(d) establishes the grounds for denial of a variance application. A variance application can be denied: (1) When enforcement of the violation would be handled as a de minimis violation; (2) when a variance is not necessary, for example, when an interpretative ruling is granted on a specific standard or portion thereof; (3) when there is a situation that does not meet the requirement for a variance set forth in the approval criteria.

Section 851.33—Terms and Conditions

Section 851.33 establishes the required terms and conditions of an approved variance. The section establishes that a variance may contain, but is not limited to, provisions that limit its duration, require alternative action, require partial compliance, or establish a schedule for full or partial compliance. No comments were submitted on the corresponding provisions of the supplemental notice of proposed rulemaking during the public comment period.

Section 851.34—Requests for Conferences

Section 851.34 allows for a worker to request a conference. Any affected contractor or worker may file a request for a conference on the application with the Assistant Secretary for Environment, Safety and Health. A request must include a statement showing how the contractor or worker would be affected by the variance applied for, the specification in the application that is denied and a summary of evidence in support of each denial, and any views or arguments on any issue of facts or law presented.

As discussed in section 851.31(b), several commenters (Ex. 10, 30, 54, 55) believed that worker input should be required and solicited, and requested that workers and their representatives be fully able to participate in any discussions and appeal any decision. DOE agrees with this request and incorporated worker notification requirements and worker rights to petition for a conference into the final rule.

Section 851.34(c) of the final rule, allows the Assistant Secretary for Environment, Safety and Health, or its designee, to determine whether to meet with an affected contractor or worker.

F. Subpart E—Enforcement Process

Subpart E of this rule describes how DOE will enforce the rule's worker safety and health program requirements. Specifically, the subpart outlines the rights and responsibilities of DOE and contractors during inspections, investigations, and resulting enforcement actions. The enforcement options available to DOE are designed to provide a flexible framework that encourages settlement of enforcement proceedings while prescribing clear, timely communication between DOE and contractors throughout all phases of enforcement activities.

DOE received support for the elements of the enforcement program from several commenters, who generally view DOE's approach as reasonable and sound. One commenter (Ex. 51) strongly agreed with the enforcement process of the supplemental proposal and expected that the self-auditing process would create positive incentives for contractors to self-identify and correct hazards. Additionally, this commenter found the enforcement process's purpose and procedures to be clearly defined, as were the classifications and categories of violation severity levels.

Other commenters requested clarification of various points of the rule. For instance, one commenter (Ex. 5) asked DOE to clarify whether only deviations from the rule could result in financial penalties. The commenter suggested that "it would be better to use the preliminary hazard analysis (PHA) process such that fines and penalties could be imposed if sites violated technical safety requirements." DOE presumes that this commenter is distinguishing between deviations from the letter of the rule and deviations from their approved written program. In fact, DOE intends for both the approved worker safety and health program and the applicable requirements of Subpart C to be enforceable. DOE recognizes that violations of standard requirements may be the result of worker safety and health program failures. In these instances worker safety and health program failures may be cited.

Another commenter (Ex. 6) suggested that safety and health-related enforcement should be performed by OSHA rather than DOE. In its view, DOE does not have the capabilities (e.g., certified occupational safety and health inspectors) to enforce the rule. DOE agrees that a qualified staff is an important component of an effective enforcement program and notes that DOE, through authority granted under the AEA of 1954, has enforced occupational safety and health requirements through contracts on DOE sites since its inception. Section 3173 of the NDAA mandates DOE to promulgate this rule to provide a regulatory enforcement and civil penalty mechanism. The Office of Price-Anderson Enforcement is staffed with trained, qualified professionals capable of performing enforcement inspections and investigations.

Several of the comments (Exs. 12, 13, 37) sought clarification of certain aspects of the enforcement process. For instance, one commenter (Ex. 13) found some of the terminology (e.g., "deception," "willfulness," "gross negligence") too subjective for use in

determining the severity of violations. The commenter suggested that further guidance is needed to clearly define the DOE's intended enforcement of the rule. Clear definitions were also requested by a commenter (Ex. 37) who suggested that DOE adopt provisions from OSHA's enforcement processes on severity of findings, threshold criteria for appeals, and an independent and equitable appeals process. Another commenter (Ex. 12) felt the rule did not clearly indicate how potential violations would be identified and screened. This commenter suggested that DOE develop compliance directives such as those used by OSHA. DOE agrees that enforcement guidelines with clearly defined terminology will aid the Department in ensuring fair and consistent enforcement. DOE has revised Appendix B of the final rule (previously Appendix A of the supplemental proposed rule) to clarify severity levels, and final rule section 851.44 clearly describes the administrative appeals process. Additionally, DOE intends to publish enforcement guidance supplements (EGS) that, coupled with Appendix B to the final rule, will further guide the enforcement process.

A commenter (Ex. 16) concerned specifically with the Noncompliance Tracking System (NTS) process and NTS reporting thresholds suggested that DOE use an enforcement process similar to that used for the enforcement of Price-Anderson Amendment Act (PAAA). This commenter indicated that DOE could benefit from its experience of implementing the PAAA process over the past 10 years, particularly by integrating costly NTS reporting with Occurrence Reporting and Processing System (ORPS), making use of fully integrated contractor management systems (as in draft DOE Order 226.1), following the Nuclear Regulatory Commission (NRC) precedents by eliminating subjective NTS reporting thresholds, and encouraging contractors to shift from "event driven" to "assessment driven" reporting. While not opposed to further clarification of NTS reporting thresholds, DOE notes that the DOE community has experience in implementing tracking programs. Contractors have long been responsible for recording and analyzing occupational safety and health (OSH) noncompliances and tracking abatement progress as required by DOE Order 440.1A. To help refine the process under the final rule, the Office of Price-Anderson Enforcement plans to develop and publish in appropriate EGSs, thresholds for voluntary contractor reporting of noncompliances into NTS. The Office of Price-Anderson Enforcement expects to periodically adjust the thresholds as additional experience is gained under the final rule. Also, this office will incorporate lessons learned from the reporting of nuclear violations into NTS.

Several commenters (Exs. 31, 37, 42, 57, 58) expressed concern that the proposed rule would not provide for defenses that are commonly applied to American industry in OSHA enforcement proceedings. These commenters offered specific examples, including defenses related to a standard being "unenforceably vague," lack of employee endangerment, lack of employer knowledge of a hazard, technological or economic feasibility of abatement for noise and toxic substance hazards or regulatorily proposed mitigation plans, unpreventable or unforeseeable employee misconduct, lack of employer control over a hazard, and emergency conditions. DOE recognizes the value of additional guidance on these matters but notes that affirmative defenses from OSHA citations are not built into the regulatory text of the OSHA standards as suggested by some of the commenters. Such defenses are instead discussed in OSHA's enforcement guidance, including the Field Inspection Reference Manual. The defenses commonly addressed in OSHA guidance include unpreventable employee misconduct, impossibility, greater hazard, and multi-employer workplaces. DOE intends to follow a similar approach by incorporating guidelines on these types of affirmative defenses in appropriate EGSs to the extent these defenses are appropriate for DOE. Another commenter (Ex. 11) suggested that the rule should contain details of an inspection targeting process that outlines the procedures DOE will use as the criteria for selecting facilities for inspection. The commenter indicated that OSHA has published criteria of this type, which are used to ensure effective use of limited enforcement resources. DOE does not agree with this comment. There is no statutory requirement that DOE outline its process for identifying and prosecuting violations of the Part 851. Such a process would interfere with the discretion necessary to effectively implement the statutory mandate. However, as previously mentioned, DOE does intend to develop EGSs that will present guidelines for the enforcement process. The Office of Price-Anderson Enforcement expects to adapt many of OSHA's inspection protocols to the unique DOE enforcement regime.

DOE received several comments that questioned whether DOE can effectively regulate contractors to the extent indicated by this part. For example, a commenter (Ex. 6) questioned whether DOE would enforce this regulation for its Headquarters (HQ), regional, or site offices, and suggested that HQ will need to set up an independent oversight office. These commenters may not be aware that the Office of Price-Anderson Enforcement, which has independent oversight authority, currently enforces nuclear safety requirements, will expand its enforcement function to include enforcement of the worker safety and health provisions of this rule.

Another commenter (Ex. 13) described the enforcement policy as establishing a highly complex nuclear safety process that far exceeds what OSHA expects of the industrial sector. DOE disagrees with this statement. The worker safety and health program implemented in the final rule is based on the program management provisions established in DOE Order 440.1A and its predecessor orders to address occupational safety and health at DOE facilities. The worker safety and health program was based in large measure on the OSHA Voluntary Safety and Health Management Guidelines published in 1989. Accordingly, DOE believes that the provisions of the final rule are generally consistent with what OSHA expects of effective worker safety and health programs in the private sector.

Compliance costs and accounting were a concern for several commenters. Two of these commenters (Exs. 31, 48) felt that DOE enforcement will result in increased cost to contractors "to respond to new and extensive enforcement activities." DOE disagrees. Contractors with effective integrated safety management programs, which incorporate both nuclear safety and worker safety and health programs, have little to worry about. The Office of Price-Anderson Enforcement intends to enforce both nuclear and worker safety and health programs from the same office, using similar operating principles. The Office of Price-Anderson Enforcement will most likely consider enforcement action in significant situations. Another commenter (Ex. 29) suggested that—for the purposes of the Major Fraud Act—the rule should include a provision stating when the contractor must begin segregating the costs of responding to a DOE safety and health investigation, since these costs will not be recoverable if a violation is confirmed. DOE has significant experience with the Major Fraud Act in

connection with the implementation of part 820. Accordingly, the same procedures and requirements that DOE has already successfully applied to enforcement actions under 10 CFR part 820 will apply to enforcement actions under 10 CFR part 851.

DOE received a number of comments in addition to those discussed above that recommended that DOE incorporate various aspects of OSHA's enforcement program. A few commenters (Ex. 29, 37, 47) believed that DOE should use an enforcement process based on OSHA to better serve the needs of worker safety and health. For instance, one commenter (Ex. 37) felt strongly that an "OSHA approach to safety enforcement" is more appropriate and better understood by DOE management and operating contractors and subcontractors than the nuclear safety enforcement approach proposed in the rule. The commenter suggested that DOE consider relying upon OSHA enforcement guidance and case law for determining violations and penalties under the DOE rule, particularly in regard to the General Duty Clause and affirmative action defenses. DOE does not agree with this commenter's assertion that contractors are unfamiliar with the enforcement approach in this rule. This rule will apply to contractors and their subcontractors, just as the nuclear safety rules apply. Therefore, these parties should already be familiar with the enforcement regime and the flow down of requirements. Two other commenters (Exs. 38, 57) believe that, unlike the OSHA enforcement process, the DOE enforcement process in the supplemental notice of proposed rulemaking would not afford contractors the right to a hearing with the ability to present witness testimony before penalties are assessed. DOE disagrees and notes that the final rule gives contractors several opportunities to contest notices of violation and provide evidence (including witness testimony) to support their position. These opportunities include the right, under final rule section 851.44, to an administrative appeal to the Office of Hearings and Appeals in accordance with 10 CFR 1003, Subpart G, which establishes procedural regulations for the DOE Office of Hearings and Appeals with respect to private grievances and redress.) The procedures under 10 CFR 1003.77 also allow petitioners to seek further judicial review of the final order issued by the Office of Hearings and Appeals.

Another commenter (Ex. 42) expressed concern that the supplemental notice of proposed rulemaking does not address whether DOE will use contractor self-assessments as a basis for enforcement actions. This commenter recommended that DOE adopt OSHA's policy regarding the treatment of voluntary employer safety and health self-audits. DOE notes that contractors are responsible for identifying and tracking noncompliances. The Office of Price-Anderson Enforcement does not intend to routinely ask to see contractor self-assessment reports for the purpose of identifying noncompliances; however, the Office may review such documents during the course of a program review or during an investigation prompted by an event such as an accident, recurring or repetitive condition, or programmatic failure.

One commenter (Ex. 48) suggested that "The overall effect of this rule * * * as written will be to burden both the Government and its contractors with a potentially massive reporting and analysis effort. Contractors will be compelled to report each variation in standard compliance and the DOE enforcement and investigative arm [will be compelled] to read and screen all reports for NOV issue." It appears to DOE that this commenter assumes that a contractor may have a significant number of noncompliances on the effective date of this rule. This should not be the case since contractors should already be in compliance with DOE Order 440.1A, which provides the basis for this final rule. Noncompliances that existed in the past should have been identified, analyzed, and tracked through abatement. Any noncompliances that still exist, should already be in the contractors' tracking systems. The magnitude of emerging noncompliances should not overwhelm reporting systems.

The same commenter (Ex. 48) also views the rule as providing only punitive compliance mechanisms. The commenter argued that relying only on punitive measures will reverse the successful partnering of DOE and its contractors that has achieved significant safety and health performance in recent decades. The commenter suggested that the DOE rule will shift the focus of contractor worker safety and health practice to policing for conditional violations and away from successful proactive programs. DOE disagrees, believing instead that this rule is more likely to enhance the relationship between DOE and its contractors. DOE contractors have already made contractual commitments to perform their work in accordance with DOE's safety and health requirements as established in DOE Order 440.1A. The rule will only clarify and strengthen both DOE's and the contractor understands of the requirements.

Section 851.40—Investigations and Inspections

Section 851.40 establishes DOE's right to conduct investigations and inspections to confirm contractor compliance with the rule and describes the steps DOE must take when performing an investigation or inspection. The section also gives contractors certain rights and responsibilities during inspections and investigations.

Section 851.40(a) gives the Director the right to take any actions necessary to conduct inspections and investigations of contractor compliance with health and safety program requirements. In order to conduct these inspections, DOE enforcement officers have the right to prompt entry into worksites.

One commenter (Ex. 42) indicated that DOE must establish clear procedures for OE to carry out investigations and enforcement actions. This commenter believed that these procedures should specify what events will trigger an informal conference and subsequent enforcement action and whether Type A and B investigations will be used as the basis for legal action. Again, DOE finds that it is more appropriate to establish inspection protocols EGSs. These EGSs, coupled with Appendix B to the final rule, will guide the enforcement process and address the issues raised by the commenter. The Office of Price-Anderson Enforcement will use all available information in exercising its enforcement authority.

A second commenter (Ex. 5) inquired whether the Office of Price-Anderson Enforcement is considering revising the existing guidance provided in the Operational Procedures (*Identifying, Reporting, and Tracking Nuclear Safety Noncompliances Under PAAA*, June 1998 edition) or if the Office will develop a stand-alone guidance document for the review and reporting determination of potential non-compliances. As stated above, the Office of Price-Anderson Enforcement intends to provide EGSs that will cover NTS reporting thresholds.

A number of commenters (Exs. 11, 16, 28, 29, 35, 36, 37, 43, 45, 47, 51) expressed the opinion that Voluntary Protection Program (VPP) sites should not be subject to programmed inspections or should qualify for a reduction in inspections. DOE agrees that VPP sites are likely to have the best worker safety and health programs and be in substantial compliance with the

provisions of this rule. Nevertheless, DOE believes it is important that VPP sites be subject to all of the provisions of this rule. The Office does not expect these sites to have many NTS-reportable violations, but the Office will respond as necessary to significant violations and develop appropriate programmed inspection strategies.

One commenter (Ex. 31) asked whether inspection and investigation authority will be delegated to the field or site office level. Enforcement authority rests with the Office of Price-Anderson Enforcement and will not be delegated to the field or site office levels. DOE does not, however, intend to interfere with inspection and investigation activities conducted by the field or site offices. A commenter (Ex. 32) suggested that the rule address how the Office of Price-Anderson Enforcement will take the results of inspections that are performed at DOE sites by the Office of Independent Oversight and Performance Assurance's Office of Safeguards and Security Evaluations (OA–10) and EH's Office of Quality Assurance Programs (EH–31), into account when determining the frequency and necessity of its own inspections. The Office of Price-Anderson Enforcement will use all available information, from any source, in developing enforcement protocols and plans, and making enforcement decisions.

Section 851.40(b) requires contractors to cooperate with DOE throughout enforcement activities. DOE received no comments on section 851.40(b) during the public comment period.

The right of a worker or worker representative to request an investigation is included in final rule section 851.40(c). Although the worker may remain anonymous, the investigation request should identify the activity of concern as specifically as possible and include supporting documentation. Several commenters (Exs. 30, 54, 55, 60) suggested that persons requesting investigations or inspections be allowed to remain anonymous. DOE agrees, final rule section 851.40(c) now includes a provision establishing a worker's or worker representative's right to remain anonymous upon filing a request for an inspection or investigation.

Two commenters (Exs. 26, 39) asked DOE to clarify that it is up to the Director to determine whether a complaint will be investigated and suggested changing the subject of this paragraph from "any person" to a "covered worker." The commenters thought such a change would avoid the implication that DOE will investigate all complaints, even those made by a private citizen who called with an investigation request. DOE agrees that the original language in supplemental proposed section 851.400(c) too board. Accordingly, final rule section 851.40(c) clarifies DOE's intent to allow workers or their representatives the opportunity to request an investigation or inspection of a specific work place safety and health concern. DOE intends to respond to all worker and worker representative requests for investigation or inspection, at least to the extent needed to determine if further action is necessary or warranted. If the initial investigation reveals that further investigation or inspection is unwarranted, the Director may, under final rule section 851.40(i), close the investigation.

It is important to note that the Office of Price-Anderson Enforcement expects that workers or worker representatives will have first presented their concerns through their respective Employee Concerns Programs (ECPs), but without satisfactory resolution. Several related comments (Exs. 31, 36, 42, 48) suggested that this rule recognize the ECP and contractor management as an avenue to resolve concerns involving safety matters. Two of these commenters (Exs. 31, 48) indicated that if the issue cannot be resolved, then the worker should be able to request an investigation but not an inspection; they argued that a request for inspection should be handled only through the established ECP program or contractor management chain of command.

DOE notes that final rule sections 851.20(a)(6) through (9) establish provisions for contractors to develop and implement procedures allowing workers to express concerns regarding workplace hazards and for contractors to respond to those concerns. While DOE intends for workers to explore these avenues first, DOE does not feel it is appropriate to restrict a worker's right to request an inspection or investigation by requiring them to try these other options first. DOE disagrees with the comment that inspections should be limited to the ECP or contractor chain of command. Onsite inspections often are a necessary part of an investigation and may give the Office of Price-Anderson Enforcement the best opportunity to verify whether a violation or noncompliance exists.

Two commenters (Exs. 54, 55) asked that employees and their representatives be given the right to accompany the inspector under supplemental proposed section 851.400(c). One of these commenters (Ex. 54) stated that this section would not give workers or their representatives the right to be involved in any part of the inspection, except the right to accompany an inspector under supplemental proposed section 851.10(b)(4). DOE notes that final rule section 851.20(b) establishes the right for a worker representative to accompany the Director during the physical inspection of the workplace. If a representative is not available, the Director must consult, as appropriate, with employees on matters of worker safety and health. During an evaluation of a noncompliance or an inspection, the Office of Price-Anderson Enforcement normally interviews individuals with direct knowledge of the workplace to gather information such as frequency of exposure, duration of exposure, and other details. The Office of Price-Anderson Enforcement expects that, through this process, the appropriate people would be consulted.

One of the commenters (Ex. 54) was also concerned that a worker's ability to request and receive copies of inspections and accident investigations in accordance with ISM and with supplemental proposed section 851.10(b)(4) may be curtailed by portions of this section. DOE disagrees and notes that final rule section 851.20(b), which mirrors the worker rights provisions of DOE Order 440.1A, clearly establishes that workers have the right to obtain results of inspections and accident investigations, as described in final rule section 851.20(b)(6).

When a contractor becomes the subject of an investigation or inspection, final rule section 851.40(d) requires the Director to inform the contractor in writing. The written notification must describe the purpose of the action and be provided at the initiation of the investigation or inspection process.

Three commenters (Exs. 28, 45, 51) requested that DOE revise supplemental proposed section 851.400(d) to require the Director to notify a contractor in writing prior to the initiation of a proceeding under the Major Fraud Act. A fourth commenter (Ex. 36) asked whether this section would change the Office of Price-Anderson Enforcement's practice in defining a "proceeding" under the Major Fraud Act. DOE has significant experience with the Major Fraud Act in connection with the implementation of part 820. Accordingly, the same procedures and requirements that DOE has already successfully applied to enforcement actions under 10 CFR part 820 will apply to enforcement actions under 10 CFR part 851.

A commenter (Ex. 47) suggested that DOE indicate in the rule that all information pertaining to the investigation or inspection that is in the

possession of DOE will be provided to the contractor at the initiation of the investigation or inspection. Although DOE generally provides such information to contractors, the Office of Price-Anderson Enforcement must retain the right not to disclose certain information if it believes the information may interfere with the willingness of individuals to step forward on a confidential basis or if sharing the information will hinder the Office's enforcement activities. Therefore, DOE is not adopting this suggestion.

Section 851.40(e) prohibits DOE from releasing to the public any information obtained during an investigation or inspection, unless the Director authorizes the public disclosure of the investigation. Once the Director authorizes public disclosure for an investigation, the information associated with the investigation is a matter of public record. Prior to and disclosure, DOE must determine that disclosure is not precluded by the Freedom of Information Act (FOIA), 5 U.S.C. 552, and Part 1004 of this title.

DOE received several comments expressing concern about the Director's discretion to authorize or withhold public disclosure of information related to an investigation. Three commenters (Exs. 26, 39, 48) wondered whether the Director's discretion overrides FOIA, Privacy Act, and judicial determinations of what otherwise might remain confidential or be required to be released. These commenters were particularly concerned about protection of classified project or proprietary information. Two of these commenters (Exs. 39, 48) expressed similar concerns about supplemental proposed section 851.400(f), which addressed requests for confidential treatment of information. DOE recognizes these concerns and confirms that the Director's actions with respect to release of documents are always subject to the constraints of law. Final rule section 851.40(e) or 851.40(f) has been revised to clarify that disclosure of information is subject to the Freedom of Information Act.

Section 851.40(f) clarifies that a request for confidential treatment of information under the Freedom of Information Act (FOIA), does not prevent disclosure of the information if the Director determines the release is in the public interest and is permitted or required by law.

During an investigation or inspection, final rule section 851.40(g) allows any contractor to submit to DOE any information that the contractor feels explains the contractor's position or is relevant to the investigation or inspection. DOE received no comments on section 851.40(g) during the public comment period.

Section 851.40(h) permits the Director to convene, and require a contractor to attend, an enforcement conference to discuss any information related to a situation that might be a violation of a requirement in this part. Conference discussions might include, but are not limited to, the significance or causes of a violation, corrective action taken or not taken by the contractor, and mitigating or aggravating circumstances. DOE will not make a transcript and the conference is not normally open to the public.

Two commenters (Exs. 31, 48) indicated that informal conferences should never be open to the public since it would hinder open dialogue and the cooperative nature of the conference. DOE agrees that enforcement conferences should not normally be open to the public, but believes that this is a matter that is appropriately within the discretion of the Director. This provision is consistent with the Office of Price-Anderson Enforcement nuclear safety enforcement provisions and practices.

The same commenters (Exs. 31, 48) also noted that if the Director can compel contractor attendance at the informal conference, then the "official enforcement process" has begun at that point and the contractor should attend with legal counsel present. DOE has significant experience with the Major Fraud Act in connection with the implementation of part 820. Accordingly, the same procedures and requirements that DOE has already successfully applied to enforcement actions under 10 CFR part 820 will apply to enforcement actions under 10 CFR part 851. With respect to the "conferences," DOE has determined that it is appropriate to retain the term "informal conference" to retain consistency with section 820.22.

Another commenter (Ex. 47) asked that contractors be allowed to request informal conferences. DOE agrees; final rule Appendix B ("General Statement of Enforcement Policy"), paragraph VII (d) clarifies that a contractor may request an enforcement conference.

Section 851.40(i) permits the Director to close the investigation or inspection if facts show that further action is unwarranted. Two commenters (Exs. 31, 48) suggested that when the Director closes an investigation due to lack of factual evidence or if evidence shows no violation, then the matter should be closed without prejudice and may not be reopened by the Director. DOE notes that the Director has the authority to initiate or close an investigation. If facts presented or discovered during the investigation indicate that further action is unwarranted, then the Director may close the investigation without prejudice. If, after the initial investigation is closed, facts are discovered which indicate that the investigation should be reopened or reconvened, then the Director may reopen the investigation.

Section 851.40(j) allows the Director to issue enforcement letters that state DOE's expectations with respect to any aspect of the requirements of Part 851. The enforcement letter, however, may not create the basis for a legally enforceable requirement pursuant to this part. One commenter (Ex. 29) inquired whether supplemental proposed section 851.400(j) should have used the term "Enforcement Guidance Supplements" rather than "enforcement letters." DOE disagrees because the two terms are separate and distinct. Enforcement letters are issued in cases where DOE decides that an enforcement action is not required, but concludes that it is important to communicate a particular message to the contractor. An enforcement letter is a vehicle to highlight actions taken by the contractor that were appropriate and that formed the basis for not taking more formal enforcement actions. The enforcement letter will also usually identify areas (1) that may have been less satisfactory than desired but not sufficiently serious to warrant enforcement action, and (2) in which contractor attention is required to avoid a more serious condition that would require enforcement action. An enforcement letter may also highlight noteworthy contractor practices. EGSs, on the other hand are issued periodically by the Office of Price-Anderson Enforcement to provide clarifying guidance regarding the processes used in enforcement activities. EGSs provide information or recommendations only and impose no requirements or actions on DOE contractors.

Section 851.40(k) permits the Director to sign, issue, and serve subpoenas. For NNSA sites, this responsibility is assigned to the NNSA Administrator in final rule section 851.45(a). Several commenters (Exs. 28, 45, 51) argued that this provision would present an apparent conflict of interest if the investigator can become party to the judicial process by signing, issuing, and serving subpoenas. DOE disagrees with this concern and notes that the Director and NNSA Administrator have each been given subpoena authority within their statutory purview.

Section 851.41—Settlement

Section 851.41 encourages settlement of DOE enforcement proceedings and establishes a basic framework within which settlements shall proceed. This section presents the rights and duties of the Director and contractors seeking to resolve issues through a consent order.

Section 851.41(a) states that DOE encourages settlement of any enforcement proceeding, if settlement is consistent with Part 851. At any time, the Director and contractor may hold a settlement conference, which will not be recorded in a transcript or open to the public.

Section 851.41(b) allows the Director to use a consent order to resolve issues in an outstanding proceeding. The consent order must set forth the relevant facts, terms, and remedies to which the parties agree and must be signed by both parties. The order need not find or admit that a violation occurred, but shall constitute a final order.

DOE did not receive any comments specific to section 851.41(a) or 851.41(b), but did receive three comments that relate to 851.41 as a whole. One commenter (Ex. 30) was concerned that enforcement actions that require funding to abate hazards pose a "special challenge to a self regulated entity." The commenter believes that such actions should not be settled unless the settlement contains a resource-loaded plan that will ensure implementation. DOE notes that DOE field management are involved in all decision making related to enforcement actions, and settlement negotiations include appropriate cost considerations. The same commenter was joined by another (Exs. 30, 54) in suggesting that DOE should allow workers and unions to elect party status in an enforcement proceeding and to participate in settlement negotiations, as is allowed by OSHA. The second commenter (Ex. 54) also objected to the fact that the supplemental proposed rule would permit all settlement records to be kept secret and would provide no appeal right on the settlement. DOE disagrees with these commenters and does not intend to provide this opportunity. The Director is responsible for carrying out the intent of enabling legislation as delegated by the Secretary. A commenter (Ex. 45) requested that DOE define the term "settlement." After carefully reviewing this comment, DOE believes the settlement process is adequately described in final rule section 851.41 and need not be separately defined. The final rule does define the outcome of a settlement (that is, a consent order), in section 851.3.

Section 851.42—Preliminary Notice of Violation

Section 851.42 permits the Director to issue a preliminary notice of violation (PNOV) to the contractor if the Director believes that a violation of this part has occurred. The section lists the specific information that must be included in the PNOV and in the contractor's reply. The PNOV constitutes a final order with no right of appeal if the contractor fails to reply within 30 days. Once final, the PNOV must be posted.

DOE received two general comments regarding section supplemental proposed section 851.402. In the first, three commenters (Exs. 54, 55, 60) noted that the supplemental proposal contained no requirement to post notifications of violation. Two of these commenters (Exs. 54, 55) were also concerned that the section provided no right of worker or union appeals or for worker or union involvement in any way in the process. DOE agrees that it is appropriate for workers or their representatives to play a role in the process and has revised the rule to facilitate their participation. In the final rule, section 851.20(b)(5) gives worker representatives the right to accompany the Director during inspections or, if a representative is not available, requires inspectors to consult employees on matters of health and safety. Section 851.20(b)(6) gives workers the right to request and receive results of inspections and accident investigations. DOE also has included in section 851.42(e) a requirement that PNOVs be posted once they are final.

A commenter (Ex. 28) argued that a contractor should give greater weight to an OSHA decision involving an interpretation of an OSHA standard than to a DOE interpretation of the same standard. DOE notes that OSHA interpretations of OSHA standards will be considered valid unless directed by DOE General Counsel. However, DOE reserves the right to deviate from an OSHA interpretation when it applies to a unique operation at a DOE site. In such cases, DOE will issue its own interpretation for purposes of implementing the DOE worker safety and health program.

Section 851.42(a) authorizes the Director to issue a PNOV. The PNOV must include specific information under section 851.42(b), including as the facts on which the alleged violation is based, proposed remedies and civil penalties, and a statement obliging the contractor to reply in writing within 30 days. Section 851.42(c) requires that the contractor's reply cover the relevant facts, any extenuating circumstances, and answers to questions set forth in the PNOV. Under section 851.42(d), if the contractor fails to submit a reply and all supporting documents within the allowed time, the contractor relinquishes the right to appeal the PNOV. Section 851.42(e) requires that the PNOV be prominently posted in the area where the violation occurred until the violation is corrected.

DOE did not receive comments related specifically to sections 851.42(a) through (e) during the public comment period.

Section 851.43—Final Notice of Violation

Section 851.43 requires the Director to review a contractor's timely written reply to a preliminary notice of violation (PNOV). If the Director determines that a violation occurred, this section allows the Director to issue a final notice of violation that includes specific information listed by this section. Unless the contractor petitions the Office of Hearings and Appeals, the final notice constitutes a final order. Section 841.43(a) establishes that the Director will review and make a final determination regarding a contractor's timely reply to a PNOV. If the Director determines that a violation has occurred or is continuing to occur, the Director may issue the contractor a final notice of violation as described by section 841.43(b). Specifically, the final notice must state that the contractor may petition the Office of Hearings and Appeals in accordance with 10 CFR Part 1003, subpart G.

One commenter (Ex. 47) recommended that supplemental proposed sections 851.403 and 851.404 be revised to provide for appeals to Administrative Law Judges (ALJs), following the PAAA process contained in 10 CFR 820, rather than to DOE's Office of Hearings and Appeals. DOE has not accepted this comment, because initial decisions based on an evidentiary record are prepared by the Office of Price-Anderson Enforcement. Therefore, a trial *de novo* (new trial) is unnecessary and the Office of Hearings and Appeals is the appropriate forum to which appeals may be referred.

Under section 841.43(c), a contractor relinquishes any right to appeal if the contractor fails to make a timely petition for review of a final notice of violation. In the absence of a petition for review the final notice becomes a final order.

Section 851.44—Administrative Appeal

Section 851.44 establishes the right of a contractor to petition the Office of Hearings and Appeals for review. Section 851.44(a) describes this right,

which must be exercised within 30 calendar days of receipt of the final notice of violation. Section 851.44(b) clarifies that in order to exhaust final remedies; the contractor must make such a petition in accordance with section 851.44(a).

DOE received several general comments on the review process. Several commenters (Exs. 15, 31, 47) suggested that a third party reviewer (not DOE) should handle contractors' petitions instead of the Office of Hearings and Appeals. These commenters recommended that contractors be given an opportunity to challenge a proposed civil penalty either before an ALJ or in a U.S. District Court, as provided for in 10 CFR 820. The commenters pointed out that ALJs routinely hear OSHA cases and have a greater familiarity with OSHA requirements and case law. One of these commenters (Ex. 15) went on to suggest that DOE establish a small independent review commission as a final step in the administrative review process, as is used effectively by OSHA. A related comment (Ex. 61) inquired whether the final rule would provide a mechanism for contesting or overturning potential findings that a contractor believes to be technically inaccurate. As discussed with regards to final rule section 851.43, the Office of Price-Anderson Enforcement prepares initial decisions based on an evidentiary record. Therefore, a trial *de novo* (new trial) is unnecessary and the Office of Hearings and Appeals is the appropriate forum to which appeals may be referred.

Section 851.45—Direction to NNSA Contractors

Section 851.45 establishes that for NNSA contractors, it is the NNSA Administrator, rather than the Director, who issues subpoenas and notices. Section 851.45(a) gives the NNSA Administrator authority to sign, issue, and serve subpoenas, orders, disclosures, preliminary notice of violations, and final notices. The Administrator must consider the Director's recommendation.

Appendix A—Worker Safety and Health Functional Areas

This appendix establishes the mandatory requirements for implementing the applicable functional areas required by 10 CFR 851.24 of this part. These provisions from DOE Order 440.1A, "Worker Protection Management for DOE Federal and Contractor Employees," were derived through years of coordination, analysis, and review and comment procedures seeking input from top subject matter experts throughout the Department as part of the Order development process. As a result, at the time of publication of DOE Order 440.1A, these provisions reflected the state-of-the-art in corporate safety and health program requirements and were established with the concurrence of each DOE Program Secretarial Office. Since the order was published, the Department has gained close to a decade of experience in successfully implementing these functional area provisions on DOE worksites. These sections build on the lessons learned over these years and establish appropriate functional area enhancements as deemed necessary by DOE subject matter experts in conjunction with the respective DOE internal technical advisory committees.

Several commenters (Exs. 16, 27, 28, 42, 45) expressed concern that the provisions of this Appendix would require contractors to expend additional effort and resources to submit safety and health plans above and beyond the safety and health program called for under supplemental proposed Section 851.100 or to perform an extensive review and analysis of existing programs to ensure compliance with the rule. DOE does not believe that this is the case. The fundamental requirements captured in Appendix A of the final rule reflect those of DOE Order 440.1A, which has been applicable at DOE worksites for many years. Consequently, DOE believes that contractors are already complying with these requirements and thus minimal, if any, additional effort will be needed.

One commenter (Ex. 28) sought clarification on whether plans required under the functional area sections of the rule must be submitted for DOE approval. Section 851.11 of the final rule requires contractors to submit to a written worker safety and health program that provides the methods for implementing the requirements of Subpart C (which includes the functional areas) to the appropriate Head of DOE Field Element for approval. Accordingly, a description of how the contractor will meet the requirements of Appendix A of the final rule must be included in the worker safety and health program that is submitted for DOE approval.

These sections also establish provisions for a new functional area within the comprehensive worker protection program to address biological safety. DOE believes this new functional area is warranted to address concerns that arose from the anthrax terrorist attacks of October 2001. Provisions for each of the functional areas are discussed in further detail in the sections that follow.

1. Construction Safety

Appendix A, section 1 (formerly supplemental notice of proposed rulemaking section 851.202) establishes requirements and responsibilities that apply to the construction managers and construction contractors for planning and implementing appropriate worker safety and health measures during construction activities. For the construction section of this rule, it was necessary to provide separate definitions in final rule section 851.3 that are applicable to construction in order to circumscribe those activities to which the construction safety provisions apply and to assign responsibilities for these activities. The definition of "construction" was taken directly from OSHA's standards, which in turn has taken its definition from the Davis-Bacon Act regulating wage rates for federally funded construction projects.

The definition for "construction contractor" as provided in order to discern where in the contract hierarchy the responsibility for implementing the provisions of a construction contract lies. Depending on the contracting situation, the construction contractor may be the management and operating contractor if the work is performed directly by his forces or it may be a subcontractor to the management and operating contractor or a subcontractor to a separate construction management contractor.

Similarly, the definition of "construction manager" was provided in order to discern where in the project hierarchy the responsibility for primary oversight of the construction contractor lies. For the purpose of this rule, the construction manager could be DOE if the construction work is performed directly by the management and operating contractor or it may be the management and operating contractor if the construction work is performed by a subcontractor to the management and operating contractor. It could also be a separate firm hired by DOE or the management and operating contractor to perform construction management services.

The definitions for "construction project" and "construction worksite" were provided in order to circumscribe the activities and geographic location, respectively, to which the construction safety provisions of this rule apply.

Some commenters (Exs. 16, 27, 28, 36, 42, 45) expressed concern that the provisions of this section would require contractors to expend additional effort

and resources to submit safety and health plans above and beyond the safety and health program called for under supplemental proposed section 851.100 or to perform an extensive review and analysis of existing programs to ensure compliance with the rule. As stated previously, DOE does not believe that this is the case, because the requirements in Appendix A, section 1, of the final rule reflect those of DOE Order 440.1A.

One commenter (Ex. 54) requested that references to OSHA's Process Safety Management standards (29 CFR 1910.119 and 1926.64) be added to the construction safety requirements of the rule. DOE notes, however, that final rule section 851.23 requires contractors to comply with all standards at 29 CFR 1910 and 1926, so a separate reference is not needed in Appendix A, section 1, of the final rule.

Three commenters (Exs. 16, 28, 45) were of the opinion that the language in this section of the supplemental proposal was subjective and more suitable as contract language than as enforceable language in a rule. DOE considers the "subjectivity" of this language—now captured in Appendix A, section 1, of the final rule—to be useful in allowing for a graded approach in the implementation of the construction safety requirements. A graded approach can also be applied to the development and approval of health and safety plans by the construction manager, which was an area of concern for other commenters (Exs. 36, 42).

Other commenters (Exs. 20, 29, 37, 45, 51, 54) requested clarification on the responsibilities of various contractors at a DOE construction site. Accordingly, DOE has introduced the terms "construction contractor" and "construction manager" and specified distinct responsibilities and requirements for each type of contractor, in addition to providing definitions for these two terms in section 851.3—Definitions.

The provisions of section 1(a)(1) of Appendix A focus on the requirement for construction contractors to prepare activity hazard analyses for project activities prior to commencement of work on the affected activities. One commenter (Ex. 40) pointed to the need for construction managers to provide a list of known worksite risks (e.g., site characterization data) to the construction contractor so that they can be appropriately addressed in the construction contractor's activity hazard analysis. Section 1(a)(ii) was added to the final rule to address this concern.

Another commenter (Ex. 29) requested clarification on whether activities that use standard personal protective equipment require a hazard analysis. DOE's intent, as stated in Appendix A section 1(a), is to require activity level hazard analysis for each definable construction activity. The need for personal protective equipment does not dictate the need to perform a hazard analysis. Rather, the hazard analysis, through the identification of workplace hazards, dictates the need for workplace controls and protective equipment.

One commenter (Ex. 48) argued that it is more appropriate to perform an ongoing hazard analysis rather than performing the hazard analysis before initiating the construction project. DOE agrees in part. As noted in Appendix A section 1(a), the hazard analysis required under section 1(a)(1) is required for "each separately definable construction activity (e.g., excavations, foundations, structural steel, roofing)." DOE's intent with this provision is that the construction manager prepares a hazard analysis prior to the start of each discrete construction activity within the project. DOE acknowledges that these activities will likely occur at different stages of the overall project and that some contractors may find it easier to prepare the related analyses as the project progresses rather than all at one time. DOE believes that this decision is best left to the discretion of the construction manager provided that the hazard analyses meet the requirements of section 1(a)(1).

Several commenters (Exs. 26, 36, 39, 42, 45, 48, 51) noted that the wording of supplemental proposed section 851.202(a)(1)(iii) implied the need for a professional engineer for a wide variety of services beyond those prescribed by OSHA's construction standards, 29 CFR 1926. DOE agrees that the language of the supplemental proposal could be misinterpreted and, as a result, this provision was edited in Appendix A section 1(a)(iii), of the final rule to reflect the requirement for professional engineering services consistent with OSHA's standards.

A number of commenters (Exs. 15, 19, 42, 45, 48, 49, 51) took issue with the wording of supplemental proposed section 851.202(a)(1)(iv) and the need to provide qualifications for competent persons. This provision was changed in Appendix A section 1(a)(iv) of the final rule to require the identification of the competent person for each work activity, consistent with OSHA requirements.

Appendix A section 1(a)(2) requires the construction contractor to ensure that workers are aware of foreseeable hazards and the protective measures described within the activity analysis. The provision of supplemental proposed section 851.202(a)(3) that would have made a worker's use of appropriate protective measures a condition of employment was cited by four commenters (Exs. 16, 31, 36, 48) as reducing flexibility in labor/management relations. DOE agrees with these concerns. Accordingly, this provision was revised in Appendix A section 1(a)(3), of the final rule to state that the construction contractor must require that workers acknowledge being informed of the hazards and protective measures associated with assigned work activities and to require that workers failing to use the required controls be subject to the contractor's disciplinary process. One commenter (Ex. 16) argued that the rule should include an enforcement provision that does not hold contractors responsible for willful non-compliance on the part of employees. DOE agrees with this commenter and has added a provision in final rule section 851.20(b) to prohibit workers from taking actions inconsistent with the rule. As mentioned in the section-by-section discussion for section 851.5 of the final rule, DOE will develop enforcement guidance for the rule that will include provisions similar to OSHA's unpreventable employee misconduct defense—outlined in OSHA's Field Inspection Reference Manual, Chapter III, paragraph C.8.c(1).

Appendix A section 1(b) requires the construction contractor to have a designated representative on the construction worksite during periods of active construction and that this representative is knowledgeable of project hazards and have the authority to take actions. The section further clarifies that the representative must conduct frequent and regular inspections of the worksite to identify and correct hazards.

Several commenters (Exs. 16, 31, 36, 42, 47, 48, 49) objected to the requirement for a construction contractor's designated representative to be on the construction worksite at all times. These commenters also questioned the need for daily worksite inspections by the contractor's designated representative and requested clarifications on the terms "on site at all times" and "active construction" (Exs. 20, 29, 39, 47, and 48). The need for a contractor's representative to be onsite during active construction derives from the Federal Acquisition Regulation (FAR) Parts 36.506 and 52.236–6, Superintendence by the Contractor, which state that "At all times during performance of this contract and until

the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the worksite a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor." The term "active construction" in section 1(b) of Appendix A is effectively defined by the addition of the parenthetical statement clarifying that "active construction" excludes periods of inactivity such as weekends or weather delays. With regard to the frequency of safety and health inspections, the text in section 1(b) has been changed to replace the term "daily" with "frequent and regular" in an effort to be consistent with OSHA's construction safety standard addressing this issue, 29 CFR 1926.20(b)(2).

One commenter (Ex. 49) requested that the term "onsite" in supplemental proposed section 851.202(a)(4) be replaced with "available" to accommodate for the designated representative's lunch breaks. DOE believes that, in the absence of activity on the construction worksite during a lunch break, there is no need for the presence of a designated representative. However, if construction continues during the designated representative's lunch break, the contractor must ensure that another representative is designated and present onsite.

One commenter (Ex. 16) objected to a requirement in supplemental proposed section 851.202(a)(4) for specific training for designated representatives. DOE agrees with this commenter's concern and has removed the provision from the final rule.

Other commenters (Exs. 20 and 47) requested a definition for the term "designated representative." DOE notes that, although the rule does not provide such a definition, section 1(b) provides that the designated representative must be a person who is knowledgeable of the project's hazards and has full authority to act on behalf of the construction contractor.

Appendix A section 1(c) is derived from provisions originally included in supplemental proposed section 851.202(a)(4). These provisions require that workers be instructed to report identified hazards to the contractor's designated representative and that contractors take certain steps up to and including stopping work if they cannot immediately correct the hazards.

Several commenters took issue with a variety of terms used in the original provision of the supplemental proposal. Specifically, one commenter (Ex. 27) objected to the use of the word "unforeseen" in describing hazards that workers must report. Accordingly, the word has been deleted from the rule and the text clarified to refer to hazards that have not been previously identified or evaluated. Another commenter (Ex. 48) questioned the appropriateness of the term "immediate corrective action" on the grounds that it implies permanent correction. DOE disagrees that the term is inappropriate. Appendix A section 1(c) specifically discusses the conditions for which interim control measures are appropriate (*i.e.*, when immediate corrective action is not possible or the hazard falls outside the project scope).

On the subject of workers reporting hazards not previously identified or evaluated, one commenter (Ex. 31) responded that, because current practices involve workers reporting safety concerns to their immediate supervisors, the requirement be reworded to include reporting of hazards to either the immediate supervisor "or" the designated representative. DOE disagrees. Designated representatives, as discussed above, are persons with the authority to act on behalf of the construction contractor and, therefore, are the appropriate persons to inform of the hazards. This does not, however, preclude the contractor from establishing internal procedures to require workers to report hazards to their immediate supervisor and the designated representative.

Appendix A section 1(d) requires construction contractors to prepare a written construction project safety and health plan to implement the requirements of section 1 of the Appendix. The section stipulates that the contractor must obtain the construction manager's approval of the plan before commencing any work covered by the plan.

There were several comments (Exs. 15, 40, 47, 48, 55) regarding the supplemental proposal's requirement in section 851.202(b) of having the monetary threshold of the Davis-Bacon Act trigger the need for a written construction safety plan. The Davis-Bacon act was used in previous DOE policy, as a means for deciding which activities were constructions. However, DOE has decided, after considering the comments that using a law governing wage rates as the determining factor for a safety regulation is inappropriate and often confusing. Hence, reference to the Davis-Bacon Act has been deleted from the final rule.

There were also numerous comments (Exs. 15, 16, 25, 28, 29, 36, 37, 42, 45, 49, 51) concerning the requirement for DOE to review and approve construction contractors' safety and health plans. These comments focused on the fact that DOE generally does not have the personnel resources to fulfill this requirement. DOE agrees with these comments and has changed the approving authority in section 1(a)(1) to the construction manager.

2. Fire Protection

Appendix A section 2 (formerly supplemental notice of proposed rulemaking section 851.203), establishes the basic requirements for a comprehensive fire protection program.

Numerous commenters (Exs. 2, 3, 4, 5, 8, 13, 15, 29, 31, 36, 39, 42, 47, 48, 49, 61) objected to the approach taken in the supplemental proposed rule with regard to fire protection. Section 851.203 of the supplemental proposal included specific requirements for fire protection and fire department operations. DOE agrees that a more pragmatic and less prescriptive approach to the delineation of requirements for fire protection and emergency services is appropriate. Consequently, the final rule has been revised to include the text from the fire protection portion of DOE Order 440.1A, which has been in effect since 1998.

One commenter (Ex. 5) suggested that the rule prohibit the purchase or use of self-illuminating exit signs or other signs at nuclear facilities since these signs are a source of tritium and are difficult to disassociate from a nuclear event at a nuclear facility. DOE notes that the purchase or use of self-illuminating exit signs or other signs at nuclear facilities is not within the scope of the final rule. Self-illuminating exit signs or other signs are commercially available and issued under the Nuclear Regulatory Commission's general license.

Section 2(a) of Appendix A to the final rule establishes the specific requirements for the implementation of a comprehensive fire protection program to ensure workers a safe and healthful workplace. These requirements, along with the applicable NFPA standards, and DOE fire safety directives, technical standards and guidance, have historically been considered necessary for a comprehensive fire safety program. The section further clarifies that the program must include appropriate facility and site-wide fire protection, fire alarm notification and egress features, and that contractors must assure access to a fully staffed, trained, and equipped emergency response organization that is capable of responding in a timely and effective manner to site emergencies.

Two commenters (Exs. 31, 39) objected to the requirement that all contractors must implement a fire protection *and response program* (emphasis added). According to the commenters, other options are available, including reliance on another government agency or a public fire department. The requirement for a current Baseline Needs Assessment and the need for written pre-fire strategies, plans, and standard operating procedures, as would be provided by section 851.203(a)(7) and (a)(8) in the supplemental notice of proposed rulemaking was of concern to other commenters (Ex. 36, 39, 48). These commenters were of the view that these requirement should not apply to contractors that do not operate fire departments. DOE agrees with the commenters, and has revised the text to emphasize that contractors must *have access* (emphasis added) to a fully staffed, trained, and equipped emergency response organization that is capable of responding in a timely and effective manner to a spectrum of site emergencies. However, DOE expects that the decision regarding the type of emergency services capability that is credited is based, in part, on the results of a Baseline Needs Assessment.

A few commenters (Exs. 31, 42, 49, 61) requested that DOE define "qualified fire protection engineer." DOE has removed this term from the final rule.

Appendix A section 2(b), requires inclusion of appropriate fire protection criteria and procedures, analyses, hardware and systems, apparatus and equipment, and personnel in the fire protection program to ensure that the objective in Appendix A section 2(a) is met. This includes meeting the applicable building code and National Fire Protection Association (NFPA) Codes and Standards or exceeding them, when necessary, to meet safety objectives, unless explicit written relief has been granted by DOE.

Numerous commenters (Exs. 2, 4, 5, 8, 16, 19, 22, 24, 31, 37, 42, 45, 49, 53, 54, 58, 61) objected to the number of NFPA codes and standards proposed by DOE in the supplemental notice of proposed rulemaking, as many appeared to have little, or no relevance to activities at DOE sites. Similarly, another commenter (Ex. 39) asserted that some of the requirements in those codes and standards applied to the protection of structures and were not directly related to the safety and health of workers. DOE has decided that an exhaustive list of applicable NFPA standards is unnecessary and has not included a list in the final rule. With regard to the issue of facility-specific requirements within NFPA codes and standards, DOE agrees that any requirement that is not directly related to the safety and health of workers is not applicable in the context of this rule. However, these requirements may apply to DOE facilities through DOE directives, such as with DOE O 420.1, which are made applicable by contract.

A number of commenters (Exs. 2, 4, 22, 49, 54, 55, 61) objected to the inclusion of specific editions of the applicable NFPA standards, arguing that as this would result in the enforcement of obsolescent criteria. As discussed previously, DOE has decided against incorporating into the rule most of the standards included in the supplemental proposed rule.

Two commenters (Exs. 7, 29) expressed concern that adoption of NFPA Standard 1710, and the enforcement of requirements from other NFPA standards that govern fire department operations would impose significant burdens (in terms of time, staffing, paperwork, etc.) on site emergency services organizations for which there are insufficient budgets. Other commenters (Exs. 5, 37, 39, 42, 48) stated their belief that the non-fire department oriented requirements would also significantly increase costs. DOE agrees and has deleted the NFPA standards governing fire department operations from the final rule.

One commenter (Ex.1) suggested that NFPA Standard 1600, "Disaster and Emergency Management and Business Continuity Programs" be included in the rule. DOE disagrees with this recommendation because this standard is included in other DOE directives, such as DOE O 420.1, which apply, through contracts, to DOE facilities.

Several commenters (8, 15, 29, 31, 35, 36, 37, 42, 46, 49) objected to the list of NFPA and other industry standards because there was no consideration for the fact that many DOE facilities were constructed years ago under the "code(s) of record." DOE agrees with the commenter and has revised the list of standards to more closely mirror the list of standards required under DOE O 440.1A. It is DOE's intent that contractors use DOE fire safety directives which establish the concept of compliance with a "code of record."

Another commenter (Ex. 49) questioned on how NFPA standards would apply in leased locations where the contractor has no enforcement authority and does not control the fire department manpower, training and equipment. DOE has deleted the NFPA standards from the final rule.

One commenter (Ex. 13) suggested that DOE consider adding the Underwriters Laboratories (UL) listings and Factory Mutual data sheets to Appendix A section 2. This commenter did not, however, provide a rationale for this suggestion. Without a rationale DOE could make determine the need for the inclusion of such standards in the final rule, therefore, DOE has not included them in the final rule.

Another commenter (Ex. 54) requested that references to OSHA's Process Safety Management standards (29 CFR 1910.119 and 1926.64) be added to the fire safety requirements of the rule. DOE notes that final rule section 851.23 requires contractors to comply with all standards at 29 CFR 1910 and 1926. Hence, a separate reference is not needed in Appendix A section 2 of the final rule. Several commenters (Exs. 2, 4, 16, 48, 49, 59, 61) objected to the lack of explicit reference to the "equivalency" concept that has historically been used within the DOE fire safety community to rationalize alternative approaches to fire safety. DOE agrees in part and concludes that, beyond the definition of a formal exemption process to this rule, no explicit reference to "equivalencies" is necessary, as this concept is an integral part of all NFPA codes and standards and DOE fire safety directives. The recommendation made by two commenters (Exs. 36, 42) that the Authority Having Jurisdiction (AHJ) be responsible for approving fire safety code and standard equivalencies (as required by DOE Order 420.1A) instead of the DOE site manager (as would be required by the proposed rule) is acceptable to DOE.

3. Explosives Safety

Appendix A section 3 (formerly supplemental notice of proposed rulemaking section 851.204), of the final rule establishes safety provisions for DOE contractors performing work involving explosive materials. Appendix A section 3(a) establishes the primary requirement for DOE contractors to develop, implement, and maintain a comprehensive explosives safety program. These provisions this program must assure that workers, visitors, and members of the public are not exposed to significant explosives threats (blast overpressure, fragment, debris, structural collapse, heat and fire).

DOE explosives handling and processing operations are an integral part of DOE weapons and weapons-related development, manufacturing, and dismantlement activities as well as DOE security operations. Safety in all

operations associated with explosive materials is an ongoing, primary concern and must be given high priority in all program direction and management activities.

DOE received a number of comments on the explosives safety provisions included in section 851.204 of the supplemental proposed rule. A majority of these commenters (Exs. 8, 15, 20, 37, 59) stated that the rule should require contractors to comply with DOE Manual 440.1–1, DOE Explosives Safety Manual. These commenters argued that the provisions in this section of the supplemental proposal were vague and were not as comprehensive and clear as the provisions of the DOE Explosives Safety Manual. The commenters noted specific concerns regarding reference to an undefined certification program to train persons assigned to explosives operations (Exs. 37, 59); the omission of a grandfather clause to address older facilities that cannot meet newer requirements (Ex. 59); the omission of criteria related to firebreaks and fire exits (Exs. 37, 59); and the omission of critical components of the lightning protection program (Exs. 37, 59). These commenters noted that the DOE Explosives Safety Manual was specifically developed to address explosives safety in DOE operations and felt that reliance on the Manual rather than the incomplete explosives safety requirements in the supplemental proposal would provide for more effective protection of the DOE work force.

DOE agrees with these commenters and has accordingly replaced the technical provisions that were included in the supplemental proposal with the basic requirement in Appendix A section 3(b) that contractors comply with DOE Manual 440.1–1A, Explosives Safety Manual (DOE M 440.1–1A), Contractor Requirements Document (Attachment 2), January 9, 2006. As noted by the commenters, this Manual establishes safety controls and standards that are not addressed in other existing DOE or non-DOE regulations. The Manual closes the considerable safety gap created by DOE's unique activities, governs the DOE explosives safety process, and ensures that explosives safety is commensurate with actual risk.

One commenter (Ex. 39) questioned why the explosives safety provisions in the supplemental proposal specifically excepted the use of explosive material for routine construction, demolition, and tunnel blasting. Although, this specific exception has been removed from the text of the final rule, the exception, with additional clarification and rationale, is a part of the DOE Explosive Safety Manual. Specifically, the Manual states that if blasting operations are routine in the context of construction or tunneling blasting, then the more appropriate OSHA 1910 and 1926 standards may be used. However, magazines must be sited according to the Department of Defense (DoD) Criteria in DoD 6055.9, DOD Ammunition and Explosives Safety Standards. Transportation of explosives across DOE sites must be in conformity with the Manual. DOE does not believe, however, that explosive demolition of facilities should be considered a routine use of explosives due to its unique risks. As a result, DOE intends that such operations would be governed by requirements in the DOE Technical Standard on Explosive Demolition of Structures.

Several commenters (Exs. 9, 16, 22, 59) questioned the incorporation of NFPA 495, Explosives Materials and NFPA 498, Standards for Safe Havens and Interchange Lots for Vehicles Transporting Explosives, in Subpart C of the supplemental proposal. These commenters noted that the standards are not applicable to the military style of explosives materials used in DOE and felt that their inclusion in the rule would only confuse covered contractors with conflicting and less rigorous safety policies. DOE agrees with these commenters and has removed the standards from the final rule.

Appendix A section 3(c) of the final rule clarifies that contractors must determine the applicability of the explosives safety requirements to research and development laboratory type operations consistent with the DOE level of protection criteria established in the DOE Explosives Safety Manual. This provision was added to the final rule to address one commenter's (Ex. 36) concern that the explosives safety provisions of the supplemental proposal did not accommodate laboratory activities where the forms and quantities of explosive materials did not represent a significant personnel or facility hazard.

4. Pressure Safety

Appendix A section 4 (formerly supplemental notice of proposed rulemaking section 851.205), of the final rule establishes pressure safety requirements for DOE contractors performing activities at covered workplaces. DOE received numerous comments regarding the corresponding section of the supplemental proposed rule expressing concern or requesting clarification of proposed pressure safety provisions.

DOE critically evaluated each of these comments and considered related input from the Department's Pressure Safety Committee in crafting the pressure safety section of the final rule. DOE notes that the DOE Pressure Safety Committee includes both federal and contractor experts from within the DOE complex. Based on this evaluation and an evaluation of comments on the overall supplemental proposed rule in general, DOE revised the pressure safety section of the final rule to closely follow the requirements of the Pressure System Safety section in DOE Order 440.1A. DOE Order 440.1A has governed pressure system safety within DOE for the last eight years and has been well scrutinized through an expert technical review processes.

The sections that follow provide a detailed discussion of the provisions of the pressure safety section of the final rule as well as a summary of, and DOE responses to, the specific comments received related to these provisions. One commenter (Ex. 20) expressed concern that intensive configuration management would be required to administer the requirements of the rule and research would be necessary to establish a clearly documented baseline for compliance. In response to this concern, DOE notes since the pressure safety requirements in the final rule incorporate the existing requirements in DOE Order 440.1A, DOE believes that contractors, who are already in compliance with DOE Order 440.1A, will require minimal, if any effort to implement the rule requirements.

Appendix A section 4(a) describes what constitute pressure systems and requires contractors to establish safety policies and procedures to ensure they are designed, fabricated, tested, inspected, maintained, repaired, and operated by trained and qualified personnel in accordance with applicable and sound engineering principles.

Two commenters (Ex. 42, 49) requested a definition of pressure systems. DOE notes that the DOE Pressure Safety Committee has, in the draft Implementation Guide to DOE Order 440.1A, defined pressure systems in the following terms: "Pressure systems are comprised of all pressure vessels, and pressure sources including cryogenics, pneumatic, hydraulic, and vacuum. Vacuum systems should be considered pressure systems due to their potential for catastrophic failure due to backfill pressurization. Associated hardware (e.g. gauges, and regulators), fittings, piping, pumps, and pressure relief devices are also integral parts of the pressure system". DOE has included this definition in final rule

section 851.3 and in Appendix A section 4(a). In addition, DOE emphasizes that cryogenic and vacuum systems are included as pressure systems.

Two commenters (Ex. 29, 48) suggested that pressure retaining vessel safety requirements were best imposed through contract provisions or through specifications for new components, and that operational safety requirements were already contained in the applicable national consensus standards (OSHA regulations) incorporated in the proposed rule. The commenters specifically suggested modifying the language in proposed section 851.205(a) to require contractor safety policies and procedures to ensure that design, fabrication, testing, inspection, maintenance and operation of pressure systems is performed by "qualified personnel in accordance with applicable safety or national consensus standards."

In response, DOE notes that the corresponding Appendix A section (4)(a) follows the requirements of the Pressure System Safety section in DOE Order 440.1A, according to which contractors must establish safety policies and procedures to ensure that pressure systems are designed, fabricated, tested, inspected, maintained, repaired, and operated by trained and qualified personnel in accordance with applicable and sound engineering principles. Further DOE stresses that training of personnel using, maintaining, repairing, or constructing pressure systems is paramount. The inspection and maintenance of the systems is also essential as they decay over time and a reasoned engineering approach must be used to maintain safety.

Appendix A section 4(b) further describes the applicable national consensus standards including professional and state and local codes, that contractors must conform to with respect to pressure system safety in DOE covered workplaces.

DOE received numerous comments (Exs. 2, 8, 16, 19, 29, 37, 45, 49) expressing concern over the inclusion of ASME codes in proposed section 851.201(c) and suggested they be eliminated or modified. In response to these concerns, DOE has revised the corresponding final rule section Appendix A section 4(b) to eliminate the proposed tables and any cited standards that lacked relevance to the pressure safety requirements of the rule.

One commenter (Ex. 16) expressed concern over the separation of requirements for compliance with ASME codes and ensuring pressure safety and suggested it gave "the appearance of being inappropriate or unsafe for components within the scope of the ASME code." The commenter recommended presenting both requirements in a manner that clarified their relationship and scope. In response DOE notes that the corresponding final rule section has been revised to present the relevant codes within the pressure safety requirements in Appendix A section 4(b). Additionally, DOE reiterates that this new section follows the requirements of the pressure system safety section in DOE Order 440.1A. According to Appendix A section 4(b)(1) through (3) of the final rule, contractors must ensure that all pressure vessels, boilers, air receivers, and supporting piping systems conform to the applicable ASME Boilers and Pressure Vessel Safety Codes, the ANSI/ASME B.31 Piping Code or the strictest applicable state and local codes. These provisions are consistent with the long held policy of only citing the ASME code on pressure vessels or the ANSI piping code, which are mainly manufacturing and fabrication codes.

The research and development aspects of DOE often require that some pressure vessels are built to contain very high pressure that is above the level of applicability of the ASME Pressure Safety Code. Other times, new materials or shapes are required that are beyond the applicability of the ASME Code. In these cases, addressed under Appendix A section 4(c), rational engineering provisions are set to govern the vessels construction and use and assure equivalent safety.

Appendix A section 4(c) provides guidelines for equivalent measures that contractors may implement in the event that national consensus standards are not applicable to ensure pressure system safety and meet the requirements of the final rule.

A few commenters (Ex. 29, 42, 49) sought clarification of what constituted an "independent peer review" to determine if national consensus codes and standards were applicable or not. In response to this concern, DOE has revised the language of the corresponding final rule section to eliminate use of the phrase "independent peer review." One commenter (Ex. 49) further questioned what approved measures were to be implemented in the event consensus standards were not applicable. In response, DOE has provided greater clarification in final rule Appendix A section 4(c) of the measures that are to be used. The final rule Appendix A section 4(c) provides that when national consensus codes are not applicable (because of pressure range, vessel geometry, use of special materials, etc.), contractors must implement measures to provide equivalent protection and ensure a level of safety greater than or equal to the level of protection afforded by the ASME code. DOE notes that documented organizational peer review is acceptable for the design drawings, sketches, and calculations that must be reviewed and approved by a professional engineer.

5. Firearms Safety

Appendix A section 5 of the final rule (formerly supplemental notice of proposed rulemaking section 851.208), establishes firearms safety policies and procedures for security operations, and training to ensure proper accident prevention controls are in place. Two commenters (Exs. 27, 45) asserted that the requirements in Appendix A section 5 of the final rule appear to be a summarization of existing DOE Orders and will likely require extensive review and analysis for contractors to come into compliance with the rule requirements. Since the industrial hygiene requirements in the final rule incorporate the existing requirements in DOE Order 440.1A, DOE believes that for contractors that are already in compliance with DOE Order 440.1A, it should require minimal, if any, effort to implement the rule requirements.

Some commenters (Exs. 5, 36, 25, 42) requested clarification on whether the requirements of the rule apply to sites without armed security forces and to the occasional use of firearms for research purposes or for activities like the capture and study of wildlife. The provisions of Appendix A section 5(a) apply only to contractors engaged in DOE activities involving the use of firearms. The scope and nature of work activities involving specific types of hazards in this case, the use of firearms determines whether the requirements of a particular safety program apply to the workplace. Generally, the rule requirements do not apply to sites that do not have armed security forces. Other use of firearms at DOE facilities, such as the use of firearms for research (e.g., material testing) or for activities like the capture and study of wildlife, also could create conditions that warrant the application of Appendix A section 5(a) firearms safety provisions.

Two commenters (Exs. 42, 49) were of the opinion that rule did not correctly identify the types of contractors that must comply with the firearms safety requirements. The commenters suggested that use of the term "a contractor *engaged in DOE activities involving the use of firearms*" would be

more appropriate than the phrase "a contractor *responsible for a workplace*" which had been used in the supplemental notice of proposed rulemaking. DOE agrees with the commenters and the language in Appendix A section 5(a) had been revised accordingly.

Written procedures must address firearms safety, engineering and administrative controls, as well as personal protective equipment requirements according to Appendix A section 5(a)(1).

Appendix A sections 5(a)(2)(i) through (viii) establish requirements for contractors to develop specific procedures for various activities that involve the use of firearms including the storage, handling, cleaning, inventory, and maintenance of firearms, ammunition, pyrotechnics etc. Procedures must also be developed for the use of firing ranges by personnel other than DOE or DOE contractor protective forces personnel. As a minimum, procedures must be established for: (1) Storage, handling, cleaning, inventory, and maintenance of firearms and associated ammunition; (2) activities such as loading, unloading, and exchanging firearms. These procedures must address use of bullet containment devices and those techniques to be used when no bullet containment device is available; (3) use and storage of pyrotechnics, explosives, and/or explosive projectiles; (4) handling misfires, duds, and unauthorized discharges; (5) live fire training, qualification, and evaluation activities; (6) training and exercises using engagement simulation systems; (7) medical response at firearms training facilities; and (8) use of firing ranges by personnel other than DOE or DOE contractor protective forces personnel.

In order to comply with the provisions of Appendix A section 5(b), contractors must ensure that personnel responsible for the direction and operation of the firearms safety program are professionally qualified and have sufficient time and authority to implement the procedures under this section.

Appendix A section 5(c) requires that contractors must ensure that firearms instructors and armorers have been certified by the Safeguards and Security National Training Center to conduct the level of activity provided. Additionally, personnel must not be allowed to conduct activities for which they have not been certified.

Appendix A section 5(d), mandates that contractors conduct formal appraisals assessing implementation of procedures, personnel responsibilities, and duty assignments to ensure overall policy objectives and performance criteria are being met by qualified personnel.

According to the provisions of Appendix A section 5(e), contractors must implement procedures related to firearms training, live fire range safety, qualification, and evaluation activities, including procedures requiring that: (1) Personnel must successfully complete initial firearms safety training before being issued any firearms; (2) authorized armed personnel must demonstrate through documented limited scope performance tests both technical and practical knowledge of firearms handling and safety on a semi-annual basis; (3) all firearms training lesson plans must incorporate safety for all aspects of firearms training task performance standards; (4) firearms safety briefings must immediately precede training, qualifications, and evaluation activities involving live fire and/or engagement simulation systems; (5) a safety analysis approved by the Head of DOE Field Element must be developed for the facilities and operation of each live fire range prior to implementation of any new training, qualification, or evaluation activity, and the results of these analyses must be incorporated into procedures, lesson plans, exercise plans, and limited scope performance tests; (6) firing range safety procedures must be conspicuously posted at all range facilities; and (7) live fire ranges, approved by the Head of DOE Field Element, must be properly sited to protect personnel on the range, as well as personnel and property not associated with the range.

Contractors must ensure that the transportation, handling, placarding, and storage of munitions conform to the applicable DOE requirements to satisfy the requirements of Appendix A section 5(f).

6. Industrial Hygiene

Appendix A section 6 of the final rule (formerly supplemental notice of proposed rulemaking section 851.209), provides the industrial hygiene program requirements. Industrial hygiene is an important component of a comprehensive worker protection program. The contents of this functional area were developed by the DOE Industrial Hygiene Coordinating Committee (IHCC) to identify those minimum requirements necessary to implement an effective industrial hygiene program. The minimum set of requirements that resulted from this process reflects the recommendations of industrial hygiene experts from across the DOE complex.

Two commenters (Exs. 27, 45) asserted that the requirements in supplemental proposed section 851.209 appeared to be a summarization of existing DOE Orders and would likely require extensive review and analysis for contractors to come into compliance with the rule requirements. Since the industrial hygiene requirements in the final rule incorporate the existing requirements in DOE Order 440.1A, DOE believes that for contractors that are already in compliance with DOE Order 440.1A, minimal, if any, effort will be required to implement the rule requirements.

One commenter (Ex. 37) recommended that Appendix A section 6 reference DOE's Industrial Hygiene (IH) manual and the OSHA standards in lieu of the American Conference of Governmental Industrial Hygienists' (ACGIH's) threshold limit values (TLV) manual. DOE notes that final rule section 851.23 requires contractors to comply with the standards listed in that section, which include OSHA standards as well as the ACGIH TLVs. Further, the purpose of the DOE IH manual is to serve as a guidance tool rather than as regulatory text. Therefore, DOE believes that it is neither necessary nor appropriate to reference the DOE IH manual in Appendix A section 6, in place of the standards already required by section 851.23.

The absence of any requirement for worker participation within the provisions of rule was an issue for two commenters (Exs. 54 and 55). Sections 851.20(a) and (b) of the final rule requires worker participation in work-related safety and health activities and evaluations. This section also requires worker access to various types of safety and health information, in addition to providing for other workers' rights. Therefore, there is no need for worker participation requirements to be specified separately in Appendix A section 6.

Appendix A section 6 in the final rule contains provisions for contractor implementation of a comprehensive and effective industrial hygiene program to reduce the risk of work-related disease or illness. One commenter (Ex. 16) considered the use of the term "workplace" in the supplemental proposed 851.209(a) confusing, especially for sites where DOE utilizes multiple contractors. DOE agrees with the commenter and, accordingly, this term had been deleted from the text of Appendix A section 6.

Appendix A section 6(a) requires initial or baseline surveys and periodic resurveys and/or exposure monitoring as appropriate of all work areas or

operations to identify and evaluate potential worker health risks. Several commenters (Exs. 12, 15, 16, 35, 42, and 48) contended that conducting initial and baseline surveys of all work areas or operations can be burdensome and costly, especially for areas undergoing or intended to undergo decontamination and decommission. DOE disagrees with this contention. The requirements of Appendix A section 6(a) allow contractors the flexibility to determine the appropriate level of assessment based on the complexity of the operation and the presence and level of workplace hazards. The effort for assessments should be graded according to the level of risk each hazard poses. Regarding the question of "grandfathering" existing assessments, if a baseline assessment has already been accomplished, as would be the case for contractors already in compliance with the provisions of DOE O 440.1, and the workplace hazards and activities have not changed, then a new baseline assessment of risks is not required. However, DOE agrees with the commenters that areas or operations undergoing decontamination and decommission could change on a daily basis. As a result, more frequent assessments are needed to ensure that all hazards are identified and controlled.

Appendix A section 6(b), requires coordination with planning and design personnel to anticipate and control facility and operations related health hazards as one of the elements of the industrial hygiene program that contractors must implement.

Coordination with cognizant occupational medical, environmental, health physics, and work planning professionals is another element of the industrial hygiene program that is required by Appendix A section 6(c).

According to Appendix A section 6(d), the contractor's industrial hygiene program must include policies and procedures to control risks from identified and potential occupational carcinogens. Two commenters (Exs. 16, 48) asserted that the rule fails to specify or define the identified or potential carcinogens. DOE notes that section 851.23 of the final rule mandates compliance with several safety and health standards, including OSHA standards and the ACGIH TLVs, that address occupational carcinogens. These standards identify occupational carcinogens and provide additional information in the areas of exposure levels, hazard control, and worker protection for different carcinogens. Consequently, Appendix A section 6(d) does not provide a separate identification or definition for carcinogens.

Appendix A section 6(e) of the final rule requires that the contractors' industrial hygiene program be managed and implemented by professionally and technically qualified industrial hygienists.

7. Biological Safety

Appendix A section 7 of the final rule (formerly supplemental notice of proposed rulemaking section 851.207), provides the biological safety program requirements. In February 2001, the DOE Office of Inspector General (DOE–IG) issued a report entitled "Inspection of Department of Energy Activities Involving Biological Select Agents" (DOE/IG–0492). In this report the DOE–IG made 7 recommendations regarding the handling and use of biological agents within the Department. In response to this report the department developed, through its directives system, DOE Notice 450.7 "The Safe Handling, Transfer, and Receipt of Biological Etiologic Agents at Department of Energy Facilities". Proposed 10 CFR 851.207 reflected the requirements contained in DOE Notice 450.7.

In November 2001, the Deputy Secretary of Energy indicated in a memo that the Department must be a responsible steward of biological etiologic agents and directed Departmental elements to have DOE Notice 450.7, The Safe Handling, Transfer, and Receipt of Biological Etiologic Agents at the Department of Energy Facilities, incorporated into applicable contracts. DOE Notice 450.7 lays out the Department's expectations for BioSafety at the DOE facilities.

The Department of Health and Human Services (DHHS) and the Department of Agriculture issued new regulations covering the possession, use, and transfer of select agents and toxins as interim final rules (42 CFR Part 73, 7 CFR Part 331, and 9 CFR Part 121) in December 2003. The rules were issued in response to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 and provide updated requirements to those found in DOE Notice 450.7. The updated requirements are included in this rule to cover DOE contractors.

Appendix A section 7(a) (proposed as 851.207(a)) requires the establishment of an institutional biological safety committee (IBC) to review work with biological agents to ensure their compliance with appropriate federal and state guidelines for this type of activity.

Several commenters (Exs. 27, 28, 36, 42, 48) expressed concern that the requirements in supplemental proposed section 851.207 would expose contractors to dual regulation because they would be subject to Part 851, based on DOE directive and to DHHS and Agriculture rules. These concerns are unfounded. When 10 CFR 851 is made effective, including the Biological Safety requirements of Appendix A section 7, DOE N 450.7 will expire and will not be renewed. As stated above, today's final rule incorporates the updated requirements in the DHHS and Department of Agriculture rules.

One commenter (Ex. 28) sought clarification on whether supplemental proposed section 851.207 would be part of the worker health and safety plan that must be submitted for DOE approval. Section 851.11 of the final rule requires contractors to submit to a written worker safety and health program that provides the methods for implementing the requirements of Subpart C (which includes the functional areas, such as biological safety) to the appropriate Head of DOE Field Element for approval. A description of how the contractor will meet the requirements of Appendix A section 7 of the final rule must be included in the worker safety and health program that is submitted for DOE approval.

One commenter (Ex. 15) requested a definition for the term "biological etiological agents" which was included in supplemental proposed section 851.207 and is used throughout Appendix A section 7 of the final rule. DOE interprets the term "biological etiological agent" to mean any agent capable of causing disease in humans, plants or animals. Other commenters (Exs. 6, 15) noted that the term "biological etiological agents" includes many agents that are of little importance to workplace safety or do not pose a security risk and therefore, recommended that this term be replaced by either "Select Agents" as defined by 42 CFR 73, or "Risk Group 3 and 4 agents." DOE believes that the requirements in Appendix A section 7(a)(1) are meant to apply to not only select agents but to any agent that may cause disease. In order to comply with this intent of the rule, the site institutional biological safety committee (IBC) should review *all* work with biological agents and determine if appropriate controls are being put into place, although a graded approach should be used for the reviews to reflect the severity of the hazard.

Appendix A section 7(a)(1) requires the establishment of an IBC to review work with biological agents to ensure

compliance with appropriate federal and state guidelines for this type of activity. Several commenters (Ex. 25, 37, 45, and 51) expressed concern that this provision could be interpreted to apply to contractors that do not possess or use biological etiological agents in the workplace. DOE intends that contractors must implement the provisions of Appendix A section 7(a)(1) wherever they are applicable. A contractor that does not perform work involving exposure to biological agents is not required to implement any provisions of Appendix A section 7. Another commenter (Ex. 15) argued that the requirements in Appendix A section 7(a)(1) would result in additional costs and increased workload for the IBC. DOE considers it good practice to review any work undertaken with biological agents. Although the IBC is required to review all work with biological agents to determine if appropriate controls are in place, DOE believes that the extent and rigor of the review will depend upon the risk and hazard associated with the agent being used. Application of this graded approach should limit any increases in the workload and associated costs. Another commenter (Ex. 29) recommended that the word "appropriate" in supplemental proposed section 851.207(a)(1) be changed to "applicable." DOE agrees, and has revised the text in Appendix A, section 7(a)(1)(i) of the final rule accordingly. Appendix A section 7(a)(1)(ii) of the final rule instructs contractors to confirm the presence of site security, safeguards, and emergency management plans and procedures, when performing work with biological etiologic agents. Two commenters (Ex. 15 and 42) found a lack of clarity in the provisions of supplemental proposed section 851.207(a)(2) and the requirement for IBC review of security plans and procedures; in their view, security matters are typically not considered to be an area of IBC expertise. DOE disagrees, believing the provisions in Appendix A section 7(a)(1)(ii) of the final rule appropriately reflect the importance of maintaining security measures with respect to bioagents. The DHHS and Department of Agricultures rules (42 CFR 73.11 and 73.12), establish requirements for Security and Emergency Response plans to be developed and implemented for select agents. DOE believes there must be a determination of how much review and oversight is needed for all types of biological etiological agents and that the IBC can provide the sites security organization with the expertise to address these issues. The IBC should note in its review of proposals if security has been properly addressed. However, the policy for security at a DOE facility should be addressed by the security department.

Appendix A section 7(a)(2) requires maintenance of an inventory and status of biological etiologic agents. This information must be submitted to the DOE field and area office as part of an annual report describing the status and inventory of biological etiologic agents and the program. One commenter (Ex. 42) requested definition of the terms "status" and "readily retrievable inventory" and sought clarification on what DOE expectations were for the contents of the annual status report. DOE agrees that the term "readily retrievable" was unclear and has removed the term from the text of Appendix A section 7(a)(2) in the final rule. DOE interprets "status" as including information that will determine whether the biological etiologic agents are on site, dead or live, frozen or in active storage as well as information on the person(s) responsible. This information is necessary to keep DOE informed on the biological etiologic agent activities being undertaken on the Departments sites.

Appendix A section 7(a)(3) requires the submission of each Laboratory Registration/Select Agent Program registration application package to the head of the appropriate DOE field element. One commenter (Ex. 15) was concerned that this provision may affect every revision to the registration, including those involving staff transfers of materials. DOE's intent is for the provision to apply to the initial registration submittal because this will allow DOE to become aware of all bioagent activity. However, staff transfers of materials need not be reported to DOE as long as the Department of Health and Human Services and the Department of Agriculture rules and requirements are met. Other commenters (Exs. 15, 42) asked for the withdrawal of supplemental proposed section 851.207(c). DOE disagrees with this request. As reported by DOE–IG (DOE/IG–0492), DOE may not have knowledge of the presence of biological agents on a site. Appendix A section 7(a)(4) was included to ensure that DOE is aware of all biological agent activity occurring at DOE sites, as well as any information submitted to the Center for Disease Control and Prevention (CDC) regarding how and where biological agents will be used.

Appendix A section 7(a)(4) of the final rule contains provisions for submission to the appropriate Head of DOE Field Element a copy of each CDC Form EA–101, Transfer of Select Agents, upon initial submission of the Form EA–101 to a vendor or other supplier requesting or ordering a biological select agent for transfer, receipt, and handling in the registered facility. The completed copy of the Form EA–101, documenting final disposition and/or destruction of the select agent must also be submitted to the appropriate Head of DOE Field Element within 10 days of completion of the Form EA–101.

Appendix A section 7(a)(5) of the final rule requires the IBC to confirm that the site safeguards and security plans and emergency management programs address biological etiologic agents, especially biological select agents. One commenter asserted that the implementation of requirements in supplemental proposed section 851.207(e) would result in high costs to the contractors. As stated above, DHHS and the Department of Agriculture have established requirements for Security and Emergency Response plans through 42 CFR Part 73.11 and 73.12. These rules are enforced by DHHS and the Department of Agriculture, not DOE. Therefore, Appendix A section 7(a)(5) is included to require the contractor to confirm that all site safeguards and security plans and emergency management programs that address biological etiologic agents are in place.

According to the requirements in Appendix A section 7(a)(6), the IBC must establish an immunization policy for personnel working with biological etiologic agents based on the evaluation of risk and benefit of immunization. The CDC has established guidelines for immunizations and these guidelines should be consulted in the establishment of an immunization policy.

8. Occupational Medicine

Appendix A section 8 of the final rule (formerly supplemental notice of proposed rulemaking section 851.210), establishes the requirements for occupational medicine services. Appendix A section 8(a) requires contractors to provide comprehensive occupational medicine services to workers employed at a covered work place. One commenter (Ex. 33) expressed concern that supplemental proposed section 210 included many additional requirements for the preparation and implementation of occupational medical programs beyond those in the initial proposed rule. The commenter also believed that supplemental proposed section 851.210 expanded requirements for site

occupational medical directors (SOMD) in other areas of occupational medicine regardless of the nature or size of DOE activities. DOE has considered the comment but believes that the additions are necessary. The practice of occupational medicine is constantly evolving and medical advances which must be incorporated into site occupational medicine services to ensure the health of workers in maintained and/or improved, and that DOE maintains its medical programs consistent with occupational medicine practice standards and guidelines.

Another commenter (Ex. 48) asserted that the occupational medical services specified in supplemental proposed section 851.210 would result in substantial cost for non-management and operating contractors. DOE does not agree with the commenter's assertion a requirement that all levels of contractors provide comprehensive occupational medicine services will create a negative health and safety situation for DOE, including opening DOE up to increased medical liability. In DOE's experience, small contractors and subcontractors are capable of providing more that a minimal OSHA-level required protection and health care. Therefore, the final rule retains the occupational medicine service provisions.

Two commenters (Exs. 16, 28) believed that program-type documents to supplement the worker safety and health program were not necessary. The commenters recommended that this requirement be deleted, or integrated with the overall worker safety and health program. DOE does not agree with the commenter and believes that the documents should be a part of the overall worker safety and health program.

Another commenter (Ex. 48) questioned if a contractor operating a limited occupational medicine program, such as a first aid station appropriate for construction, is required to adopt all of the elements in supplemental proposed section 851.210, assuming that the contractor desires to continue providing these services after the effective date of the rule. DOE contends that operating a first aid station is but one element of a comprehensive occupational medicine program (OMP). DOE intends for this rule to apply to all covered contractors, including construction contractors.

One commenter (Ex. 16) felt that the use of the term "workplace" in supplemental proposed section 851.210(a) could easily result in unintended confusion and extensive debate for sites where DOE utilizes multiple contractors. DOE agrees with the commenter and has modified the provision in Appendix A section 8(a) of the final rule.

One commenter (Ex. 42) believed that supplemental proposed rule section 851.210(a) was unclear in what was considered to be a "comprehensive" occupational medical program or services, and requested that DOE provide elements of the OMP in the rule. DOE does not agree with the commenter and notes that the rules' implementation guide is the appropriate place to provide elements of the occupational medicine program.

Three commenters (Exs. 28, 45, 51) recommended removing: "At sites with operations performed by more than one contractor, several contractors may agree to use services provided under a single contractor's OMP," from supplemental proposed section 851.210(a) because they felt that this language was specific to multi-employer DOE sites and need not be included in the rule. DOE agrees, and has deleted this sentence from the final rule. However, contractors at multi-employer sites may choose to follow this approach to comply with the medical services requirement.

Appendix A section 8(a)(1) of the final rule establishes that the occupational medicine services must provide services for workers who work on a DOE site for more than 30 days in a 12-month period and for workers who are enrolled for any length of time in a medical or exposure monitoring program required by this rule and/or any other applicable Federal, State or local regulation, or other obligation as specified in Appendix A section 8(a)(2) of the final rule.

Appendix A section 8(b) of the final rule establishes that occupational medicine services must be under the direction of a graduate of a school of medicine or osteopathy who is licensed for the practice of medicine in the state in which the site is located.

Appendix A section 8(c) of the final rule requires that occupational medicine physicians, occupational health nurses, physician's assistants, nurse practitioners, psychologists, employee assistance counselors, and other occupational health personnel providing occupational medicine services must be licensed, registered, or certified as required by Federal or State law where employed.

Appendix A section 8(d) of the final rule states that contractors must provide the occupational medicine providers with access to hazard information by promoting its communication, coordination, and sharing among operating and environment, safety, and health protection organizations. One commenter (Ex. 54) recommended adding workers and their representatives to supplemental proposed section 851.210(d) which requires contractors to promote communication and coordination between all environmental, safety, and health groups. DOE agrees that worker participation is a critical component of a successful safety and health program. This section imposes requirements only on contractors to provide necessary information to occupational medicine providers

Appendix A section 8(d)(1) of the final rule requires contractors to provide occupational medicine providers with access to information about site and employee hazards and exposures and any changes in them. Specifically, Appendix A section 8(d)(1)(i) of the final rule requires current information about actual or potential work-related site hazards (chemical, radiological, physical, biological, or ergonomic); section 8(d)(1)(ii) requires employee job-task and hazard analysis information, including essential job functions; section 8(d)(1)(iii) requires actual or potential work-site exposures of each employee; and section 8(d)(1)(iv) specifies information on personnel actions resulting in a change of job functions, hazards or exposures to be provided to the occupational medicine providers.

One commenter (Ex. 48) expressed concern about supplemental proposed section 851.210(d)(3) because it would require the SOMD to be engaged in determining the need for surveillance in each individual's case. The commenter stated that in some cases, such as union construction work, the collective bargaining agreement may not permit medical screening of workers for fitness. DOE understands the commenter's concern and has omitted the language, "prior to medical placement or surveillance evaluations" from final rule Appendix A section 8(d)(1)(iii).

One commenter (Ex. 48) expressed concern that supplemental proposed section 851.210(d)(i) included ergonomic assessments. The commenter asked what would such a requirement involve (*i.e.*, what guidelines and applicable standards would be used; what constitutes an adequate ergonomic evaluation; what are the required credentials for an evaluator; and what constitutes a violation). DOE notes that a detailed explanation of ergonomics and the information requested by the comment is not appropriate for a rule, but will be discussed in the implementation guide to the rule.

One commenter (Ex. 49) recommended that DOE change

supplemental proposed section 851.210(d)(1) to read: "Current *available* information about actual or potential work-related site hazards (chemical, physical, biological, or ergonomic);" supplemental proposed section 851.210(d)(2) to read: "Employee job-task and hazard analysis information, including essential job functions, *as requested by the SOMD*;" and supplemental proposed section 851.210(d)(3) to read: "Actual or potential work-site exposures of each employee prior to medical placement or surveillance evaluations, *as requested by the SOMD*." DOE elected not to add the suggested qualifiers. Limiting the requirement only to "available" information or only that information "requested by the site occupational medicine provider" would significantly constrain the collection and dissemination of critical data.

Several commenters (Exs. 16, 36, 42, 49) believed that supplemental proposed section 851.210(d)(4) which would require the SOMD to be notified of employee job transfers should only be required if the transferred employee would be exposed to new or different hazards. DOE believes that the occupational medicine provider should know where to locate the employee for health related follow-ups, and how to contact an employee in the case of an emergency.

Appendix A section 8(d)(2) of the final rule requires contractors to notify the occupational medicine providers when an employee has been absent because of an injury or illness for more than 5 consecutive workdays (or an equivalent time period for those individuals on an alternative work-schedule). One commenter (Ex. 48) stated that the proposed rule section 851.210(d)(5) would place a significant burden on the SOMD in cases of off-the-job illness, and did not specify if the injury or illness must be work-related or not.

Appendix A section 8(d)(3) requires contractors must provide the occupational medicine provider information on, and the opportunity to participate in, worker safety and health team meetings and committees. One commenter (Ex. 25) expressed concern that the proposed rule section 851.210(d)(6) required SOMDs to be offered the opportunity to participate in worker safety and health team meetings and committees, yet worker safety and health teams or committees were not mentioned anywhere else in the supplemental proposed rule.

Appendix A section 8(d)(4) requires that contractors provide occupational medicine providers with access to the workplace for evaluation of job conditions and issues relating to workers' health.

Appendix A section 8(e) stipulates that a designated occupational medicine provider must: (1) Plan and implement the occupation medicine services; and (2) Participate in worker protection teams to build and maintain necessary partnerships among workers, their representatives, managers, and safety and health protection specialists in establishing and maintaining a safe and healthful workplace.

One commenter (Ex. 16) recommended that DOE delete the proposed rule section 851.210(e)(2) that required a formal written plan detailing methods and procedures implementing the OMP on the basis that such a requirement would place an unnecessary burden on the SOMD since many contractor OMPs currently require a series of medical program procedures, rather than a higher level program document. The commenter further stated that Subpart B already required an overall written worker safety and health program that must provide for effective implementation of the worker safety and health requirements of Subpart C. DOE notes the commenters concerns and has revised the rule accordingly.

Appendix A section 8(f) requires that a record, containing any medical, health history, exposure history, and demographic data collected for the occupational medicine purposes, must be developed and maintained for each employee for whom medical services are provided. Furthermore, the rule stipulates that all occupational medical records must be maintained in accordance with Executive Order 13335, Incentives for the Use of Health Information Technology. Several commenters (Exs. 5, 15, 25, 29, 39, 42, 48) expressed concern over the proposed rule provision 851.210(f) that required all records containing any medical, clinical, health history, exposure history, and demographic data collected under OMP be kept in electronic format, beginning January 2007. Most of these commenters cited significant costs as the basis for their concern. Another commenter (Ex. 49) believed that the proposed rule provision required all medical records collected under OMP be kept in electronic format, beginning January 2007, should be clarified to apply only for medical records generated on or after January 1, 2007. DOE has modified the final rule to be consistent with Executive Order 13335 which requires that medical records be available electronically by 2015.

Appendix A section 8(f)(1) requires that employee medical, psychological, and employee assistance program (EAP) records must be kept confidential, protected from unauthorized access, and stored under conditions that ensure their long-term preservation. Furthermore, the rule specifies that psychological records must be maintained separately from medical records and in the custody the designated psychologist. This provision is consistent with 10 CFR 712.38(b)(2) which applies to the DOE Human Reliability Program. Appendix A section 8(f)(2) establishes that access to these records must be provided in accordance with DOE regulations implementing the Privacy Act and the Energy Employees Occupational Illness Compensation Program Act.

One commenter (Ex. 62) requested that the proposed rule provision 851.210(f)(1) prohibits the SOMD and their staff from providing employers or their lawyers with personal medical information without the employee's consent. DOE notes that all medical information is subject to the Privacy Act of 1974 and the Health Insurance Portability and Accountability Act and is not released without signed consent of the affected worker or other legal authorization.

Appendix A section 8(g) specifies that the occupational medicine services provider must determine the content of the worker health evaluations. These evaluations must be conducted under the direction of a licensed physician, in accordance with current sound and acceptable medical practices, and in accordance with all pertinent statutory and regulatory requirements, such as the Americans with Disabilities Act. One commenter (Ex. 48) suggested that DOE eliminate supplemental proposed rule section 851.210(f)(2) because the rule extended the occupational medical program into the domain of disability evaluations under the Americans with Disabilities Act (ADA). DOE disagrees and has retained the provision in the final rule since occupational medicine service providers are required to conduct post offer/pre-placement physical and mental examinations in accordance with the ADA.

Several commenters (Exs. 16, 25, 47, 49) took exception to the requirement in proposed rule section 851.210(f)(3) for the SOMD to maintain an up-to-date list of all medical evaluations and tests that are offered and to submit this list annually through the Cognizant Field Element to the Office of Environment, Safety and Health. These commenters suggested eliminating this requirement. One commenter (Ex. 16) suggested the

process would be more efficient if the list of medical evaluations was included in the information in the overall Worker Safety and Health Program. DOE agrees with the commenters and has eliminated the requirement from the final rule.

Appendix A section 8(g)(1) requires that workers must be informed of the purpose and nature of the medical evaluations and tests offered by the occupational medicine provider. Specifically, Appendix A section 8(g)(1)(i) requires that the purpose, nature and results of evaluations and tests must be clearly communicated verbally and in writing to each worker that is being provided with testing and that the communication must be documented in the worker's medical record as specified in Appendix A section 8(g)(1)(ii).

Two commenters (Exs. 15, 47) proposed elimination of the provision in proposed rule section 851.210(f)(5) that required medical test and result related communication be documented in the medical chart with signatures of both the occupational health examiner and worker. These commenters pointed out that supplemental proposed rule section 851.210(f)(4) required communication of the purpose and nature of the tests and suggested this, along with inclusion of language such as "and individual results discussed with the employee," could be sufficient to meet the requirement of proposed rule section 851.210(f)(5). One of the commenters (Ex. 15) asserted that the requirement was "far in excess of the community standard for the practice of medicine for routine medical tests."

Conversely, in order to further strengthen the requirement in proposed rule section 851.210(f)(5) and prevent post-examination changes to employee medical records without the employee's consent, one commenter (Ex. 62) favored adding the language, "modifications to an employee's medical chart cannot be made without the concurrence and signature of the employee." DOE believes that the site occupational medicine records are created and maintained, updated, and reviewed in accordance with accepted medical practice. DOE regulations and medical professionals have explicit guidelines on how to modify records so that changes are tracked. Additionally, DOE notes that employees may officially request a copy of their record. After reviewing the record, if the employee wishes to provide a dated, signed, written statement about an element within the record, they may do so. The attachment from the employee will remain with the record in accordance with DOE records management regulations.

Appendix A section 8(g)(2) requires certain health evaluations to be conducted when deemed necessary by the occupational medicine provider for the purpose of providing initial and continuing assessment of an employee's fitness for duty. One commenter (Ex. 62) believed that the rule should explicitly bar the SOMD from "prescribing tests, including behavioral science exams, for purposes of carrying out retaliation against employees who were engaged in protected activities, such as reporting waste, fraud, abuse or unlawful or unsafe activities, unless the un-coerced consent of the employee was secured in writing." DOE believes that occupational medicine providers are very sensitive to informed consent which causes them to explain and ask workers to sign consent for evaluations and examinations. DOE further notes that workers have the right and option to decline any portion of an examination, or all medical evaluations or examinations. However, refusing mandatory examinations may result in difficulties placing the worker appropriately in a job.

Appendix A section 8(g)(2)(i) requires that at the time of employment entrance or transfer to a job with new functions and hazards, a medical placement evaluation of the individual's general health and physical and psychological capacity to perform work be conducted to establish a baseline record of physical condition and assure fitness for duty. One commenter (Ex. 54) sought clarification of the criteria for "emotional capacity" as referred to in supplemental proposed rule section 851.210(f). The commenter expressed concern that this requirement would be interpreted to mean that the determination of emotional capacity was left entirely to the SOMD with no apparent limitations or requirements. In response to this concern, DOE has replaced the term "emotional capacity" with "psychological capacity" in the final rule. DOE further notes that the final rule makes allowance for the involvement of licensed, registered or certified psychologists in the occupational medicine service process. Thus DOE believes that such professionals have the requisite training and knowledge to apply clinically established criteria in the determination of an individual's psychological capacity.

One commenter (Ex. 47) suggested the term "medical placement examination" in supplemental proposed rule section 851.210(f)(6)(i) be replaced with the term "medical placement evaluation." DOE has modified the language in final rule Appendix A section 8(g)(2)(i) to include the term "evaluation" in place of "examination."

Two commenters (Exs. 39, 49) sought clarification of the term "job transfer." One commenter (Ex. 49) suggested defining the term as "involving new or different hazards," while the other commenter (Ex. 39) inquired whether both new and existing employee movement between jobs was covered under the provision. DOE notes that final rule Appendix A section 8(g)(2)(i) clarifies "job transfers" as transfers to jobs with new functions and hazards. Additionally, DOE notes that job transfers for the purposes of reporting to the site occupational medicine department, remains the same regardless of whether the employee is new or existing and means any change in job tasks, titles, exposures, and/or job description.

Appendix A section 8(g)(2)(ii) specifies that periodic, hazard-based medical monitoring or qualification-based fitness for duty evaluations as required by regulations and standards, or as recommended by the occupational medicine services provider, will be provided at the required frequency. DOE did not receive comments on this proposed provision during the public comment period.

Appendix A section 8(g)(2)(iii) specifies use of diagnostic examinations to evaluate employee's injuries and illnesses in order to determine work-relatedness, the applicability of medical restrictions, and referral for definitive care, as appropriate. One commenter (Ex. 47) favored either eliminating the phrase "degree of disability" or substituting the phrase with "apply medical restrictions as appropriate." DOE has eliminated the phrase "degree of disability" in the corresponding final rule Appendix A section 8(g)(iii). Additionally DOE notes that the medical restriction provision has been greatly modified in the final rule section Appendix A section 8(h).

Another commenter (Ex. 25) expressed concern that supplemental proposed rule section 851.210(f)(6)(iii), would pose a challenge for the SOMD to win the trust of workers in the determination of the work-relatedness of disease and degree of disability, given that the occupational medicine physician worked for the contractor (or multiple contractors). Additionally the commenter expressed the opinion that determination of work-relatedness would increase the potential for worker compensation claims and associated liability, which "contractors would rather avoid regardless of the merits of

the claim." DOE believes that a basic tenet of occupational medicine is to assist workers and management in the determination of the work-relatedness of illness and injury. Hence trained and certified occupational health providers are expected to retain professional impartiality and decide claims on the basis of their merits. Furthermore to minimize the potential for any subjectivity in medical determinations, DOE has eliminated use of the phrase "degree of disability" in the final rule Appendix A section 8(g)(iii).

Appendix A section 8(g)(2)(iv) specifies that after a work-related injury or illness or an absence due to any injury or illness lasting 5 or more consecutive workdays (or an equivalent time period for those individuals on an alternative work schedule), a return to work evaluation will determine the individual's physical and psychological capacity to perform work and return to duty. One commenter (Ex. 54) suggested that supplemental proposed rule section 851.210(f)(6)(iv) clarify that contract language took precedence over SOMD determinations. The commenter proposed including a requirement for a third party medical review (at the expense of the contractor) in the event of a disagreement between the SOMD and a worker's own physician. DOE believes that the occupational medicine provider's recommendation does not supplant contractual requirements regarding return to work (RTW). The occupational service provider is responsible for advising management on the medically appropriate reinstatement of a worker following an injury or illness based on input from the worker's personal physician and other sources.

One commenter (Ex. 15) expressed concern that the requirement for return to work evaluations infringed individual privacy rights with respect to vacation absence and would result in additional costs to the contractor. The commenter proposed that for non-work related illness (such as surgery), it was more appropriate and cost effective to have the worker's personal surgeon make the determination regarding fitness for return to duty. Another commenter (Ex. 48) favored elimination of return to work evaluations after absences due to illnesses or injury for 5 or more days. DOE notes that the occupational medical providers use the written recommendations regarding restrictions that are provided by private physicians. However, occupational medicine providers must conduct return-to-work fitness-for-duty evaluations and make determinations about whether the employee can safely return to their assigned job tasks in the interest of protecting the worker, co-workers, and the company.

Many commenters (Exs. 16, 25, 36, 42) sought additional clarification on whether return to work health evaluations were merely for absences due to injuries or illnesses, or some other unique situation (e.g., return from active military duty) that were deemed appropriate by the SOMD, and not for return to work from vacations or other non-medically related absences. DOE believes that the corresponding final rule Appendix A section 8(g)(2)(iv) adequately clarifies that return to work evaluations are necessary only when an employee has been absent for illness or injury for 5 or more days.

Appendix A section 8(g)(2)(v) provides that at the time of separation from employment, individuals shall be offered a general health evaluation to establish a record of physical condition. DOE received many comments with respect to the need for termination exams. One commenter (Ex. 49) suggested that termination exams under supplemental proposed rule section 851.210(f)(6)(v) only be required for "employees enrolled in HAZWOPER or laser surveillance programs at the time of separation." DOE disagrees and believes it is imperative that termination exams and evaluations be conducted on all workers in order to minimize the liability impact of work-related injury and illness claims. Another commenter (Ex. 25) sought clarification of why a termination exam was required. DOE notes that termination examinations are not fitness-for-duty; rather they are examinations to document the health status and known exposures of the employees when they leave employment at DOE.

Several commenters (Ex. 16, 36, 42) noted that contractors did not have the ability to require a terminating individual to participate in the evaluations required by supplemental proposed rule section 851.210(f)(6)(v), which specifies that a health evaluation is required for individuals at the time of separation from employment. These commenters suggested that the rule be modified to require contractors to only offer a medical evaluation at termination. DOE agrees with the commenters suggestion and has modified the language in final rule Appendix A section 8(g)(2)(v) to only require contractors to offer individuals, at the time of separation from employment, a general health evaluation to establish a record of physical condition.

Appendix A section 8(h) requires the occupational medicine provider to monitor ill and injured workers to facilitate their rehabilitation and safe return to work and to minimize lost time and its associated costs. Two commenters (Exs. 30, 62) expressed concern that the requirement in supplemental proposed rule section 851.210(g)(2), for the occupational medicine program to "monitor ill and injured workers to facilitate their rehabilitation and safe return to work and to minimize lost time and its associated costs," encourages the SOMD to return workers to the job before they are well. The commenters asserted that this placed the SOMD in the posture of serving two masters: the patient's health and well being, and the economic interests of the contractor. As previously discussed in this section, occupational medicine providers are bound by medical and legal obligations to put the patient's interest first and make recommendations to the contractor about fitness-for-duty and/or return-to-work status without breaching confidence of a non-occupational diagnosis or condition without the patient's permission. For example, the occupational medicine provider can state that the worker has a condition for which restrictions are recommended, and state specifically what those restrictions are. Restrictions are based on the best interest of the physical and mental health and well-being of the patient/worker and on the safety and well-being of co-workers. When a contractor has no work for which that individual is qualified at that time, then the patient/worker must abide by the contractor's employment policies and benefits that are available.

Appendix A section 8(h)(1) the occupational medicine provider to place an individual under medical restrictions when health evaluations indicate the worker should not perform certain job tasks. Furthermore, the occupational medicine provider must notify the worker and contractor management when employee work restrictions are imposed or removed.

Two commenters (Exs. 30, 54) noted that supplemental proposed rule section 851.210(g) requires the SOMD to place an individual under medical restrictions when health evaluations indicate that the worker should not perform certain job tasks. However, the commenters pointed out that the proposed rule has no requirement for medical removal protection (*i.e.*, no loss of pay if transferred to a job which pays less or inability to work due to a work related problem as is the case with OSHA's Lead standard). The commenters suggested that such a provision for medical removal protection should be included in the rule, whether required

by an OSHA regulation or not. DOE believes that medical removal protection is an inappropriate remedy in this instance. The primary purpose of medical removal protection is to reduce or eliminate the potential for exposure to toxic materials in workers who display evidence of overexposure to that material. Workers under medical restriction may be protected by the Americans with Disability Act, Workers' Compensation Programs, or other means.

Appendix A section 8(i) stipulates that occupational medicine provider's physicians and medical staff must, on a timely basis, communicate results of health evaluations to management and to safety and health protection specialists in order to facilitate the mitigation of worksite hazards. Three commenters (Exs. 47, 54, 55) sought clarification of the requirement in proposed rule section 851.210(g)(3) for the "communication of results of health trend evaluations to management and site worker health protection professionals." One of the commenters (Ex. 47) suggested that only "identified" health trends should be included under this provision, while other commenters (Exs. 54, 55) suggested the inclusion of worker health and safety committees and worker representatives as recipients for the health evaluation trend data. DOE has eliminated the term "trend" and only requires "communication of results of health evaluations to management and health protection specialists" in the corresponding final rule Appendix A section 8(i). DOE further notes that worker safety and health committees and worker representatives can obtain trend data on illness and injury and trend data on safety from the Office of Environment, Safety and Health's offices of Epidemiology and Health Surveillance, Performance and Assessment, respectively.

Appendix A section 8(j) specifies that the occupational medicine provider must include measures to identify and manage the principal preventable causes of premature morbidity and mortality affecting worker health and productivity. In particular, Appendix A section 8(j)(1) requires the occupational medicine provider to include programs to prevent and manage these causes of morbidity when evaluations demonstrate their cost effectiveness. Additionally, Appendix A section 8(j)(2) requires contractors to make available to the occupational medicine provider appropriate access to information from health, disability, and other insurance plans (de-identified as necessary) in order to facilitate this process.

Appendix A section 8(k) establishes that the occupational medicine services provider must review and approve the medical and behavioral aspects of employee counseling and health promotional programs. One commenter (Ex. 48) favored eliminating the requirement in proposed rule section 851.210(h) and replacing it with the language, "Occupational medical services and medical surveillance must be provided to employees as required by applicable OSHA regulations." DOE believes that limiting the services to only what is required by OSHA regulations places undue constraints on the occupation medicine program. The services listed constitute many of the elements of a comprehensive occupation medicine program.

Appendix A section 8(k)(1) specifies that contractor-sponsored or contractor-supported EAPs must be reviewed and approved by the occupational medicine services provider. One commenter (Ex. 5) suggested that DOE should offer alternatives for the SOMD review, such as review by the medical director of the EAP programs, because many companies use corporate sponsored programs that are not reviewed by the SOMD. DOE believes that the occupational medicine provider must review and approve all services offered to employees because the occupational medicine provider has overall responsibility for ensuring that employees are offered appropriate and comprehensive services.

Appendix A section 8(k)(2) specifies that contractor-sponsored or contractor-supported alcohol and other substance abuse rehabilitation programs must be reviewed and approved by the occupational medicine services provider.

Appendix A section 8(k)(3) specifies that contractor-sponsored or contractor-supported wellness programs must be reviewed and approved by the occupational medicine services provider. DOE did not receive comments on this proposed provision during the public comment period.

Additionally, Appendix A section 8(k)(4) of the final rule specifies that the occupational medicine services provider must review the medical aspects of immunization programs, blood-borne pathogens programs, and bio-hazardous waste programs to evaluate their conformance to applicable guidelines. One commenter (Ex. 16) recommended that proposed rule section 851.210(h)(4) be modified to include the language, "The SOMD must review the medical aspects of * * * programs to evaluate their conformance to applicable guidelines, as determined appropriate by the SOMD." DOE believes that such guidelines put forth by OSHA and CDC qualify as common industry knowledge and that qualified (licensed/registered/certified) occupational medicine providers as required in Appendix A section(c) are aware of such guidelines.

Appendix A section 8(k)(5) requires that the occupational medicine services provider must develop and periodically review medical emergency response procedures included in site emergency and disaster preparedness plans. This provision further stipulates that medical emergency responses must be integrated with nearby community emergency and disaster plans.

Two commenters (Exs. 5, 16) expressed concerns with respect to emergency and disaster preparedness plans and how they integrate within the occupational medicine requirements under proposed rule section 851.210(i)(1). One commenter (Ex. 16) suggested the language be modified to require "the SOMD to review and approve the medical portion of the site emergency and disaster preparedness plans and procedures." Another commenter (Ex. 5) suggested that contrary to the requirements of proposed rule sections 851.210(i)(1) and (2), in small communities, the SOMD may review the site emergency and disaster preparedness plans, but the development, and integration of such plans with community plans is done by the management and operating emergency management or occupational health staff, not by the local physician.

With reference to supplemental proposed sections 851.210(i)(1) and (2), one commenter (Ex. 5) raised the issue that previous DOE guidance on community plan integration specifically referenced mass casualties. However as written, the proposed rule did not include any requirement for mass casualty planning. DOE notes that the DOE order on emergency preparedness addresses mass casualties. Additionally occupational medicine programs are required to be integrated into the Emergency Plans at sites.

9. Motor Vehicle Safety

Appendix A section 9 of the final rule (formerly supplemental notice of proposed rulemaking section 851.206), provides the motor vehicle safety program requirements. This section adopts the motor vehicle safety provisions in DOE Order 440.1A. These provisions allow continued contractor flexibility in determining the most efficient methods for achieving compliance and targeting local accident and injury trends based on local driving and operating conditions. The motor

vehicle safety requirements of this section apply to operation of industrial equipment powered by an electric motor or an internal combustion engine, including, fork trucks, tractors, and platform lift trucks and similar equipment. Appendix A section 9(a) of the final rule requires contractors to implement a motor vehicle safety program to protect the safety and health of all drivers and passengers in Government-owned or -leased motor vehicles and powered industrial equipment (*i.e.*, fork trucks, tractors, platform lift trucks, and other similar specialized equipment powered by an electric motor or an internal combustion engine).

Two commenters (Exs. 27, 45) asserted that the proposed requirements which are in Appendix A section 9 of the final rule, appear to be a summarization of existing DOE Orders and would likely require extensive review and analysis for contractors to come into compliance with the rule requirements. Since motor vehicle requirements in the final rule are the same as the requirements in DOE Order 440.1A, DOE believes that contractors are already in compliance with DOE Order 440.1A should require minimal, if any effort to implement the rule requirements.

Another commenter (Ex. 48) argued that the requirements in Appendix A section 9 should be deleted because motor vehicle safety is adequately covered by OSHA regulation and state laws, including the requirements for training and qualification of powered industrial trucks. DOE disagrees with the commenter and has retained the provisions for motor vehicle safety.

Another commenter (Ex. 40) contended that the requirement that each contractor implement a motor vehicle safety program would be problematic in cases where many contractors share the same space and traffic patterns. DOE notes, each contractor should coordinate with the other contractors to ensure that there are clear roles, responsibilities and procedures that will ensure the safety and health of workers at multi-contractor workplaces.

Appendix A section 9(b) mandates that the contractor must tailor the motor vehicle safety program to the individual DOE site or facility, based on an analysis of the needs of that particular site or facility. Appendix A sections 9(c)(1) through (8), specify the different elements that must be addressed by the contractor's motor vehicle safety program. Specifically, these elements include: (1) Vehicle licensing; (2) use of seat belts and other safety devices; (3) training for vehicle operators; (4) vehicle maintenance and inspection; (5) traffic control and signage; (6) speed limits and other traffic rules; (7) public awareness programs to promote safe driving; (8) and enforcement provisions.

Two commenters (Ex. 39, 40) criticized the corresponding provisions of the supplemental proposed rule, specifically sections 851.206(c)(1) through (3) on the ground that they duplicate the training, testing and licensing requirements of local and state government agencies that regulate motor vehicles. DOE disagrees with the commenters and has retained the requirements in the final rule.

Several commenters (Exs. 16, 29, 36, 48) objected to the use of the word "incentive" in supplemental proposed rule section 851.206(c)(7), which stated that awareness campaigns and incentive programs to encourage safe driving must be part of the motor vehicle safety program. Their rationale was that the word incentive implies monetary reward, and it would be inappropriate to include this type of requirement in a regulation that subjects contractors to civil penalty for violations. DOE disagrees and notes that contractors have been subject to the enforcement (through contract mechanisms) of this exact requirement through the provisions of DOE Order 440.1A for close to ten years. DOE is unaware of any difficulties associated with either compliance with or enforcement of this provision. DOE's intent with the use of the term "incentives programs" as clarified in Appendix A section 9(c)(7) of the final rule is to refer to any program developed by the contractor to encourage safe driving among its workforce. This provision provides contractors the latitude to determine the types of incentives programs they feel are appropriate and effective. The provision does not limit the contractor to or restrict them from the use of monetary incentives.

Another set of commenters (Exs. 20, 36, 39) expressed several concerns about the supplemental proposal, included in section 851.206(c)(8) to require enforcement provisions to the motor vehicle safety program. The applicability of the enforcement provisions to DOE sites with multiple on-site entities was of concern to one commenter (Ex. 39). A second commenter (Ex. 20) questioned how the enforcement provisions would be implemented (*i.e.*, whether the DOE police, a Federal magistrate, or the contractor's staff would be authorized to enforce the program provisions). A third commenter (Ex. 36) contended that the enforcement provisions in the proposed section would infringe on the employee-employer relationship and go beyond commercial and regulatory practice. Again, DOE notes that the motor vehicle provisions of this final rule are taken directly from DOE Order 440.1A and have been applicable to contractor operations for almost ten years. DOE expects that contractors will use their existing motor vehicle safety enforcement provisions developed in response to DOE Order 440.1A to comply with the enforcement provisions required under Appendix A section 9(c)(8) of the final rule.

10. Electrical Safety

Three commenters (Ex. 17, 18, 53) recommended that DOE add a new rule section related to electrical safety and worker protection from electrical hazards. One of these commenters (Ex. 53) recommended that the proposed Electrical Safety section include NFPA 70E (Standard for Electrical Safety in the Workplace). Another (Ex. 29) questioned if DOE plans to publish an electrical safety implementation guide. The commenter believed that this would be helpful for understanding what DOE considers an "acceptable approach" for "development of an integrated set of hazard controls." In response to these comments, DOE added Appendix A section 10 to the final rule, which requires contractors to implement a comprehensive electrical safety program that is appropriate for the activities at their site. This program must meet the applicable electrical safety codes and standards referenced in section 851.23 of the rule. As requested, the section 851.23 includes NFPA 70 and 70E among the mandatory electrical safety codes and standards. DOE notes its intent to publish appropriate guidance documents to assist contractors in their compliance efforts.

11. Nanotechnology Safety—Reserved

The Department has chosen to reserve this section since policy and procedures for nanotechnology safety are currently being developed. Once these policies and procedures have been approved, the rule will be amended to include them through a rulemaking consistent with the Administrative Procedure Act.

12. Workplace Violence Prevention—Reserved

The Department has chosen to reserve this section since the policy and procedures for workplace violence prevention are currently being developed. Once these policies and procedures have been approved, the rule will be amended to include them

through a rulemaking consistent with the Administrative Procedures Act.

Appendix B—General Statement of Enforcement Policy

As a guidance document for enforcing this rule, the Department has issued a general statement of enforcement policy as Appendix B. The policy sets forth the general framework which DOE will follow to ensure compliance with the regulations and to issue enforcement actions and exercise civil penalty authority. The policy is not binding and does not create any legally enforceable requirements pursuant to this part. It only provides guidance as to how DOE generally expects to seek compliance with the proposed regulations and to deal with any violations of the proposed regulations. One commenter (Ex. 47) pointed out that the supplemental proposal made references to reasonable quality assurance measures and also suggested that contractor activities before the effective date of the rule should not be enforceable. DOE notes that the statute does not allow a contactor to be penalized under both sections (234A and 234C) of the law for the same violation. Also, the statute does not provide for grandfathering activities of the contractor before the effective date of the rule. Therefore, contractors must be in compliance on the effective date of the rule.

Several commenters (Exs. 13, 29, 43, 58) suggested that terms and definitions be expanded or clarified in this section of the final rule. DOE feels that most of these terms are commonly understood and need not be defined in the rule. The rule incorporates commonly used and understood terms from both the nuclear safety enforcement program and worker safety and health programs in both DOE and the private sector. DOE clarifies in final rule section 851.3(b) that terms undefined in this part that are defined in the Atomic Energy Act of 1954 must have the same meaning as under that Act. DOE agrees that all of the different terms used to refer to violations and noncompliances in the supplemental proposal should be deleted.

Three commenters (Exs. 28, 45, 51) supported the position that Appendix B should be deleted from the rule and issued as separate guidance. DOE disagrees. The rule establishes the worker safety and health requirements for contractors. If contractors fully comply with requirements of this rule, then there will be no enforcement actions taken against contractors. If, however, a contractor does not comply, it is necessary to delineate enforcement policies, as is done in Appendix B, so that contractors can understand the enforcement process. Appendix B establishes that necessary framework for the worker safety and health enforcement program.

The policy is intended to achieve the dual purposes of promoting proactive behavior on the part of DOE contractors to improve worker safety and health performance and deterring contractors from violating the proposed regulations. The policy will encourage DOE contractors to self-identify, report and correct worker safety and health noncompliances and will provide adjustment factors to escalate or mitigate civil penalties on the basis of the nature of the violation and the behavior of the contractor. Several commenters (Exs. 5, 11, 16, 28, 29, 31, 35, 36, 37, 43, 45, 47, 49, 51) took issue with the treatment of DOE Voluntary Protection Program (DOE VPP) sites in that special provisions were not made for their exemplary worker safety and health programs, such as exemption from programmed inspections and special mitigating factors during enforcement. DOE disagrees and believes that the performance of DOE VPP sites under this rule will validate the strength of their programs and that they will stand out as examples of excellent worker safety and health programs within DOE. DOE VPP sites will be subject to all of the provisions of this rule. In fact, DOE VPP sites should have the best worker safety and health programs and be in compliance with the worker safety and health requirements of this rule. DOE would not expect that these sites would need to report many Noncompliance Tracking System (NTS)-reportable violations. The Office of Price-Anderson Enforcement, however, will respond as necessary to significant violations if and when they do occur and develop appropriate programmed inspection strategies.

One commenter (Ex. 39) took exception with the statement that contractors will almost always discover noncompliances before DOE. The commenter noted that DOE representatives are often co-located onsite with contractors and could identify violations before the contractor. DOE disagrees and maintains that contractors are in the best position to identify noncompliances. Since contractors are required to identify and evaluate hazards in the workplace, and have managers, supervisors and employees operating in the workplace on a routine basis, they should be the first to identify noncompliances. Contractors should not rely on DOE to identify noncompliances. If DOE finds noncompliances rather than the contractor, then this may indicate a weakness in the contractor's worker safety and health program. One commenter (Ex. 29) was concerned since DOE facility representatives are integrated into site operations and participate in collaborative assessments. This commenter argued that, as a result, DOE may learn of violations at the same time or before the contractor. The commenter felt that DOE discovery in such cases should not be held against the contractor when determining mitigation. As noted in the final rule, Appendix B section IX(b)(9)(a)(1) refers to violations identified by a DOE independent assessment or other formal program efforts.

Another commenter (Ex. 21) questioned use of the term awareness in Appendix B section IX(2)(f), and argued that awareness would be difficult to prove on a large worksite, with multiple contractors and informal resolution of noncompliances on the spot, without documentation. Generally, contractors should be aware of the hazards in their covered workplace. Only in rare cases, would DOE accept that the contractor was unaware of hazards. DOE will consider the contactor's self-assessment program and the extent of management involvement in making such determinations.

Several commenters (Exs. 15, 29, 31) took exception to applying enforcement provisions of the rule to subcontractors and suppliers, citing privity of contract, additional management burden, financial implications, and other disincentives for working with DOE. Contract privity is not an issue because DOE, through the Atomic Energy Act, has statutory authority to regulate health and safety matters of workers on the DOE sites covered under this rule. In fact, since DOE indemnifies subcontractors and suppliers against a nuclear incident under the statute, it does not receive further privity in any event. DOE will exercise this authority through this final rule and need not have a direct contractual relationship with subcontractors. This will not alleviate contractors of their responsibility to flow contractual requirements down to their subcontractors. The statute mandates indemnification and the statutory requirements apply without respect to any particular contract. Contractors remain contractually responsible for the activities of their subcontractors. DOE also plans to issue an enforcement guidance supplement (EGS) similar to the Occupational Safety and Health Administration (OSHA)'s multi-employer worksite policy, which explains how enforcement will be viewed with respect to multiple

contractors at a particular covered workplace.

Appendix B incorporates the basic outlines of DOE's well-established nuclear safety enforcement program in 10 CFR Part 820. One commenter (Ex. 37) is concerned that DOE will not consider effective OSHA enforcement policies and procedures, such as their letters of interpretation, rulings of law, approach to multi-employer sites and the General Duty Clause. The Office of Price-Anderson Enforcement has maintained copies of all enforcement letters, enforcement actions, program review reports and other data related to nuclear safety enforcement on its web site, which is available to participants in the Price-Anderson Amendments Act (PAAA) program. Over the past 10 years the program has been administered as required by the Price-Anderson Amendments Act. Legal precedents contained therein will be relevant. In a similar manner, on the effective date of this rule, DOE will begin to post all relevant enforcement letters, enforcement actions, program review reports, and other data related to worker safety and health. Interpretations to the OSHA standards issued by OSHA will be considered valid unless directed otherwise by DOE General Counsel. In addition to relying on DOE's proven nuclear safety enforcement principles and operating procedures, the Office of Price-Anderson Enforcement will incorporate relevant OSHA enforcement procedures into an Office of Price-Anderson Enforcement Worker Safety and Health Enforcement Manual.

Another commenter (Ex. 59) proposed that a DOE-approved worker safety and health program constitute an accepted interpretation of the rule. DOE holds that it does not represent an interpretation of the rule. As established in the final rule, a binding interpretive ruling can only be issued through the formal process outlined in section 851.7. In addition, an approved program demonstrates an acceptable approach toward implementing the requirements of the rule.

The policy provides guidance on how enforcement conferences will be conducted, how enforcement actions will be conducted and when enforcement letters will be issued. One commenter (Ex. 31) suggested that specific criteria be established for issuing or not issuing enforcement letters and that enforcement letters should not be issued when a contractor has taken appropriate abatement action. DOE believes that such detailed criteria would unduly restrict the flexibility needed in the enforcement program. With respect to the Director's exercising discretion when a contractor self-reports a violation, another commenter (Ex. 47) recommended changing "may" to "shall." DOE disagrees in that by definition, discretion cannot be exercised without restraint by DOE if DOE is constrained to act in only one way.

The enforcement policy uses several enforcement terms and includes mitigation factors similar to those in 10 CFR part 820. The severity levels and adjustment factors in the policy incorporate concepts OSHA uses in its enforcement program including whether a violation is serious, other-than-serious, willful, repeat, or *de minimis*.

Specifically, the policy as clarified in Appendix B section VI of the final rule provides guidance on the treatment of violations based on severity levels. Section VI(b)(1) establishes that a severity level I violation is a serious violation, which would involve the potential that death or serious physical harm could result from a condition in a workplace, or from one or more practices, means, methods, operations, or processes used in connection with a workplace. A severity level I violation is subject to a base civil penalty of up to 100% of the maximum base civil penalty or $70,000.

Section VI(b)(2) establishes that a severity level II violation is an other-than-serious violation, which would involve a potential that the most serious injury or illness that might result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees, but does have a direct relationship to their safety and health. A severity level II violation is subject to a base civil penalty up to 50% of the maximum base civil penalty or $35,000.

Under section VI(b)(3) a *de minimis* violation is defined as a violation that has no direct or immediate relationship to safety or health and thus, will not be the subject of formal enforcement action through the issuance of a Notice of Violation.

Several commenters took issue with DOE's description of violation severity in the corresponding sections of the supplemental proposed rule. For instance, four commenters (Exs. 15, 29, 38, 57) favored using OSHA's definition for severity level I since probability in this rule was not precisely defined. DOE disagrees. The probability language in the definition of severity level II (*i.e.*, "a hazardous condition that cannot reasonably be predicted to cause death or serious physical harm") clearly encompasses hazards that present only a remote possibility of death or serious physical harm, thus, such hazards would be considered severity level II. As a result, the supplemental proposal language is retained in the final rule.

One commenter (Ex. 15) insisted that DOE apply the maximum civil penalty only to cases of willfulness, death, serious injury, patterns of systemic violations, flagrant violations or repeated poor performance and apply the OSHA penalty structure to violations classified as serious, other-than-serious, and *de minimis*. DOE disagrees, the penalty structure was established by Public Law. The Director may use discretion to reach final penalty amounts. Appendix B section IX(b)(3) addresses the adjustment factors that the Director will consider when arriving at a penalty amount.

Two commenters (Exs. 45, 51) also suggested adding definitions to supplemental proposed section 851.3 for "severity levels I and II." DOE disagrees, however, since the terms are adequately defined in this appendix. Two other commenters (Exs. 38, 57) requested that DOE more clearly delineate between severity level II and *de minimis* violations in the rule arguing that under the severity classifications in the supplemental proposed rule, a single improperly placed ladder could be consider a severity level II hazard subject to a $35,000 penalty. DOE disagrees that a change is needed. The commenters are correct that an improperly positioned ladder could be considered a severity level II hazard if the condition had a direct relationship to employee safety and health but could not reasonably be predicted to cause death or serious physical harm. If, on the other hand, the specific condition had no direct or immediate relationship to safety or health, the hazard would be considered *de minimis*. DOE also points out here that, under certain circumstances, an improperly positioned or secured ladder could easily present a significant fall hazard which could be considered a severity level I hazard. Since the probability that an injury or illness will occur has a bearing on the proposed penalty, the definitions of severity level I, II, or *de minimis* violations take likelihood or probability into account. In determining the severity level of a violation, the Office of Price-Anderson Enforcement will consider the circumstances affecting each condition—employee exposure, frequency of exposure, proximity to the hazard, level of worker experience, etc.

With respect to fire protection, one commenter (Ex. 61) stated that due to legacy issues there will be numerous *de minimis* violations of National Fire Protection Association (NFPA)

standards. The commenters questioned whether DOE intends for contractors to document and correct these *de minimis* violations and also stated that most of the code deviations would address property protection rather than worker protection. In response, DOE notes that the list of NFPA standards in the final rule corresponds to those already listed in DOE Order 440.1A and are significantly reduced from that included in the supplemental proposal. Since these NFPA standards have been in place for many years under the DOE Order, DOE does not expect that there will be numerous violations. In addition, DOE believes that deviations from the NFPA standards that would qualify as *de minimis* violations would likely be addressed through the equivalency process built into the NFPA standards.

In addition to the clear definitions for severity levels I and II and *de minimis* violations described in Appendix B section VI of the final rule, the supplemental proposed rule Appendix A sections VI(d) through (g) described certain other factors that would be taken into account in determining the severity of a violation. Several commenters took issue with the consideration of these other factors arguing that the factors had no relationship to the actual severity of the hazard. For instance, two commenters (Exs. 29, 36) suggested that severity levels be defined based on the extent of potential harm that could result from the violation (as discussed in supplemental proposed Appendix A sections VI(b) and (c)), not on the culpability of the contractor (as discussed in supplemental proposed Appendix A sections VI(d) and (e)). DOE agrees and has made appropriate changes in the final rule. Culpability will be considered in the assessment of adjustment factors when determining an appropriate level of penalty. Accordingly, this paragraph is now included as an adjustment factor under Appendix B section IX(b)(3)(e) of the final rule.

Two other commenters (Exs. 29, 36) pointed out that, as defined in the supplemental proposal, a severity level II violation could be increased to severity level I if a contractor failed to report a violation. These commenters argued that this potential increase in severity level would make NTS reporting mandatory. DOE agrees. Accordingly, this provision of the supplemental proposal has been moved to Appendix B section IX(b)(3)(g) in the final rule and is no longer included as a factor in determining severity. As in the nuclear safety enforcement program, self-reporting is included as an adjustment factor in determining appropriate penalty amounts.

Two commenter (Exs. 36, 47) took issues with Appendix A section VI(g) which provided special considerations for facility-related legacy hazards in determining severity levels. One commenter (Ex. 47) stated that this section of the supplemental proposed rule did not address personnel-related legacy issues such as asbestosis cases, hearing loss due to chronic noise exposures, etc. The other commenter (Ex. 36) wondered whether facility-related and legacy hazards would be considered in determining the severity of the hazard or would be considered as a mitigating factor when determining penalty amounts. DOE has considered both of these comments as well as other comments received related to legacy hazards and believes that flexibility for legacy hazards is best addressed through worker safety and health program requirements rather than through adjustments to the severity level of a violation. Accordingly, DOE has removed this paragraph from Appendix B section VI of the final rule. Under the final rule, facility-closure issues must be addressed under the contractor's safety and health program (final rule section 851.21(b)). DOE's intent is that this provision address facility-closure issues impacting worker safety and health.

Appendix B section IX of the final rule clarifies that DOE may invoke the provisions for reducing contract fees in cases: (1) Involving especially egregious violations; (2) that indicate a general failure to perform under the contract with respect to worker safety and health; or (3) where the DOE line management believes a violation requires swift enforcement and corrective action. Where DOE uses environmental closure-type contracts, some of short duration and/or where fee payments are scheduled only after significant accomplishment of work, DOE would initially pursue the use of the fee reduction provision. Such violations would call into question a contractor's commitment and ability to achieve the fundamental obligation of providing safe and healthy workplaces for workers because of factors such as willfulness, repeated violations, death, serious injury, patterns of violations, flagrant DOE-identified violations, repeated poor performance in areas of concern, or serious breakdown in management controls. Because such violations indicate a general failure to perform under the contract with respect to worker safety and health where both remedies are available and DOE elects to use a reduction in fee, DOE would expect to reduce fees substantially under the Conditional Payment of Fee clause.

Regarding the factor of ability of DOE contractors to pay civil penalties, the policy provides in Appendix B section IX(b)(2) that it is not DOE's intention that the economic impact of a civil penalty would put a DOE contractor out of business. Several commenters (Exs. 29, 42, 47) contend that since DOE controls funding, some accommodation would be appropriate in circumstances where the violation existed because funding was not provided. They go on to state that contactors should not be liable if they have notified the contracting officer or COR that funds are needed to correct legacy hazards and infrastructure issues (Exs. 42, 47). The Director will consider all relevant factors in determining an appropriate enforcement method. However, the rule makes no provision for violations that have existed and have not been abated for lack of funding. It is the responsibility of contractors to be in compliance on the effective date of this rule.

The policy also provides that when a contractor asserts that it cannot pay the proposed penalty, DOE would evaluate the relationship of affiliated entities to the contractor such as parent corporations. One commenter (Ex. 39) stated that such an approach is "in direct contravention of state laws that establish C-corporations, S-corporations and limited liability companies (LLCs), as well as other legal entities." DOE appreciates these concerns. Nevertheless, to ensure that responsible parties such as an affiliate are held responsible for the safety and health of workers, and to maintain consistency with the duties and responsibilities set forth in 10 CFR part 820, DOE has determined that it is necessary to continue to reference affiliated entities.

Based on the adjustment factors relating to a noncompliance as described in Appendix B section IX(b)(3), DOE could mitigate a civil penalty from the statutory maximum of $70,000 per violation per day. Mitigation factors used to reduce a civil penalty include whether a DOE contractor promptly identified and reported a violation and took effective corrective actions. Factors used to increase penalties (but not over the statutory maximum of $70,000) would include whether a violation is repeated or involves willfulness, death, serious physical harm, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdowns in management controls.

One commenter (Ex. 13) suggested that the adjustment/mitigating factors should include percentages as in 10 CFR part 820. In response, DOE notes that in addition to establishing civil penalty percentages based on the severity of the violation, 10 CFR part 820 establishes adjustment factor percentages for two mitigating factors: (1) Reduction of up to 50% of civil penalty for self-identification and -reporting and (2) increases or decreases of up to 50% of civil penalty for failure to take corrective action or for implementation of prompt corrective action, respectively. DOE has included similar percentage adjustments based on severity of hazards and based on self-identification and -reporting in both the supplemental proposal and in the final rule at Appendix B section IX(b)(4). DOE has not included a specific adjustment percentage based on the promptness of corrective action for two reasons: (1) DOE already ties corrective action into the adjustment factor for self-identification and -reporting in section IX(b)(4) which states, " No consideration will be given to a reduction in penalty * * * if the immediate actions necessary to restore compliance with the worker safety and health requirements are not taken;" and (2) DOE is limited under section 234 C of the AEA to imposing a maximum civil penalty of $70,000 per violation, per day. In other words, DOE is prohibited under the statute from applying a 50% increase to the base civil penalty of $70,000.

Several commenters (Exs. 31, 37, 45, 51) suggested mitigating penalties based on a contractor's good faith, timely corrective action, and general inspection history, and providing a comprehensive list of positive mitigating factors in Appendix B. DOE discusses adjustment factors (including positive mitigating factors) in Appendix B, section IX(b)(3) of the final rule. This discussion touches upon many of the items listed by the commenters, however, DOE disagrees that a specific list of positive mitigating factors should be included in the rule. DOE believes that such a list would be limiting and could actually stifle contractor innovation in implementing their safety and health program. Mitigating factors, in different combinations, in different circumstances, may affect the penalty amount in different ways. Simply stated, DOE's intent in applying positive mitigating factors is to recognize proactive contractor safety and health measures when considering appropriate enforcement actions. The same commenter went on to support enforcement immunity for contractors who self-identify violations. Contractors are responsible for providing a workplace free from recognized hazards, not just identifying hazards. Hazard identification is fundamental to the worker safety and health program. Contractors are also responsible for evaluating hazards, implementing interim protective measures and abating noncompliances. If contractors were granted immunity for identifying hazards, then inappropriate or inadequate contractor actions that normally follow hazard identification would not be citable by the Office of Price-Anderson Enforcement. The procedure retained in the final rule is consistent with enforcement actions in Appendix A of 10 CFR part 820.

Two commenters (Exs. 29, 36) argued that the rule should provide for personal errors and employee willful misconduct beyond the control of the contractor, including a responsibility for employees to comply (similar to section 5(b) of the Occupational Safety and Health Act) and should mirror the "unpreventable employee misconduct" defense recognized by OSHA. DOE agrees and added section 851.12(b) to the final rule to prohibit workers from taking actions inconsistent with the rule. DOE will develop enforcement guidance for the rule that will include provisions similar to OSHA's unpreventable employee misconduct defense outlined in OSHA's Field Inspection Reference Manual. Another commenter (Ex. 29) stated that an isolated case of a willful violation by an employee may be outside the control of the contractor should be eliminated from enforcement discretion, and should not be considered as grounds for classifying the violation as a "willful" violation. DOE agrees and intends for the policy regarding willful violations to address a willful violation on the part of contractor management.

As noted previously, when both remedies are available, DOE may consider a reduction in contract fees if a violation is especially egregious or indicates a general failure to perform under the contract with respect to worker safety and health. One commenter (Ex. 29) inquired as to whether mitigating factors would be applied to contract penalties as they might be applied to civil penalties. In response, DOE notes that except where a violation is considered a continuing violation, and each day is considered a separate day for the purposes of computing the penalty, the maximum contract penalty for each violation will not exceed $70,000. DOE further notes that adjustment factors also apply to contract penalties. Section IX.2(e) indicates that DOE will evaluate the relationship between a contractor and affiliated entities in determining whether a contractor is able to pay a proposed penalty. DOE will generally consider the scope and magnitude of the contract and associated fees and/or profit, among other factors. It is not the intent of DOE to put a contractor out of business by assessing large penalties. In rare circumstances, when the nature of a contractor's violations and conduct are especially egregious, then contract termination may be more appropriate. In determining whether to refer a violation to the appropriate DOE official responsible for administering reductions in fee pursuant to the Conditional Payment of Fee clause, the Director will generally focus on the factors stated above, such as willfulness, repeated violations, death, serious injury, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls. In cases where DOE may elect between civil penalties and a contract penalty, these kinds of factors may also lead DOE to consider a reduction in fee if they raise doubts about a contractor's overall performance or ability to perform its contract with proper regard for worker safety and health.

One commenter (Ex. 25) favored a penalty structure more in line with OSHA's penalty structure. In establishing the base civil penalties for the types of violations in this policy, DOE set the starting base amounts at levels higher than the average OSHA penalty for several reasons. DOE's activities are conducted by large, experienced management and operating contractors and their subcontractors. Through the contractual relationships that DOE has with these entities, DOE is in constant dialogue concerning the management and operation of DOE's sites and the performance of its governmental missions. DOE has the authority to require these contractors to develop their own worker safety and health programs for DOE approval. Moreover, DOE may unilaterally direct contractors to include various provisions in their programs. Thus, the Director is in a position to enforce against these programs and can provide incentives for proactive compliance. The policy strongly encourages self-identification of violations, self-reporting, tracking systems, and corrective action programs. Moreover, DOE also has the authority and flexibility to coordinate and choose either a civil penalty or fee reduction remedy based on the enforcement policy

and the fee reduction contract clause. The proposed enforcement structure of this rule fits the DOE complex better than would a generic system as found in OSHA's enforcement programs.

Finally, as a tool for implementing the enforcement policy, Appendix B section IX(b)(5) clarifies that DOE intends to provide a computerized database system to allow contractors to voluntarily report worker safety and health noncompliances. DOE will enhance its NTS, currently used for reporting of noncompliances of the DOE nuclear safety requirements, to permit its use for reporting noncompliances with this rule. DOE will develop appropriate reporting thresholds unique to worker safety and health to assure that the system will focus on issues with the greatest potential consequences for worker safety and health.

Numerous commenters believed that contractor reporting into NTS is the most important issue to resolve, and that details about reporting thresholds, recording noncompliances, integration of reporting with existing DOE reporting requirements, among other issues, will have a bearing on contractor operations and their cost of doing business. All commenters (Exs. 5, 9, 15, 25, 28, 29, 30, 31, 35, 38, 39, 42, 45, 47, 49, 51, 57) stated that doing so places contractors in a position of making "an admission against interest," that DOE should provide immunity for self-reported violations, and that reporting would have a negative economic impact. DOE disagrees and views contractor reporting of noncompliances as responsible and in the best interest of the contractor, since up to 50 percent mitigation of the base penalty may be granted for self-reporting. While contractors should track all their noncompliances locally, only a subset would be reported into NTS based on reasonable reporting thresholds that will be established in a future enforcement guidance supplement (EGS). DOE anticipates that the NTS reporting thresholds will be established such that only severity level I and certain severity level II noncompliances will be reported. The EGS will also provide guidance on the reporting of noncompliances involving repeat, willful, programmatic, etc. issues.

The NTS reporting scheme is similar to that already in use for nuclear safety enforcement. One commenter (Ex. 29 queried as to whether contractors would eventually move toward trending deficiencies and programmatic deficiencies. Enforcement of the requirements of this rule will be conducted from the Office of Price-Anderson Enforcement. DOE notes that a well-developed contractor worker safety and health program should involve trending and include an evaluation to determine whether identified noncompliances are of a programmatic nature. This type of evaluation would impact the contractor's response to identified noncompliances.

Several commenters (Exs. 10, 13, 16, 29, 31, 37, 42, 49) took issue with reporting noncompliances into NTS and argued that this reporting would result in increased operating and management costs since these represent new requirements. These commenters argued that DOE should coordinate NTS with the Occurrence Reporting and Processing System (ORPS) to eliminate duplication of reporting. One of the commenters (Ex. 37) recommended eliminating contractor reporting altogether and suggested that DOE should require local DOE reporting of violations that result in actual endangerment to contractor employees. DOE disagrees with the commenter and believes that contractors are in the best position to identify noncompliances in their covered workplaces, not local DOE officials. In addition, local DOE representatives are not part of the enforcement program. Contractors operating under the requirements of DOE Order 440.1A are responsible for identifying, analyzing and abating noncompliances and reporting certain noncompliances to ORPS and Computerized Accident/Incident Reporting System (CAIRS). While future enforcement guidance supplements (EGSs) may identify what reportable information may be common to various reporting systems, it is generally left to the contractor to develop efficiencies in its own operating environment. DOE will continue to look at economies of scale between its different reporting systems. Final rule section 851.26 now requires reporting in accordance with DOE Manual 231.1–1A, Environment, Safety and Health Reporting Manual (DOE M 231.1–1A), May 9, 2005. Section 851.20(a) establishes requirements for worker involvement in the safety and health program and 851.20(b) establishes worker rights to access certain information, including limited access to OSHA Form 300 and 301 information. Another commenter (Ex. 29) questioned what was meant in supplemental proposed Appendix A section IX(b)(5)(c) by requiring that DOE have "access" to the contractor's tracking system. DOE's intent with this statement is that if requested, contractors would provide DOE information/data on noncompliances tracked locally.

With respect to contractors relying on direction given by DOE, and this reliance contributing to a violation, one commenter (Ex. 47) stated that supplemental proposed Appendix A section IX(b)(8) should indicate that DOE "shall" (instead of "may") refrain from issuing a notice of violation, or "shall" (instead of "may") mitigate, either partially or entirely, any proposed civil penalty when DOE has a contributing role according to provisions in the rule. DOE disagrees. The word may, instead of shall, gives the Director the discretion that is needed. Whether or not a notice of violation is issued depends on the nature of the direction given by DOE to the contractor, not simply that direction was given by DOE, and the extent to which a contractor relies on the direction from DOE.

LIST OF COMMENTERS

Exhibit No.	Company/organization
1	Robert Burger, CEM.
2	Richard Lewis.
3	Beverly Brookshire.
4	Robert P. Sierzputoowski.
5	Waste Isolation Pilot Plant.
6	Bryan Bowser.
7	Argonne Fire Department.
8	Jane Lataille.
9	Honeywell Federal Manufacturing & Technologies.
10	Glenn Bell.
11	David M. Smith.

LIST OF COMMENTERS—Continued

Exhibit No.	Company/organization
12	Geoffrey Gorsuch.
13	CH2M Hill Corporation.
14	Peter Washburn.
15	University of California—Los Alamos National Laboratory; Lawrence Berkeley National Laboratory; Lawrence Livermore National Laboratory.
16	Westinghouse Savannah River Company.
17	R&D Electrical Safety Meeting and Workshop Attendees.
18	R&D Electrical Safety Meeting and Workshop-Group #2.
19	Duke Cogema Stone & Webster, LLC.
20	BWXT Pantex.
21	S & V Wallace.
22	National Fire Protection Association (NFPA).
23	Gai Oglesbee.
24	International Code Council.
25	Princeton Plasma Physics laboratory.
26	Sandia National Laboratory.
27	Jefferson Laboratory.
28	Fluor Fernald, Incorporated.
29	Brookhaven Science Associates.
30	Paper, Allied Industrial Chemical & Energy Workers Union (PACE).
31	Bechtel Hanford.
32	Charles R. Briggs.
33	Universities Research Association, Inc.
34	University of Chicago—Argonne National Laboratory.
35	CH2M Hill Hanford Group.
36	Pacific Northwest National Laboratory—Battelle Memorial Institute.
37	Honeywell International, Inc.
38	Stanford Linear Accelerator Center.
39	Bechtel Jacobs Company, LLC.
40	Building and Construction Trades Department, AFL–CIO.
41	James Seward, MD.
42	UT-Battelle, LLC.
43	Voluntary Protection Program Participant's Association (VPPPA).
44	Senators Jim Bunning & Edward M. Kennedy.
45	Fluor Corporation.
46	BWXT Technologies, Inc.
47	Idaho National Laboratory.
48	Bechtel National, Inc. Hanford Waste Treatment and Immobilization Plant.
49	BWXT–Y12.
50	Edward Jacobson.
51	Fluor.
52	Chris Blankner.
53	Randall Unger.
54	The International Chemical Workers Union Council of the United Food and Commercial Workers Union.
55	Atomic Trades and Labor Council.
56	American Conference of Governmental Industrial Hygienists (ACGIH).
57	DOE Contractor Attorneys' Association, Inc.
58	Bechtel Nevada Corporation.
59	Donald Stedem, James Dotts, Scott Wood, Bo Kim, Graham Giles, Barbara Yoerg, Robert Griffith, Allen Herrbach, Roger Goldie, Roger Smith, Joseph Cohen.
60	Ted Strickland, U.S. Representative.
61	David Mowrer.
62	Government Accountability Project.

V. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), as amended by Executive Order 13258 (67 FR 9385, February 26, 2002). Accordingly, DOE submitted this final rule to the Office of Information and Regulatory Affairs of the Office of Management and Budget, which has completed its review.

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform" (61 FR 4779, February 7, 1996) imposes on Federal agencies the general duty to adhere to the following requirements: eliminate drafting errors and needless ambiguity, write regulations to minimize litigation, provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Section 3(b) requires Federal agencies to make every reasonable effort to ensure that a regulation, among other things: clearly specifies the preemptive effect, if any, adequately defines key terms, and addresses other important issues affecting the clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires

Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

C. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions.

Today's regulatory action has been determined not to be a "policy that has federalism implications," that is, it does not have substantial direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibility among the various levels of government under Executive Order 13132 (64 FR 43255, August 10, 1999). Accordingly, no "federalism summary impact statement" was prepared or subjected to review under the Executive Order by the Director of the Office of Management and Budget.

D. Review Under Executive Order 13175

Under Executive Order 13175 (65 FR 67249, November 6, 2000) on "Consultation and Coordination with Indian Tribal Governments," DOE may not issue a discretionary rule that has "tribal implications" and imposes substantial direct compliance costs on Indian tribal governments. DOE has determined that this final rule does not have such effects and concluded that Executive Order 13175 does not apply to this rule.

E. Reviews Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) requires that an agency prepare an initial regulatory flexibility analysis for any regulation which a general notice of proposed rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

Today's regulation establishes DOE's requirements for worker safety and health at DOE sites. The contractors who manage and operate DOE facilities are principally responsible for implementing the rule requirements. DOE considered whether these contractors are "small businesses," as that term is defined in the Regulatory Flexibility Act's (5 U.S.C. 601(3)). The Regulatory Flexibility Act's definition incorporates the definition of "small business concern" in the Small Business Act, which the Small Business Administration (SBA) has developed through size standards in 13 CFR part 121. The DOE contractors subject to this rule exceed the SBA's size standards for small businesses. In addition, DOE expects that any potential economic impact of this rule on small businesses would be minimal because DOE sites perform work under contracts to DOE or the prime contractor at the site. DOE contractors are reimbursed through their contracts with DOE for the costs of complying with DOE safety and health program requirements. They would not, therefore, be adversely impacted by the requirements in this rule. For these reasons, DOE certifies that today's rule does not have a significant economic impact on a substantial number of small entities, and therefore, no regulatory flexibility analysis has been prepared. See 68 FR 7990 at III.1. and III.1.c. (February 19, 2003).

F. Review Under the Paperwork Reduction Act

The information collection provisions of this rule are not substantially different from those contained in DOE contracts with DOE prime contractors covered by this rule and were previously approved by the Office of Management and Budget (OMB) and assigned OMB Control No. 1910–5103. That approval covered submission of a description of an integrated safety management system required by the Integration of Environment, Health and Safety into Work Planning and Execution clause set forth in the DOE procurement regulations. 48 CFR 952.223–71 and 970.5223–1, 62 FR 34842, 34859–60 (June 17, 1997). If contractors at a DOE site fulfill their contractual responsibilities for integrated safety management properly, the worker safety and health program required by this regulation should require little if any new analysis or new documents to the extent that existing analysis and documents are sufficient for purposes of the regulations. Accordingly, no additional Office of Management and Budget clearance is required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act, 5 CFR 1320.1 *et seq.*

G. Review Under the National Environmental Policy Act

DOE currently implements its broad authority to regulate worker safety and health through internal DOE directives incorporated into contracts to manage and operate DOE facilities, contract clauses and DOE regulations. This rule implements the statutory mandate to promulgate worker safety and health regulations for DOE facilities that provide a level of protection for workers at DOE facilities that is substantially equivalent to the level of protection currently provided to such workers and to provide procedures to ensure compliance with the rule. DOE anticipates that the contractor's work and safety programs required by this regulation is based on existing programs and that this rule generally does not require the development of a new program. DOE has therefore concluded that promulgation of these regulations falls into the class of actions that does not individually or cumulatively have a significant impact on the human environment as set forth in the DOE regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the rule is covered under the categorical exclusion in paragraph A6 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to the establishment of procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

H. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by states, tribal, or local governments, in the aggregate, or by the private sector, of $100 million in any one year. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officials of state, tribal, or local governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. DOE has determined that the rule published today does not contain any Federal

mandates affecting small governments, so these requirements do not apply.

I. Review Under Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use), 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for significant regulatory actions under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. DOE has determined that the rule published today does not have a significant adverse effect on the supply, distribution, or use of energy and thus the requirement to prepare a Statement of Energy Effects does not apply.

J. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a "Family Policymaking Assessment" for any rule that may affect family well-being. This rule has no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

K. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most dissemination of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(2).

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

10 CFR Part 850

Beryllium, Chronic beryllium disease, Hazardous substances, Lung diseases, Occupational safety and health, Reporting and recordkeeping requirements.

10 CFR Part 851

Civil penalty, Federal buildings and facilities, Incorporation by reference, Occupational safety and health, Safety, Reporting and recordkeeping requirements.

Issued in Washington, DC, on January 20, 2006.

John Spitaleri Shaw,

Assistant Secretary for Environment, Safety and Health.

■ For the reasons set forth in the preamble, the Department of Energy is amending chapter III of title 10 of the Code of Federal Regulations as follows:

PART 850—CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM

■ 1. The authority citation for part 850 is revised to read as follows:

Authority: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 29 U.S.C. 668; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*, E.O. 12196, 3 CFR 1981 comp., at 145 as amended.

■ 2. Section 850.1 is revised to read as follows:

§ 850.1 Scope.

This part provides for establishment of a chronic beryllium disease prevention program (CBDPP) that supplements and is deemed an integral part of the worker safety and health program under part 851 of this chapter.

■ 3. Section 850.4 is revised to read as follows:

§ 850.4 Enforcement.

DOE may take appropriate steps pursuant to part 851 of this chapter to enforce compliance by contractors with this part and any DOE-approved CBDPP.

■ 4. A new part 851 is added to Chapter III to read as follows:

PART 851—WORKER SAFETY AND HEALTH PROGRAM

Subpart A—General Provisions

Subpart B—Program Requirements

Subpart C—Specific Program Requirements

Subpart D—Variances

Subpart E—Enforcement Process

Authority: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 42 U.S.C. 5801 *et seq.*; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

Subpart A—General Provisions

§ 851.1 Scope and purpose.

(a) The worker safety and health requirements in this part govern the conduct of contractor activities at DOE sites.

(b) This part establishes the:

(1) Requirements for a worker safety and health program that reduces or prevents occupational injuries, illnesses, and accidental losses by providing DOE contractors and their workers with safe and healthful workplaces at DOE sites; and

(2) Procedures for investigating whether a violation of a requirement of this part has occurred, for determining the nature and extent of any such violation, and for imposing an appropriate remedy.

§ 851.2 Exclusions.

(a) This part does not apply to work at a DOE site:

(1) Regulated by the Occupational Safety and Health Administration; or

(2) Operated under the authority of the Director, Naval Nuclear Propulsion, pursuant to Executive Order 12344, as set forth in Public Law 98–525, 42 U.S.C. 7158 note.

(b) This part does not apply to radiological hazards or nuclear explosives operations to the extent regulated by 10 CFR Parts 20, 820, 830 or 835.

(c) This part does not apply to transportation to or from a DOE site.

§ 851.3 Definitions.

(a) As used in this part:

AEA means the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*

Affected worker means a worker who would be affected by the granting or denial of a variance, or any authorized representative of the worker, such as a collective bargaining agent.

Closure facility means a facility that is non-operational and is, or is expected to be permanently closed and/or demolished, or title to which is expected to be transferred to another entity for reuse.

Closure facility hazard means a facility-related condition within a closure facility involving deviations from the technical requirements of § 851.23 of this part that would require costly and extensive structural/engineering modifications to be in compliance.

Cognizant Secretarial Officer means, with respect to a particular situation, the Assistant Secretary, Deputy Administrator, Program Office Director, or equivalent DOE official who has primary line management responsibility for a contractor, or any other official to whom the CSO delegates in writing a particular function under this part.

Compliance order means an order issued by the Secretary to a contractor that mandates a remedy, work stoppage, or other action to address a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part.

Consent order means any written document, signed by the Director and a contractor, containing stipulations or conclusions of fact or law and a remedy acceptable to both DOE and the contractor.

Construction means combination of erection, installation, assembly, demolition, or fabrication activities involved to create a new facility or to alter, add to, rehabilitate, dismantle, or remove an existing facility. It also includes the alteration and repair (including dredging, excavating, and painting) of buildings, structures, or other real property, as well as any construction, demolition, and excavation activities conducted as part of environmental restoration or remediation efforts.

Construction contractor means the lowest tiered contractor with primary responsibility for the execution of all construction work described within a construction procurement or authorization document (*e.g.*, construction contract, work order).

Construction manager means the individual or firm responsible to DOE for the supervision and administration of a construction project to ensure the construction contractor's compliance with construction project requirements.

Construction project means the full scope of activities required on a construction worksite to fulfill the requirements of the construction procurement or authorization document.

Construction worksite is the area within the limits necessary to perform the work described in the construction procurement or authorization document. It includes the facility being constructed or renovated along with all necessary staging and storage areas as well as adjacent areas subject to project hazards.

Contractor means any entity, including affiliated entities, such as a parent corporation, under contract with DOE, or a subcontractor at any tier, that has responsibilities for performing work at a DOE site in furtherance of a DOE mission.

Covered workplace means a place at a DOE site where a contractor is responsible for performing work in furtherance of a DOE mission.

Director means a DOE Official to whom the Secretary assigns the authority to investigate the nature and extent of compliance with the requirements of this part.

DOE means the United States Department of Energy, including the National Nuclear Security Administration.

DOE Enforcement Officer means a DOE official to whom the Director assigns the authority to investigate the nature and extent of compliance with the requirements of this part.

DOE site means a DOE-owned or -leased area or location or other area or location controlled by DOE where activities and operations are performed at one or more facilities or places by a contractor in furtherance of a DOE mission.

Final notice of violation means a document that determines a contactor has violated or is continuing to violate a requirement of this part and includes:

(1) A statement specifying the requirement of this part to which the violation relates;

(2) A concise statement of the basis for the determination;

(3) Any remedy, including the amount of any civil penalty; and

(4) A statement explaining the reasoning behind any remedy.

Final Order means an order of DOE that represents final agency action and, if appropriate, imposes a remedy with which the recipient of the order must comply.

General Counsel means the General Counsel of DOE.

Head of DOE Field Element means an individual who is the manager or head of the DOE operations office or field office.

Interpretative ruling means a statement by the General Counsel concerning the meaning or effect of a requirement of this part which relates to a specific factual situation but may also be a ruling of general applicability if the General Counsel determines such action to be appropriate.

National defense variance means relief from a safety and health standard, or portion thereof, to avoid serious impairment of a national defense mission.

NNSA means the National Nuclear Security Administration.

Nuclear explosive means an assembly containing fissionable and/or fusionable materials and main charge high-explosive parts or propellants capable of producing a nuclear detonation (*e.g.*, a nuclear weapon or test device).

Nuclear explosive operation means any activity involving a nuclear explosive, including activities in which main charge high-explosive parts and pit are collocated.

Occupational medicine provider means the designated site occupational medicine director (SOMD) or the individual providing medical services.

Permanent variance means relief from a safety and health standard, or portion thereof, to contractors who can prove that their methods, conditions, practices, operations, or processes provide workplaces that are as safe and healthful as those that follow the workplace safety and health standard required by this part.

Preliminary notice of violation means a document that sets forth the preliminary conclusions that a contractor has violated or is continuing to violate a requirement of this part and includes:

(1) A statement specifying the requirement of this part to which the violation relates;

(2) A concise statement of the basis for alleging the violation;

(3) Any remedy, including the amount of any proposed civil penalty; and

(4) A statement explaining the reasoning behind any proposed remedy.

Pressure systems means all pressure vessels, and pressure sources including cryogenics, pneumatic, hydraulic, and vacuum. Vacuum systems should be considered pressure systems due to their potential for catastrophic failure due to backfill pressurization. Associated hardware (*e.g.*, gauges and regulators), fittings, piping, pumps, and pressure relief devices are also integral parts of the pressure system.

Remedy means any action (including, but not limited to, the assessment of civil penalties, the reduction of fees or other payments under a contract, the requirement of specific actions, or the modification, suspension or rescission of a contract) necessary or appropriate to rectify, prevent, or penalize a violation of a requirement of this part, including a compliance order issued by the Secretary pursuant to this part.

Safety and health standard means a standard that addresses a workplace hazard by establishing limits, requiring conditions, or prescribing the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe and healthful workplaces.

Secretary means the Secretary of Energy.

Temporary variance means a short-term relief for a new safety and health standard when the contractor cannot comply with the requirements by the prescribed date because the necessary construction or alteration of the facility cannot be completed in time or when technical personnel, materials, or equipment are temporarily unavailable.

Unauthorized discharge means the discharge of a firearm under circumstances other than: (1) during firearms training with the firearm properly pointed down range (or toward a target), or (2) the intentional firing at hostile parties when deadly force is authorized.

Under Secretary means, with respect to a particular situation, the DOE official who serves as the Under Secretary for Energy and Environment, or the Under Secretary for Science, or the Under Secretary for Nuclear Security/ Administrator for National Nuclear Security Administration who has primary line management responsibility for a contractor.

Variance means an exception to compliance with some part of a safety and health standard granted by the Under Secretary to a contractor.

Worker means an employee of a DOE contractor person who performs work in furtherance of a DOE mission at a covered workplace.

Workplace hazard means a physical, chemical, biological, or safety hazard with any potential to cause illness, injury, or death to a person.

(b) Terms undefined in this part that are defined in the Atomic Energy Act of 1954 must have the same meaning as under that Act.

§ 851.4 Compliance order.

(a) The Secretary may issue to any contractor a Compliance Order that:

(1) Identifies a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part;

(2) Mandates a remedy, work stoppage, or other action; and,

(3) States the reasons for the remedy, work stoppage, or other action.

(b) A Compliance order is a final order that is effective immediately unless the Order specifies a different effective date.

(c) Within 15 calendar days of the issuance of a Compliance Order, the recipient of the Order may request the Secretary to rescind or modify the Order. A request does not stay the effectiveness of a Compliance Order unless the Secretary issues an order to that effect.

(d) A copy of the Compliance Order must be prominently posted, once issued, at or near the location where the violation, potential violation, or inconsistency occurred until it is corrected.

§ 851.5 Enforcement.

(a) A contractor that is indemnified under section 170d. of the AEA (or any subcontractor or supplier thereto) and that violates (or whose employee violates) any requirement of this part shall be subject to a civil penalty of up to $70,000 for each such violation. If any violation under this subsection is a continuing violation, each day of the violation shall constitute a separate violation for the purpose of computing the civil penalty.

(b) A contractor that violates any requirement of this part may be subject to a reduction in fees or other payments under a contract with DOE, pursuant to the contract's *Conditional Payment of Fee* clause, or other contract clause providing for such reductions.

(c) DOE may not penalize a contractor under both paragraphs (a) and (b) of this section for the same violation of a requirement of this part.

(d) For contractors listed in subsection d. of section 234A of the AEA, 42 U.S.C. 2282a(d), the total amount of civil penalties under paragraph (a) and contract penalties under paragraph (b) of this section may not exceed the total amount of fees paid by DOE to the contractor in that fiscal year.

(e) DOE shall not penalize a contractor under both sections 234A and 234C of the AEA for the same violation.

(f) DOE enforcement actions through civil penalties under paragraph (a) of this section, start on February 9, 2007.

§ 851.6 Petitions for generally applicable rulemaking.

(a) *Right to file.* Any person may file a petition for generally applicable rulemaking to amend or interpret provisions of this part.

(b) *How to file.* Any person who wants to file a petition for generally applicable rulemaking pursuant to this section must file by mail or messenger in an envelope addressed to the Office of General Counsel, GC–1, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *Content of rulemaking petitions.* A petition under this section must:

(1) Be labeled "Petition for Rulemaking Under 10 CFR 851;"

(2) Describe with particularity the provision of this part to be amended and the text of regulatory language to be added; and

(3) Explain why, if relevant, DOE should not choose to make policy by precedent through adjudication of petitions for assessment of civil penalty.

(d) *Determinations upon rulemaking petitions.* After considering the petition and other information DOE deems relevant, DOE may grant the petition and issue an appropriate rulemaking notice, or deny the petition because the rule being sought:

(1) Would be inconsistent with statutory law;

(2) Would establish a generally applicable policy in a subject matter area that should be left to case-by-case determinations; or

(3) For other good cause.

§ 851.7 Requests for a binding interpretative ruling.

(a) *Right to file.* Any person subject to this part have the right to file a request for an interpretive ruling that is binding on DOE with regard to a question as to how the regulations in this part would apply to particular facts and circumstances.

(b) *How to file.* Any person who wants to file a request under this section must file by mail or messenger in an envelop addressed to the Office of General Counsel, GC–1, U.S. Department of

Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *Content of request for interpretive ruling.* A request under this section must:

(1) Be in writing;

(2) Be labeled "Request for Interpretive Ruling Under 10 CFR 851;"

(3) Identify the name, address, telephone number, e-mail address, and any designated representative of the person filing the request;

(4) State the facts and circumstances relevant to the request;

(5) Be accompanied by copies of relevant supporting documents if any;

(6) Specifically identify the pertinent regulations and the related question on which an interpretive ruling is sought; and

(7) Include explanatory discussion in support of the interpretive ruling being sought.

(d) *Public comment.* DOE may give public notice of any request for an interpretive ruling and provide an opportunity for public comment.

(e) *Opportunity to respond to public comment.* DOE may provide an opportunity to any person who requests an interpretive ruling to respond to public comments relating to the request.

(f) *Other sources of information.* DOE may:

(1) Conduct an investigation of any statement in a request;

(2) Consider any other source of information in evaluating a request for an interpretive ruling; and

(3) Rely on previously issued interpretive rulings with addressing the same or a related issue.

(g) *Informal conference.* DOE may convene an informal conference with the person requesting the interpretive ruling.

(h) *Effect of interpretive ruling.* Except as provided in paragraph (i) of this section, an interpretive ruling under this section is binding on DOE only with respect to the person who requested the ruling.

(i) *Reliance on interpretive ruling.* If DOE issues an interpretive ruling under this section, then DOE may not subject the person who requested the ruling to an enforcement action for civil penalties for actions reasonably taken in reliance on the ruling, but a person may not act in reliance on an interpretive ruling that is administratively rescinded or modified after opportunity to comment, judicially invalidated, or overruled by statute or regulation.

(j) *Denial of requests for an interpretive ruling.* DOE may deny a request for an interpretive ruling if DOE determines that:

(1) There is insufficient information upon which to base an interpretive ruling;

(2) The interpretive question posed should be treated in a general notice of proposed rulemaking;

(3) There is an adequate procedure elsewhere in this part for addressing the interpretive question such as a petition for variance; or

(4) For other good cause.

(k) *Public availability of interpretive rulings.* For information of interested members of the public, DOE may file a copy of interpretive rulings on a DOE internet web site.

§ 851.8 Informal requests for information.

(a) Any person may informally request information under this section as to how to comply with the requirements of this part, instead of applying for a binding interpretive ruling under § 851.7. DOE responses to informal requests for information under this section are not binding on DOE and do not preclude enforcement actions under this part.

(b) Inquiries regarding the technical requirements of the standards required by this part must be directed to the Office of Environment, Safety and Health, Office of Health (EH–5), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) Information regarding the general statement of enforcement policy in the appendix to this part must be directed to the Office of Environment, Safety and Health, Office of Price-Anderson Enforcement (EH–6), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

Subpart B—Program Requirements

§ 851.10 General requirements.

(a) With respect to a covered workplace for which a contractor is responsible, the contractor must:

(1) Provide a place of employment that is free from recognized hazards that are causing or have the potential to cause death or serious physical harm to workers; and

(2) Ensure that work is performed in accordance with:

(i) All applicable requirements of this part; and

(ii) With the worker safety and health program for that workplace.

(b) The written worker safety and health program must describe how the contractor complies with the:

(1) Requirements set forth in Subpart C of this part that are applicable to the hazards associated with the contractor's scope of work; and

(2) Any compliance order issued by the Secretary pursuant to § 851.4.

§ 851.11 Development and approval of the worker safety and health program.

(a) *Preparation and submission of worker safety and health program.* By February 26, 2007, contractors must submit to the appropriate Head of DOE Field Element for approval a written worker safety and health program that provides the methods for implementing the requirements of Subpart C of this part.

(1) If a contractor is responsible for more than one covered workplace at a DOE site, the contractor must establish and maintain a single worker safety and health program for the covered workplaces for which the contractor is responsible.

(2) If more than one contractor is responsible for covered workplaces, each contractor must:

(i) Establish and maintain a worker safety and health program for the workplaces for which the contractor is responsible; and

(ii) Coordinate with the other contractors responsible for work at the covered workplaces to ensure that there are clear roles, responsibilities and procedures to ensure the safety and health of workers at multi-contractor workplaces.

(3) The worker safety and health program must describe how the contractor will:

(i) Comply with the requirements set forth in Subpart C of this part that are applicable to the covered workplace, including the methods for implementing those requirements; and

(ii) Integrate the requirements set forth in Subpart C of this part that are applicable to a covered workplace with other related site-specific worker protection activities and with the integrated safety management system.

(b) *DOE evaluation and approval.* The Head of DOE Field Element must complete a review and provide written approval of the contractor's worker safety and health program, within 90 days of receiving the document. The worker safety and health program and any updates are deemed approved 90 days after submission if they are not specifically approved or rejected by DOE earlier.

(1) Beginning May 25, 2007, no work may be performed at a covered workplace unless an approved worker safety and health program is in place for the workplace.

(2) Contractors must send a copy of the approved program to the Assistant Secretary for Environment, Safety and Health.

(3) Contractors must furnish a copy of the approved worker safety and health program, upon written request, to the affected workers or their designated representatives.

(c) *Updates.* (1) Contractors must submit an update of the worker safety and health program to the appropriate Head of DOE Field Element, for review and approval whenever a significant change or addition to the program is made, or a change in contractors occurs.

(2) Contractors must submit annually to DOE either an updated worker safety and health program for approval or a letter stating that no changes are necessary in the currently approved worker safety and health program.

(3) Contactors must incorporate in the worker safety and health program any changes, conditions, or workplace safety and health standards directed by DOE consistent with the requirements of this part and DEAR 970.5204–2, Laws, Regulations and DOE Directives (December, 2000) and associated contract clauses.

(d) *Labor Organizations.* If a contractor employs or supervises workers who are represented for collective bargaining by a labor organization, the contractor must:

(1) Give the labor organization timely notice of the development and implementation of the worker safety and health program and any updates thereto; and

(2) Upon timely request, bargain concerning implementation of this part, consistent with the Federal labor laws.

§ 851.12 Implementation.

(a) Contractors must implement the requirements of this part.

(b) Nothing in this part precludes a contractor from taking any additional protective action that is determined to be necessary to protect the safety and health of workers.

§ 851.13 Compliance.

(a) Contractors must achieve compliance with all the requirements of Subpart C of this part, and their approved worker safety and health program no later than May 25, 2007. Contractors may be required to comply contractually with the requirements of this rule before February 9, 2007.

(b) In the event a contractor has established a written safety and health program, an Integrated Safety Management System (ISMS) description pursuant to the DEAR Clause, or an approved Work Smart Standards (WSS) process before the date of issuance of the final rule, the Contractor may use that program, description, or process as the worker safety and health program required by this part if the appropriate Head of the DOE Field Element approves such use on the basis of written documentation provided by the contractor that identifies the specific portions of the program, description, or process, including any additional requirements or implementation methods to be added to the existing program, description, or process, that satisfy the requirements of this part and that provide a workplace as safe and healthful as would be provided by the requirements of this part.

(c) Nothing in this part shall be construed to limit or otherwise affect contractual obligations of a contractor to comply with contractual requirements that are not inconsistent with the requirements of this part.

Subpart C—Specific Program Requirements

§ 851.20 Management responsibilities and worker rights and responsibilities.

(a) *Management responsibilities.* Contractors are responsible for the safety and health of their workforce and must ensure that contractor management at a covered workplace:

(1) Establish written policy, goals, and objectives for the worker safety and health program;

(2) Use qualified worker safety and health staff (*e.g.*, a certified industrial hygienist, or safety professional) to direct and manage the program;

(3) Assign worker safety and health program responsibilities, evaluate personnel performance, and hold personnel accountable for worker safety and health performance;

(4) Provide mechanisms to involve workers and their elected representatives in the development of the worker safety and health program goals, objectives, and performance measures and in the identification and control of hazards in the workplace;

(5) Provide workers with access to information relevant to the worker safety and health program;

(6) Establish procedures for workers to report without reprisal job-related fatalities, injuries, illnesses, incidents, and hazards and make recommendations about appropriate ways to control those hazards;

(7) Provide for prompt response to such reports and recommendations;

(8) Provide for regular communication with workers about workplace safety and health matters;

(9) Establish procedures to permit workers to stop work or decline to perform an assigned task because of a reasonable belief that the task poses an imminent risk of death, serious physical harm, or other serious hazard to workers, in circumstances where the workers believe there is insufficient time to utilize normal hazard reporting and abatement procedures; and

(10) Inform workers of their rights and responsibility by appropriate means, including posting the DOE-designated Worker Protection Poster in the workplace where it is accessible to all workers.

(b) *Worker rights and responsibilities.* Workers must comply with the requirements of this part, including the worker safety and health program, which are applicable to their own actions and conduct. Workers at a covered workplace have the right, without reprisal, to:

(1) Participate in activities described in this section on official time;

(2) Have access to:

(i) DOE safety and health publications;

(ii) The worker safety and health program for the covered workplace;

(iii) The standards, controls, and procedures applicable to the covered workplace;

(iv) The safety and health poster that informs the worker of relevant rights and responsibilities;

(v) Limited information on any recordkeeping log (OSHA Form 300). Access is subject to Freedom of Information Act requirements and restrictions; and

(vi) The DOE Form 5484.3 (the DOE equivalent to OSHA Form 301) that contains the employee's name as the injured or ill worker;

(3) Be notified when monitoring results indicate the worker was overexposed to hazardous materials;

(4) Observe monitoring or measuring of hazardous agents and have the results of their own exposure monitoring;

(5) Have a representative authorized by employees accompany the Director or his authorized personnel during the physical inspection of the workplace for the purpose of aiding the inspection. When no authorized employee representative is available, the Director or his authorized representative must consult, as appropriate, with employees on matters of worker safety and health;

(6) Request and receive results of inspections and accident investigations;

(7) Express concerns related to worker safety and health;

(8) Decline to perform an assigned task because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious physical harm to the worker coupled with a reasonable belief that there is insufficient time to seek effective redress through normal hazard reporting and abatement procedures; and

(9) Stop work when the worker discovers employee exposures to imminently dangerous conditions or other serious hazards; provided that any stop work authority must be exercised in a justifiable and responsible manner in accordance with procedures established in the approved worker safety and health program.

§ 851.21 Hazard identification and assessment.

(a) Contractors must establish procedures to identify existing and potential workplace hazards and assess the risk of associated workers injury and illness. Procedures must include methods to:

(1) Assess worker exposure to chemical, physical, biological, or safety workplace hazards through appropriate workplace monitoring;

(2) Document assessment for chemical, physical, biological, and safety workplace hazards using recognized exposure assessment and testing methodologies and using of accredited and certified laboratories;

(3) Record observations, testing and monitoring results;

(4) Analyze designs of new facilities and modifications to existing facilities and equipment for potential workplace hazards;

(5) Evaluate operations, procedures, and facilities to identify workplace hazards;

(6) Perform routine job activity-level hazard analyses;

(7) Review site safety and health experience information; and

(8) Consider interaction between workplace hazards and other hazards such as radiological hazards.

(b) Contractors must submit to the Head of DOE Field Element a list of closure facility hazards and the established controls within 90 days after identifying such hazards. The Head of DOE Field Element, with concurrence by the Cognizant Secretarial Officer, has 90 days to accept the closure facility hazard controls or direct additional actions to either:

(1) Achieve technical compliance; or

(2) Provide additional controls to protect the workers.

(c) Contractors must perform the activities identified in paragraph (a) of this section, initially to obtain baseline information and as often thereafter as necessary to ensure compliance with the requirements in this Subpart.

§ 851.22 Hazard prevention and abatement.

(a) Contractors must establish and implement a hazard prevention and abatement process to ensure that all identified and potential hazards are prevented or abated in a timely manner.

(1) For hazards identified either in the facility design or during the development of procedures, controls must be incorporated in the appropriate facility design or procedure.

(2) For existing hazards identified in the workplace, contractors must:

(i) Prioritize and implement abatement actions according to the risk to workers;

(ii) Implement interim protective measures pending final abatement; and

(iii) Protect workers from dangerous safety and health conditions;

(b) Contractors must select hazard controls based on the following hierarchy:

(1) Elimination or substitution of the hazards where feasible and appropriate;

(2) Engineering controls where feasible and appropriate;

(3) Work practices and administrative controls that limit worker exposures; and

(4) Personal protective equipment.

(c) Contractors must address hazards when selecting or purchasing equipment, products, and services.

§ 851.23 Safety and health standards.

(a) Contractors must comply with the following safety and health standards that are applicable to the hazards at their covered workplace:

(1) Title 10 Code of Federal Regulations (CFR) 850, "Chronic Beryllium Disease Prevention Program."

(2) Title 29 CFR, Parts 1904.4 through 1904.11, 1904.29 through 1904.33; 1904.44, and 1904.46, "Recording and Reporting Occupational Injuries and Illnesses."

(3) Title 29 CFR, Part 1910, "Occupational Safety and Health Standards," excluding 29 CFR 1910.1096, "Ionizing Radiation."

(4) Title 29 CFR, Part 1915, "Shipyard Employment."

(5) Title 29 CFR, Part 1917, "Marine Terminals."

(6) Title 29 CFR, Part 1918, "Safety and Health Regulations for Longshoring."

(7) Title 29 CFR, Part 1926, "Safety and Health Regulations for Construction."

(8) Title 29 CFR, Part 1928, "Occupational Safety and Health Standards for Agriculture."

(9) American Conference of Governmental Industrial Hygienists (ACGIH), "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices," (2005) (incorporated by reference, see § 851.27) when the ACGIH Threshold Limit Values (TLVs) are lower (more protective) than permissible exposure limits in 29 CFR 1910. When the ACGIH TLVs are used as exposure limits, contractors must nonetheless comply with the other provisions of any applicable expanded health standard found in 29 CFR 1910.

(10) American National Standards Institute (ANSI) Z88.2, "American National Standard for Respiratory Protection," (1992) (incorporated by reference, see § 851.27).

(11) ANSI Z136.1, "Safe Use of Lasers," (2000) (incorporated by reference, see § 851.27).

(12) ANSI Z49.1, "Safety in Welding, Cutting and Allied Processes," sections 4.3 and E4.3 (1999) (incorporated by reference, see § 851.27).

(13) National Fire Protection Association (NFPA) 70, "National Electrical Code," (2005) (incorporated by reference, see § 851.27).

(14) NFPA 70E, "Standard for Electrical Safety in the Workplace," (2004) (incorporated by reference, see § 851.27).

(b) Nothing in this part must be construed as relieving a contractor from complying with any additional specific safety and health requirement that it determines to be necessary to protect the safety and health of workers.

§ 851.24 Functional areas.

(a) Contractors must have a structured approach to their worker safety and health program which at a minimum, include provisions for the following applicable functional areas in their worker safety and health program: construction safety; fire protection; firearms safety; explosives safety; pressure safety; electrical safety; industrial hygiene; occupational medicine; biological safety; and motor vehicle safety.

(b) In implementing the structured approach required by paragraph (a) of this section, contractors must comply with the applicable standards and provisions in Appendix A of this part, entitled "Worker Safety and Health Functional Areas."

§ 851.25 Training and information.

(a) Contractors must develop and implement a worker safety and health training and information program to ensure that all workers exposed or potentially exposed to hazards are provided with the training and information on that hazard in order to perform their duties in a safe and healthful manner.

(b) The contractor must provide:

(1) Training and information for new workers, before or at the time of initial assignment to a job involving exposure to a hazard;

(2) Periodic training as often as necessary to ensure that workers are adequately trained and informed; and

(3) Additional training when safety and health information or a change in workplace conditions indicates that a new or increased hazard exists.

(c) Contractors must provide training and information to workers who have worker safety and health program responsibilities that is necessary for them to carry out those responsibilities.

§ 851.26 Recordkeeping and reporting.

(a) *Recordkeeping.* Contractors must:

(1) Establish and maintain complete and accurate records of all hazard inventory information, hazard assessments, exposure measurements, and exposure controls.

(2) Ensure that the work-related injuries and illnesses of its workers and subcontractor workers are recorded and reported accurately and consistent with DOE Manual 231.1–1A, Environment, Safety and Health Reporting Manual, September 9, 2004 (incorporated by reference, see § 851.27).

(3) Comply with the applicable occupational injury and illness recordkeeping and reporting workplace safety and health standards in § 851.23 at their site, unless otherwise directed in DOE Manual 231.1–1A.

(4) Not conceal nor destroy any information concerning non-compliance or potential noncompliance with the requirements of this part.

(b) *Reporting and investigation.* Contractors must:

(1) Report and investigate accidents, injuries and illness; and

(2) Analyze related data for trends and lessons learned (reference DOE Order 225.1A, Accident Investigations, November 26, 1997).

§ 851.27 Reference sources.

(a) *Materials incorporated by reference.* (1) *General.* The following standards which are not otherwise set forth in part 851 are incorporated by reference and made a part of part 851. The standards listed in this section have been approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) *Availability of standards.* The standards incorporated by reference are available for inspection at:

(i) National Archives and Records Administration (NARA). For more information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*

(ii) U.S. Department of Energy, Office of Environment, Safety and Health, Forrestal Building, 1000 Independence Ave., SW., Washington, DC 20585.

(iii) American National Standards Institute Headquarters, 25 West 43rd Street, New York, NY 10036. Telephone number: 212–642–4980, or go to: *http://www.ansi.org.*

(iv) National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02169. Telephone: 617 770–3000, or go to: *http://www.nfpa.org.*

(v) American Conference of Governmental Industrial Hygienist (ACGIH), 1330 Kemper Meadow Drive, Cincinnati, OH 45240. Telephone number 513–742–2020, or go to: *http://www.acgih.org.*

(vi) American Society of Mechanical Engineers (ASME), P.O. Box 2300 Fairfield, NJ 07007. Telephone: 800–843–2763, or got to: *http://www.asme.org.*

(b) *List of standards incorporated by reference.* (1) American National Standards Institute (ANSI) Z88.2, "American National Standard for Respiratory Protection," (1992).

(2) ANSI Z136.1, "Safe Use of Lasers," (2000).

(3) ANSI Z49.1, "Safety in Welding, Cutting and Allied Processes," sections 4.3 and E4.3, (1999).

(4) National Fire Protection Association (NFPA) 70, "National Electrical Code," (2005).

(5) NFPA 70E, "Standard for Electrical Safety in the Workplace," (2004).

(6) American Conference of Governmental Industrial Hygienists, "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices," (2005).

(7) American Society of Mechanical Engineers (ASME) Boilers and Pressure Vessel Code, sections I through XII including applicable Code Cases, (2004).

(8) ASME B31 (ASME Code for Pressure Piping) as follows:

(i) B31.1—2001—Power Piping, and B31.1a—2002—Addenda to ASME B31.1—2001;

(ii) B31.2—1968—Fuel Gas Piping;

(iii) B31.3—2002—Process Piping;

(iv) B31.4—2002—Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids;

(v) B31.5—2001—Refrigeration Piping and Heat Transfer Components, and B31.5a—2004, Addenda to ASME B31.5—2001;

(vi) B31.8—2003—Gas Transmission and Distribution Piping Systems;

(vii) B31.8S—2001—Managing System Integrity of Gas Pipelines;

(viii) B31.9—1996—Building Services Piping;

(ix) B31.11—2002—Slurry Transportation Piping Systems; and

(x) B31G—1991—Manual for Determining Remaining Strength of Corroded Pipelines.

(9) DOE Manual 231.1–1A, Environment, Safety and Health Reporting Manual, September 9, 2004.

(10) DOE Manual 440.1–1A, DOE Explosives Safety Manual, Contractor Requirements Document (Attachment 2), January 9, 2006.

Subpart D—Variances

§ 851.30 Consideration of variances.

(a) Variances shall be granted by the Under Secretary after considering the recommendation of the Assistant Secretary for Environment, Safety and Health. The authority to grant a variance cannot be delegated.

(b) The application must satisfy the requirements for applications specified in § 851.31.

§ 851.31 Variance process.

(a) *Application.* Contractors desiring a variance from a safety and health standard, or portion thereof, may submit a written application containing the information in paragraphs (c) and (d) of this section to the appropriate CSO.

(1) The CSO may forward the application to the Assistant Secretary for Environment, Safety and Health.

(2) If the CSO does not forward the application to the Assistant Secretary for Environment, Safety and Health, the CSO must return the application to the contractor with a written statement explaining why the application was not forwarded.

(3) Upon receipt of an application from a CSO, the Assistant Secretary for Environment, Safety and Health must review the application for a variance and make a written recommendation to:

(i) Approve the application;

(ii) Approve the application with conditions; or

(iii) Deny the application.

(b) *Defective applications.* If an application submitted pursuant to § 851.31(a) is determined by the Assistant Secretary for Environment, Safety and Health to be incomplete, the Assistant Secretary may:

(1) Return the application to the contractor with a written explanation of what information is needed to permit consideration of the application; or

(2) Request the contractor to provide necessary information.

(c) *Content.* All variance applications submitted pursuant to paragraph (a) of this section must include:

(1) The name and address of the contractor;

(2) The address of the DOE site or sites involved;

(3) A specification of the standard, or portion thereof, from which the contractor seeks a variance;

(4) A description of the steps that the contractor has taken to inform the affected workers of the application, which must include giving a copy thereof to their authorized representative, posting a statement, giving a summary of the application and specifying where a copy may be examined at the place or places where notices to workers are normally posted; and

(5) A description of how affected workers have been informed of their right to petition the Assistant Secretary for Environment, Safety and Health or designee for a conference; and

(6) Any requests for a conference, as provided in § 851.34.

(d) *Types of variances.* Contractors may apply for the following types of variances:

(1) *Temporary variance.* Applications for a temporary variance pursuant to paragraph (a) of this section must be submitted at least 30 days before the effective date of a new safety and health standard and, in addition to the content required by paragraph (b) of this section, must include:

(i) A statement by the contractor explaining the contractor is unable to comply with the standard or portion thereof by its effective date and a detailed statement of the factual basis and representations of qualified persons that support the contractor's statement;

(ii) A statement of the steps the contractor has taken and plans to take, with specific dates if appropriate, to protect workers against the hazard covered by the standard;

(iii) A statement of when the contractor expects to be able to comply with the standard and of what steps the contractor has taken and plans to take, with specific dates if appropriate, to come into compliance with the standard;

(iv) A statement of the facts the contractor would show to establish that:

(A) The contractor is unable to comply with the standard by its effective date because of unavailability of professional or technical personnel or materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date;

(B) The contractor is taking all available steps to safeguard the workers against the hazards covered by the standard; and

(C) The contractor has an effective program for coming into compliance with the standard as quickly as practicable.

(2) *Permanent variance.* An application submitted for a permanent variance pursuant to paragraph (a) of this section must, in addition to the content required in paragraph (b) of this section, include:

(i) A description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the contractor; and

(ii) A statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide workers a place of employment which is as safe and healthful as would result from compliance with the standard from which a variance is sought.

(3) *National defense variance.* (i) An application submitted for a national defense variance pursuant to paragraph (a) of this section must, in addition to the content required in paragraph (b) of this section, include:

(A) A statement by the contractor showing that the variance sought is necessary to avoid serious impairment of national defense; and

(B) A statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide workers a safe and healthful place of employment in a manner that, to the extent practical taking into account the national defense mission, is consistent with the standard from which a variance is sought.

(ii) A national defense variance may be granted for a maximum of six months, unless there is a showing that a longer period is essential to carrying out a national defense mission.

§ 851.32 Action on variance requests.

(a) *Procedures for an approval recommendation.* (1) If the Assistant Secretary for Environment, Safety and Health recommends approval of a variance application, the Assistant Secretary must forward to the Under Secretary the variance application and the approval recommendation including a discussion of the basis for the recommendation and any terms and conditions proposed for inclusion as part of the approval.

(2) If the Under Secretary approves a variance, the Under Secretary must notify the Assistant Secretary for Environment, Safety and Health who must notify the Office of Price-Anderson Enforcement and the CSO who must promptly notify the contractor.

(3) The notification must include a reference to the safety and health standard or portion thereof that is the subject of the application, a detailed description of the variance, the basis for the approval and any terms and conditions of the approval.

(4) If the Under Secretary denies a variance, the Under Secretary must notify the Assistant Secretary for Environment, Safety and Health who must notify the appropriate CSO who must notify the contractor.

(5) The notification must include the grounds for denial.

(b) *Approval criteria.* A variance may be granted if the variance:

(1) Is consistent with section 3173 of the NDAA;

(2) Does not present an undue risk to worker safety and health;

(3) Is warranted under the circumstances;

(4) Satisfies the requirements of § 851.31 of this part for the type of variance requested.

(c) *Procedures for a denial recommendation.* (1) If the Assistant Secretary for Environment, Safety and Health recommends denial of a variance application, the Assistant Secretary must notify the CSO of the denial recommendation and the grounds for the denial recommendation.

(2) Upon receipt of a denial recommendation, the CSO may:

(i) Notify the contractor that the variance application is denied on the grounds cited by the Assistant Secretary; or

(ii) Forward to the Under Secretary the variance application, the denial recommendation, the grounds for the denial recommendation, and any information that supports an action different than that recommended by the Assistant Secretary.

(3) If the CSO forwards the application to the Under Secretary, the procedures in paragraphs (a)(2), (3), (4) and (5) of this section apply.

(4) A denial of an application pursuant to this section shall be without prejudice to submitting of another application

(d) *Grounds for denial of a variance.* A variance may be denied if:

(1) Enforcement of the violation would be handled as a *de minimis* violation (defined as a deviation from the requirement of a standard that has no direct or immediate relationship to safety or health, and no enforcement action will be taken);

(2) When a variance is not necessary for the conditions, practice, means, methods, operations, or processes used or proposed to be used by contractor;

(3) Contractor does not demonstrate that the approval criteria are met.

§ 851.33 Terms and conditions.

A variance may contain appropriate terms and conditions including, but not limited to, provisions that:

(a) Limit its duration;

(b) Require alternative action;

(c) Require partial compliance; and

(d) Establish a schedule for full or partial compliance.

§ 851.34 Requests for conferences.

(a) Within the time allotted by a notice of the filling of an application, any affected contractor or worker may file with the Assistant Secretary for Environment, Safety and Health a request for a conference on the application for a variance.

(b) A request for a conference filed pursuant to paragraph (a) of this section must include:

(1) A concise statement explaining how the contractor or worker would be affected by the variance applied for, including relevant facts;

(2) A specification of any statement or representation in the application which is denied, and a concise summary of the evidence that would be adduced in support of each denial; and

(3) Any other views or arguments on any issue of fact or law presented.

(c) The Assistant Secretary for Environment, Safety and Health, or designee, must respond to a request within fifteen days and, if the request is granted, indicate the time and place of the conference and the DOE participants in the conference.

Subpart E—Enforcement Process

§ 851.40 Investigations and inspections.

(a) The Director may initiate and conduct investigations and inspections relating to the scope, nature and extent of compliance by a contractor with the requirements of this part and take such action as the Director deems necessary and appropriate to the conduct of the investigation or inspection. DOE Enforcement Officers have the right to enter work areas without delay to the extent practicable, to conduct inspections under this subpart.

(b) Contractors must fully cooperate with the Director during all phases of the enforcement process and provide complete and accurate records and documentation as requested by the Director during investigation or inspection activities.

(c) Any worker or worker representative may request that the Director initiate an investigation or inspection pursuant to paragraph (a) of this section. A request for an investigation or inspection must describe the subject matter or activity to be investigated or inspected as fully as possible and include supporting documentation and information. The worker or worker representative has the right to remain anonymous upon filing a request for an investigation or inspection.

(d) The Director must inform any contractor that is the subject of an investigation or inspection in writing at the initiation of the investigation or inspection and must inform the contractor of the general purpose of the investigation or inspection.

(e) DOE shall not disclose information or documents that are obtained during any investigation or inspection unless the Director directs or authorizes the public disclosure of the investigation. Prior to such authorization, DOE must determine that disclosure is not precluded by the Freedom of Information Act, 5 U.S.C. 552 and part 1004 of this title. Once disclosed pursuant to the Director's authorization, the information or documents are a matter of public record.

(f) A request for confidential treatment of information for purposes of the Freedom of Information Act does not prevent disclosure by the Director if the Director determines disclosure to be in the public interest and otherwise permitted or required by law.

(g) During the course of an investigation or inspection, any contractor may submit any document, statement of facts, or memorandum of law for the purpose of explaining the contractor's position or furnish information which the contractor considers relevant to a matter or activity under investigation or inspection.

(h) The Director may convene an informal conference to discuss any situation that might be a violation of a requirement of this part, its significance and cause, any corrective action taken or not taken by the contractor, any mitigating or aggravating circumstances, and any other information. A conference is not normally open to the public and DOE does not make a transcript of the conference. The Director may compel a contractor to attend the conference.

(i) If facts disclosed by an investigation or inspection indicate that further action is unnecessary or unwarranted, the Director may close the investigation without prejudice.

(j) The Director may issue enforcement letters that communicate DOE's expectations with respect to any aspect of the requirements of this part, including identification and reporting of issues, corrective actions, and implementation of the contractor's safety and health program; provided that an enforcement letter may not create the basis for any legally enforceable requirement pursuant to this part.

(k) The Director may sign, issue and serve subpoenas.

§ 851.41 Settlement.

(a) DOE encourages settlement of a proceeding under this subpart at any time if the settlement is consistent with this part. The Director and a contractor may confer at any time concerning settlement. A settlement conference is not open to the public and DOE does not make a transcript of the conference.

(b) Notwithstanding any other provision of this part, the Director may resolve any issues in an outstanding proceeding under this subpart with a consent order.

(1) The Director and the contractor, or a duly authorized representative thereto, must sign the consent order and indicate agreement to the terms contained therein.

(2) A contractor is not required to admit in a consent order that a requirement of this part has been violated.

(3) DOE is not required to make a finding in a consent order that a contractor has violated a requirement of this part.

(4) A consent order must set forth the relevant facts that form the basis for the order and what remedy, if any, is imposed.

(5) A consent order shall constitute a final order.

§ 851.42 Preliminary notice of violation.

(a) Based on a determination by the Director that there is a reasonable basis to believe a contractor has violated or is continuing to violate a requirement of this part, the Director may issue a preliminary notice of violation (PNOV) to the contractor.

(b) A PNOV must indicate:

(1) The date, facts, and nature of each act or omission upon which each alleged violation is based;

(2) The particular requirement involved in each alleged violation;

(3) The proposed remedy for each alleged violation, including the amount of any civil penalty; and

(4) The obligation of the contractor to submit a written reply to the Director within 30 calendar days of receipt of the PNOV.

(c) A reply to a PNOV must contain a statement of all relevant facts pertaining to an alleged violation.

(1) The reply must:

(i) State any facts, explanations and arguments that support a denial of the alleged violation;

(ii) Demonstrate any extenuating circumstances or other reason why a

proposed remedy should not be imposed or should be mitigated;

(iii) Discuss the relevant authorities that support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE; and

(iv) Furnish full and complete answers to any questions set forth in the preliminary notice.

(2) Copies of all relevant documents must be submitted with the reply.

(d) If a contractor fails to submit a written reply within 30 calendar days of receipt of a PNOV:

(1) The contractor relinquishes any right to appeal any matter in the preliminary notice; and

(2) The preliminary notice, including any proposed remedies therein, constitutes a final order.

(e) A copy of the PNOV must be prominently posted, once final, at or near the location where the violation occurred until the violation is corrected.

§ 851.43 Final notice of violation.

(a) If a contractor submits a written reply within 30 calendar days of receipt of a preliminary notice of violation (PNOV), that presents a disagreement with any aspect of the PNOV and civil penalty, the Director must review the submitted reply and make a final determination whether the contractor violated or is continuing to violate a requirement of this part.

(b) Based on a determination by the Director that a contractor has violated or is continuing to violate a requirement of this part, the Director may issue to the contractor a final notice of violation that states concisely the determined violation and any remedy, including the amount of any civil penalty imposed on the contractor. The final notice of violation must state that the contractor may petition the Office of Hearings and Appeals for review of the final notice in accordance with 10 CFR part 1003, subpart G.

(c) If a contractor fails to submit a petition for review to the Office of Hearings and Appeals within 30 calendar days of receipt of a final notice of violation pursuant to § 851.42:

(1) The contractor relinquishes any right to appeal any matter in the final notice; and

(2) The final notice, including any remedies therein, constitutes a final order.

§ 851.44 Administrative appeal.

(a) Any contractor that receives a final notice of violation may petition the Office of Hearings and Appeals for review of the final notice in accordance with part 1003, subpart G of this title, within 30 calendar days from receipt of the final notice.

(b) In order to exhaust administrative remedies with respect to a final notice of violation, the contractor must petition the Office of Hearings and Appeals for review in accordance with paragraph (a) of this section.

§ 851.45 Direction to NNSA contractors.

(a) Notwithstanding any other provision of this part, the NNSA Administrator, rather than the Director, signs, issues and serves the following actions that direct NNSA contractors:

(1) Subpoenas;

(2) Orders to compel attendance;

(3) Disclosures of information or documents obtained during an investigation or inspection;

(4) Preliminary notices of violations; and

(5) Final notices of violations.

(b) The NNSA Administrator shall act after consideration of the Director's recommendation.

Appendix A to Part 851—Worker Safety and Health Functional Areas

This appendix establishes the mandatory requirements for implementing the applicable functional areas required by § 851.24.

1. Construction Safety

(a) For each separately definable construction activity (e.g., excavations, foundations, structural steel, roofing) the construction contractor must:

(1) Prepare and have approved by the construction manager an activity hazard analysis prior to commencement of affected work. Such analyses must:

(i) Identify foreseeable hazards and planned protective measures;

(ii) Address further hazards revealed by supplemental site information (e.g., site characterization data, as-built drawings) provided by the construction manager;

(iii) Provide drawings and/or other documentation of protective measures for which applicable Occupational Safety and Health Administration (OSHA) standards require preparation by a Professional Engineer or other qualified professional, and

(iv) Identify competent persons required for workplace inspections of the construction activity, where required by OSHA standards.

(2) Ensure workers are aware of foreseeable hazards and the protective measures described within the activity analysis prior to beginning work on the affected activity.

(3) Require that workers acknowledge being informed of the hazards and protective measures associated with assigned work activities. Those workers failing to utilize appropriate protective measures must be subject to the construction contractor's disciplinary process.

(b) During periods of active construction (*i.e.*, excluding weekends, weather delays, or other periods of work inactivity), the construction contractor must have a designated representative on the construction worksite who is knowledgeable of the project's hazards and has full authority to act on behalf of the construction contractor. The contractor's designated representative must make frequent and regular inspections of the construction worksite to identify and correct any instances of noncompliance with project safety and health requirements.

(c) Workers must be instructed to report to the construction contractor's designated representative, hazards not previously identified or evaluated. If immediate corrective action is not possible or the hazard falls outside of project scope, the construction contractor must immediately notify affected workers, post appropriate warning signs, implement needed interim control measures, and notify the construction manager of the action taken. The contractor or the designated representative must stop work in the affected area until appropriate protective measures are established.

(d) The construction contractor must prepare a written construction project safety and health plan to implement the requirements of this section and obtain approval of the plan by the construction manager prior to commencement of any work covered by the plan. In the plan, the contractor must designate the individual(s) responsible for on-site implementation of the plan, specify qualifications for those individuals, and provide a list of those project activities for which subsequent hazard analyses are to be performed. The level of detail within the construction project safety and health plan should be commensurate with the size, complexity and risk level of the construction project. The content of this plan need not duplicate those provisions that were previously submitted and approved as required by § 851.11.

2. Fire Protection

(a) Contractors must implement a comprehensive fire safety and emergency response program to protect workers commensurate with the nature of the work that is performed. This includes appropriate facility and site-wide fire protection, fire alarm notification and egress features, and access to a fully staffed, trained, and equipped emergency response organization that is capable of responding in a timely and effective manner to site emergencies.

(b) An acceptable fire protection program must include those fire protection criteria and procedures, analyses, hardware and systems, apparatus and equipment, and personnel that would comprehensively ensure that the objective in paragraph 2(a) of this section is met. This includes meeting applicable building codes and National Fire Protection Association codes and standards.

3. Explosives Safety

(a) Contractors responsible for the use of explosive materials must establish and implement a comprehensive explosives safety program.

(b) Contractors must comply with the policy and requirements specified in the DOE Manual 440.1–1A, DOE Explosives Safety Manual, Contractor Requirements Document (Attachment 2), January 9, 2006

(incorporated by reference, see § 851.27). A Contractor may choose a successor version, if approved by DOE.

(c) Contractors must determine the applicability of the explosives safety directive requirements to research and development laboratory type operations consistent with the DOE level of protection criteria described in the explosives safety directive.

4. Pressure Safety

(a) Contractors must establish safety policies and procedures to ensure that pressure systems are designed, fabricated, tested, inspected, maintained, repaired, and operated by trained and qualified personnel in accordance with applicable and sound engineering principles.

(b) Contractors must ensure that all pressure vessels, boilers, air receivers, and supporting piping systems conform to:

(1) The applicable American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (2004); sections I through section XII including applicable Code Cases (incorporated by reference, see § 851.27)

(2) The applicable ASME B31 (Code for Pressure Piping) standards as indicated below; and or as indicated in paragraph (b)(3) of this section:

(i) B31.1—2001—Power Piping, and B31.1a—2002—Addenda to ASME B31.1—2001 (incorporated by reference, see § 851.27);

(ii) B31.2—1968—Fuel Gas Piping (incorporated by reference, see § 851.27);

(iii) B31.3—2002—Process Piping (incorporated by reference, see § 851.27);

(iv) B31.4—2002—Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids (incorporated by reference, see § 851.27);

(v) B31.5—2001—Refrigeration Piping and Heat Transfer Components, and B31.5a—2004, Addenda to ASME B31.5—2001 (incorporated by reference, see § 851.27);

(vi) B31.8—2003—Gas Transmission and Distribution Piping Systems (incorporated by reference, see § 851.27);

(vii) B31.8S—2001—Managing System Integrity of Gas Pipelines (incorporated by reference, see § 851.27);

(viii) B31.9—1996—Building Services Piping (incorporated by reference, see § 851.27);

(ix) B31.11—2002—Slurry Transportation Piping Systems (incorporated by reference, see § 851.27); and

(x) B31G—1991—Manual for Determining Remaining Strength of Corroded Pipelines (incorporated by reference, see § 851.27).

(3) The strictest applicable state and local codes.

(c) When national consensus codes are not applicable (because of pressure range, vessel geometry, use of special materials, etc.), contractors must implement measures to provide equivalent protection and ensure a level of safety greater than or equal to the level of protection afforded by the ASME or applicable state or local code. Measures must include the following:

(1) Design drawings, sketches, and calculations must be reviewed and approved by a qualified independent design professional (*i.e.*, professional engineer). Documented organizational peer review is acceptable.

(2) Qualified personnel must be used to perform examinations and inspections of materials, in-process fabrications, non-destructive tests, and acceptance test.

(3) Documentation, traceability, and accountability must be maintained for each pressure vessel or system, including descriptions of design, pressure conditions, testing, inspection, operation, repair, and maintenance.

5. Firearms Safety

(a) A contractor engaged in DOE activities involving the use of firearms must establish firearms safety policies and procedures for security operations, and training to ensure proper accident prevention controls are in place.

(1) Written procedures must address firearms safety, engineering and administrative controls, as well as personal protective equipment requirements.

(2) As a minimum, procedures must be established for:

(i) Storage, handling, cleaning, inventory, and maintenance of firearms and associated ammunition;

(ii) Activities such as loading, unloading, and exchanging firearms. These procedures must address use of bullet containment devices and those techniques to be used when no bullet containment device is available;

(iii) Use and storage of pyrotechnics, explosives, and/or explosive projectiles;

(iv) Handling misfires, duds, and unauthorized discharges;

(v) Live fire training, qualification, and evaluation activities;

(vi) Training and exercises using engagement simulation systems;

(vii) Medical response at firearms training facilities; and

(viii) Use of firing ranges by personnel other than DOE or DOE contractor protective forces personnel.

(b) Contractors must ensure that personnel responsible for the direction and operation of the firearms safety program are professionally qualified and have sufficient time and authority to implement the procedures under this section.

(c) Contractors must ensure that firearms instructors and armorers have been certified by the Safeguards and Security National Training Center to conduct the level of activity provided. Personnel must not be allowed to conduct activities for which they have not been certified.

(d) Contractors must conduct formal appraisals assessing implementation of procedures, personnel responsibilities, and duty assignments to ensure overall policy objectives and performance criteria are being met by qualified personnel.

(e) Contractors must implement procedures related to firearms training, live fire range safety, qualification, and evaluation activities, including procedures requiring that:

(1) Personnel must successfully complete initial firearms safety training before being issued any firearms. Authorization to remain in armed status will continue only if the employee demonstrates the technical and practical knowledge of firearms safety semi-annually;

(2) Authorized armed personnel must demonstrate through documented limited scope performance tests both technical and practical knowledge of firearms handling and safety on a semi-annual basis;

(3) All firearms training lesson plans must incorporate safety for all aspects of firearms training task performance standards. The lesson plans must follow the standards set forth by the Safeguards and Security Central Training Academy's standard training programs;

(4) Firearms safety briefings must immediately precede training, qualifications, and evaluation activities involving live fire and/or engagement simulation systems;

(5) A safety analysis approved by the Head of DOE Field Element must be developed for the facilities and operation of each live fire range prior to implementation of any new training, qualification, or evaluation activity. Results of these analyses must be incorporated into procedures, lesson plans, exercise plans, and limited scope performance tests;

(6) Firing range safety procedures must be conspicuously posted at all range facilities; and

(7) Live fire ranges, approved by the Head of DOE Field Element, must be properly sited to protect personnel on the range, as well as personnel and property not associated with the range.

(f) Contractors must ensure that the transportation, handling, placarding, and storage of munitions conform to the applicable DOE requirements.

6. Industrial Hygiene

Contractors must implement a comprehensive industrial hygiene program that includes at least the following elements:

(a) Initial or baseline surveys and periodic resurveys and/or exposure monitoring as appropriate of all work areas or operations to identify and evaluate potential worker health risks;

(b) Coordination with planning and design personnel to anticipate and control health hazards that proposed facilities and operations would introduce;

(c) Coordination with cognizant occupational medical, environmental, health physics, and work planning professionals;

(d) Policies and procedures to mitigate the risk from identified and potential occupational carcinogens;

(e) Professionally and technically qualified industrial hygienists to manage and implement the industrial hygiene program; and

(f) Use of respiratory protection equipment tested under the DOE Respirator Acceptance Program for Supplied-air Suits (DOE-Technical Standard-1167–2003) when National Institute for Occupational Safety and Health-approved respiratory protection does not exist for DOE tasks that require such equipment. For security operations conducted in accordance with Presidential Decision Directive 39, U.S. POLICY ON

COUNTER TERRORISM, use of Department of Defense military type masks for respiratory protection by security personnel is acceptable.

7. Biological Safety

(a) Contractors must establish and implement a biological safety program that:

(1) Establishes an Institutional Biosafety Committee (IBC) or equivalent. The IBC must:

(i) Review any work with biological etiologic agents for compliance with applicable Centers for Disease Control and Prevention (CDC), National Institutes of Health (NIH), World Health Organization (WHO), and other international, Federal, State, and local guidelines and assess the containment level, facilities, procedures, practices, and training and expertise of personnel; and

(ii) Review the site's security, safeguards, and emergency management plans and procedures to ensure they adequately consider work involving biological etiologic agents.

(2) Maintains an inventory and status of biological etiologic agents, and provide to the responsible field and area office, through the laboratory IBC (or its equivalent), an annual status report describing the status and inventory of biological etiologic agents and the biological safety program.

(3) Provides for submission to the appropriate Head of DOE Field Element, for review and concurrence before transmittal to the Centers for Disease Control and Prevention (CDC), each Laboratory Registration/Select Agent Program registration application package requesting registration of a laboratory facility for the purpose of transferring, receiving, or handling biological select agents.

(4) Provides for submission to the appropriate Head of DOE Field Element, a copy of each CDC Form EA–101, Transfer of Select Agents, upon initial submission of the Form EA–101 to a vendor or other supplier requesting or ordering a biological select agent for transfer, receipt, and handling in the registered facility. Submit to the appropriate Head of DOE Field Element the completed copy of the Form EA–101, documenting final disposition and/or destruction of the select agent, within 10 days of completion of the Form EA–101.

(5) Confirms that the site safeguards and security plans and emergency management programs address biological etiologic agents, with particular emphasis on biological select agents.

(6) Establishes an immunization policy for personnel working with biological etiologic agents based on the evaluation of risk and benefit of immunization.

(b) [Reserved]

8. Occupational Medicine

(a) Contractors must establish and provide comprehensive occupational medicine services to workers employed at a covered work place who:

(1) Work on a DOE site for more than 30 days in a 12-month period; or

(2) Are enrolled for any length of time in a medical or exposure monitoring program required by this rule and/or any other applicable Federal, State or local regulation, or other obligation.

(b) The occupational medicine services must be under the direction of a graduate of a school of medicine or osteopathy who is licensed for the practice of medicine in the state in which the site is located.

(c) Occupational medical physicians, occupational health nurses, physician's assistants, nurse practitioners, psychologists, employee assistance counselors, and other occupational health personnel providing occupational medicine services must be licensed, registered, or certified as required by Federal or State law where employed.

(d) Contractors must provide the occupational medicine providers access to hazard information by promoting its communication, coordination, and sharing among operating and environment, safety, and health protection organizations.

(1) Contractors must provide the occupational medicine providers with access to information on the following:

(i) Current information about actual or potential work-related site hazards (chemical, radiological, physical, biological, or ergonomic);

(ii) Employee job-task and hazard analysis information, including essential job functions;

(iii) Actual or potential work-site exposures of each employee; and

(iv) Personnel actions resulting in a change of job functions, hazards or exposures.

(2) Contractors must notify the occupational medicine providers when an employee has been absent because of an injury or illness for more than 5 consecutive workdays (or an equivalent time period for those individuals on an alternative work schedule);

(3) Contractors must provide the occupational medicine provider information on, and the opportunity to participate in, worker safety and health team meetings and committees;

(4) Contractors must provide occupational medicine providers access to the workplace for evaluation of job conditions and issues relating to workers' health.

(e) A designated occupational medicine provider must:

(1) Plan and implement the occupation medicine services; and

(2) Participate in worker protection teams to build and maintain necessary partnerships among workers, their representatives, managers, and safety and health protection specialists in establishing and maintaining a safe and healthful workplace.

(f) A record, containing any medical, health history, exposure history, and demographic data collected for the occupational medicine purposes, must be developed and maintained for each employee for whom medical services are provided. All occupational medical records must be maintained in accordance with Executive Order 13335, Incentives for the Use of Health Information Technology.

(1) Employee medical, psychological, and employee assistance program (EAP) records must be kept confidential, protected from unauthorized access, and stored under conditions that ensure their long-term preservation. Psychological records must be maintained separately from medical records and in the custody the designated psychologist in accordance with 10 CFR 712.38(b)(2).

(2) Access to these records must be provided in accordance with DOE regulations implementing the Privacy Act and the Energy Employees Occupational Illness Compensation Program Act.

(g) The occupational medicine services provider must determine the content of the worker health evaluations, which must be conducted under the direction of a licensed physician, in accordance with current sound and acceptable medical practices and all pertinent statutory and regulatory requirements, such as the Americans with Disabilities Act.

(1) Workers must be informed of the purpose and nature of the medical evaluations and tests offered by the occupational medicine provider.

(i) The purpose, nature and results of evaluations and tests must be clearly communicated verbally and in writing to each worker provided testing;

(ii) The communication must be documented in the worker's medical record; and (2) The following health evaluations must be conducted when determined necessary by the occupational medicine provider for the purpose of providing initial and continuing assessment of employee fitness for duty.

(i) At the time of employment entrance or transfer to a job with new functions and hazards, a medical placement evaluation of the individual's general health and physical and psychological capacity to perform work will establish a baseline record of physical condition and assure fitness for duty.

(ii) Periodic, hazard-based medical monitoring or qualification-based fitness for duty evaluations required by regulations and standards, or as recommended by the occupational medicine services provider, will be provided on the frequency required.

(iii) Diagnostic examinations will evaluate employee's injuries and illnesses to determine work-relatedness, the applicability of medical restrictions, and referral for definitive care, as appropriate.

(iv) After a work-related injury or illness or an absence due to any injury or illness lasting 5 or more consecutive workdays (or an equivalent time period for those individuals on an alternative work schedule), a return to work evaluation will determine the individual's physical and psychological capacity to perform work and return to duty.

(v) At the time of separation from employment, individuals shall be offered a general health evaluation to establish a record of physical condition.

(h) The occupational medicine provider must monitor ill and injured workers to facilitate their rehabilitation and safe return to work and to minimize lost time and its associated costs.

(i) The occupational medicine provider must place an individual under medical restrictions when health evaluations indicate that the worker should not perform certain job tasks. The occupational medicine

provider must notify the worker and contractor management when employee work restrictions are imposed or removed.

(i) Occupational medicine provider physician and medical staff must, on a timely basis, communicate results of health evaluations to management and safety and health protection specialists to facilitate the mitigation of worksite hazards.

(j) The occupational medicine provider must include measures to identify and manage the principal preventable causes of premature morbidity and mortality affecting worker health and productivity.

(1) The contractor must include programs to prevent and manage these causes of morbidity when evaluations demonstrate their cost effectiveness.

(2) Contractors must make available to the occupational medicine provider appropriate access to information from health, disability, and other insurance plans (de-identified as necessary) in order to facilitate this process.

(k) The occupational medicine services provider must review and approve the medical and behavioral aspects of employee counseling and health promotional programs, including the following types:

(1) Contractor-sponsored or contractor-supported EAPs;

(2) Contractor-sponsored or contractor-supported alcohol and other substance abuse rehabilitation programs; and

(3) Contractor-sponsored or contractor-supported wellness programs.

(4) The occupational medicine services provider must review the medical aspects of immunization programs, blood-borne pathogens programs, and bio-hazardous waste programs to evaluate their conformance to applicable guidelines.

(5) The occupational medicine services provider must develop and periodically review medical emergency response procedures included in site emergency and disaster preparedness plans. The medical emergency responses must be integrated with nearby community emergency and disaster plans.

9. Motor Vehicle Safety

(a) Contractors must implement a motor vehicle safety program to protect the safety and health of all drivers and passengers in Government-owned or -leased motor vehicles and powered industrial equipment (*i.e.*, fork trucks, tractors, platform lift trucks, and other similar specialized equipment powered by an electric motor or an internal combustion engine).

(b) The contractor must tailor the motor vehicle safety program to the individual DOE site or facility, based on an analysis of the needs of that particular site or facility.

(c) The motor vehicle safety program must address, as applicable to the contractor's operations:

(1) Minimum licensing requirements (including appropriate testing and medical qualification) for personnel operating motor vehicles and powered industrial equipment;

(2) Requirements for the use of seat belts and provision of other safety devices;

(3) Training for specialty vehicle operators;

(4) Requirements for motor vehicle maintenance and inspection;

(5) Uniform traffic and pedestrian control devices and road signs;

(6) On-site speed limits and other traffic rules;

(7) Awareness campaigns and incentive programs to encourage safe driving; and

(8) Enforcement provisions.

10. Electrical Safety

Contractors must implement a comprehensive electrical safety program appropriate for the activities at their site. This program must meet the applicable electrical safety codes and standards referenced in § 851.23.

11. Nanotechnology Safety—Reserved

The Department has chosen to reserve this section since policy and procedures for nanotechnology safety are currently being developed. Once these policies and procedures have been approved, the rule will be amended to include them through a rulemaking consistent with the Administrative Procedure Act.

12. Workplace Violence Prevention—Reserved

The Department has chosen to reserve this section since the policy and procedures for workplace violence prevention are currently being developed. Once these policies and procedures have been approved, the rule will be amended to include them through a rulemaking consistent with the Administrative Procedure Act.

Appendix B to Part 851—General Statement of Enforcement Policy

I. Introduction

(a) This policy statement sets forth the general framework through which the U.S. Department of Energy (DOE) will seek to ensure compliance with its worker safety and health regulations, and, in particular, exercise the civil penalty authority provided to DOE in section 3173 of Public Law 107–314, Bob Stump National Defense Authorization Act for Fiscal Year 2003 (December 2, 2002) ("NDAA"), amending the Atomic Energy Act (AEA) to add section 234C. The policy set forth herein is applicable to violations of safety and health regulations in this part by DOE contractors, including DOE contractors who are indemnified under the Price-Anderson Act, 42 U.S.C. 2210(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to the regulations in this part. It is not intended to establish a "cookbook" approach to the initiation and resolution of situations involving noncompliance with the regulations in this part. Rather, DOE intends to consider the particular facts of each noncompliance in determining whether enforcement sanctions are appropriate and, if so, the appropriate magnitude of those sanctions. DOE may well deviate from this policy statement when appropriate in the circumstances of particular cases. This policy statement is not applicable to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval Nuclear Propulsion, or otherwise excluded from the scope of the rule.

(b) The DOE goal in the compliance arena is to enhance and protect the safety and health of workers at DOE facilities by fostering a culture among both the DOE line organizations and the contractors that actively seeks to attain and sustain compliance with the regulations in this part. The enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for the open and prompt identification and reporting of noncompliances, performance of effective root cause analysis, and initiation of comprehensive corrective actions to resolve both noncompliance conditions and program or process deficiencies that led to noncompliance.

(c) In the development of the DOE enforcement policy, DOE recognizes that the reasonable exercise of its enforcement authority can help to reduce the likelihood of serious incidents. This can be accomplished by placing greater emphasis on a culture of safety in existing DOE operations, and strong incentives for contractors to identify and correct noncompliance conditions and processes in order to protect human health and the environment. DOE wants to facilitate, encourage, and support contractor initiatives for the prompt identification and correction of noncompliances. DOE will give due consideration to such initiatives and activities in exercising its enforcement discretion.

(d) DOE may modify or remit civil penalties in a manner consistent with the adjustment factors set forth in this policy with or without conditions. DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate discretion in taking any enforcement action. Part of the function of a sound enforcement program is to assure a proper and continuing level of safety vigilance. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of safety requirements to DOE facilities and by promoting and coordinating the proper contractor and DOE safety compliance attitude toward those requirements.

II. Purpose

The purpose of the DOE enforcement program is to promote and protect the safety and health of workers at DOE facilities by:

(a) Ensuring compliance by DOE contractors with the regulations in this part.

(b) Providing positive incentives for DOE contractors based on:

(1) Timely self-identification of worker safety noncompliances;

(2) Prompt and complete reporting of such noncompliances to DOE;

(3) Prompt correction of safety noncompliances in a manner that precludes recurrence; and

(4) Identification of modifications in practices or facilities that can improve worker safety and health.

(c) Deterring future violations of DOE requirements by a DOE contractor.

(d) Encouraging the continuous overall improvement of operations at DOE facilities.

III. Statutory Authority

The Department of Energy Organization Act, 42 U.S.C. 7101–7385o, the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801–5911, and the Atomic Energy Act of 1954, as amended, (AEA) 42 U.S.C. 2011, require DOE to protect the public safety and health, as well as the safety and health of workers at DOE facilities, in conducting its activities, and grant DOE broad authority to achieve this goal. Section 234C of the AEA makes DOE contractors (and their subcontractors and suppliers thereto) covered by the DOE Price-Anderson indemnification system, subject to civil penalties for violations of the worker safety and health requirements promulgated in this part. 42 U.S.C. 2282c.

IV. Responsibilities

(a) The Director, as the principal enforcement officer of the DOE, has been delegated the authority to:

(1) Conduct enforcement inspections, investigations, and conferences;

(2) Issue Notices of Violations and proposed civil penalties, Enforcement Letters, Consent Orders, and subpoenas; and

(3) Issue orders to compel attendance and disclosure of information or documents obtained during an investigation or inspection. The Secretary issues Compliance Orders.

(b) The NNSA Administrator, rather than the Director, signs, issues and serves the following actions that direct NNSA contractors:

(1) Subpoenas;

(2) Orders to compel attendance; and

(3) Determines to disclose information or documents obtained during an investigation or inspection. PNOVs, Notices of Violations, and Final Notices of Violations. The NNSA Administrator acts after consideration of the Director's recommendation.

V. Procedural Framework

(a) Title 10 CFR part 851 sets forth the procedures DOE will use in exercising its enforcement authority, including the issuance of Notices of Violation and the resolution of an administrative appeal in the event a DOE contractor elects to petition the Office of Hearings and Appeals for review.

(b) Pursuant to 10 CFR part 851 subpart E, the Director initiates the enforcement process by initiating and conducting investigations and inspections and issuing a Preliminary Notice of Violation (PNOV) with or without a proposed civil penalty. The DOE contractor is required to respond in writing to the PNOV within 30 days, either: (1) Admitting the violation and waiving its right to contest the proposed civil penalty and paying it; (2) admitting the violation but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty; or (3) denying that the violation has occurred and providing the basis for its belief that the PNOV is incorrect. After evaluation of the DOE contractor's response, the Director may determine: (1) That no violation has occurred; (2) that the violation occurred as alleged in the PNOV but that the proposed civil penalty should be remitted in whole or in part; or (3) that the violation occurred as alleged in the PNOV and that the proposed civil penalty is appropriate, notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a Final Notice of Violation (FNOV) or an FNOV and proposed civil penalty.

(c) An opportunity to challenge an FNOV is provided in administrative appeal provisions. See 10 CFR 851.44. Any contractor that receives an FNOV may petition the Office of Hearings and Appeals for review of the final notice in accordance with 10 CFR part 1003, Subpart G, within 30 calendar days from receipt of the final notice. An administrative appeal proceeding is not initiated until the DOE contractor against which an FNOV has been issued requests an administrative hearing rather than waiving its right to contest the FNOV and proposed civil penalty, if any, and paying the civil penalty. However, it should be emphasized that DOE encourages the voluntary resolution of a noncompliance situation at any time, either informally prior to the initiation of the enforcement process or by consent order before or after any formal proceeding has begun.

VI. Severity of Violations

(a) Violations of the worker safety and health requirements in this part have varying degrees of safety and health significance. Therefore, the relative safety and health risk of each violation must be identified as the first step in the enforcement process. Violations of the worker safety and health requirements are categorized in two levels of severity to identify their relative seriousness. Notices of Violation issued for noncompliance when appropriate, propose civil penalties commensurate with the severity level of the violations involved.

(b) To assess the potential safety and health impact of a particular violation, DOE will categorize the potential severity of violations of worker safety and health requirements as follows:

(1) A Severity Level I violation is a serious violation. A serious violation shall be deemed to exist in a place of employment if there is a potential that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. A Severity Level I violation would be subject to a base civil penalty of up to 100% of the maximum base civil penalty of $70,000.

(2) A Severity Level II violation is an other-than-serious violation. An other-than-serious violation occurs where the most serious injury or illness that would potentially result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to employees but does have a direct relationship to their safety and health. A Severity Level II violation would be subject to a base civil penalty up to 50% of the maximum base civil penalty ($35,000).

(c) De minimis violations, defined as a deviation from the requirement of a standard that has no direct or immediate relationship to safety or health, will not be the subject of formal enforcement action through the issuance of a Notice of Violation.

VII. Enforcement Conferences

(a) The purpose of the enforcement conference is to:

(1) Assure the accuracy of the facts upon which the preliminary determination to consider enforcement action is based;

(2) Discuss the potential or alleged violations, their significance and causes, and the nature of and schedule for the DOE contractor's corrective actions;

(3) Determine whether there are any aggravating or mitigating circumstances; and

(4) Obtain other information which will help determine whether enforcement action is appropriate and, if so, the extent of that enforcement action.

(b) All enforcement conferences are convened at the discretion of the Director.

(c) The PNOV will normally be issued promptly, before the opportunity for an enforcement conference, following the inspection/investigation. In some cases an enforcement conference may be conducted onsite at the conclusion of an inspection/investigation.

(d) The contractor may request an enforcement conference if they believe additional information pertinent to the enforcement action could best be conveyed through a meeting.

(e) DOE contractors will be informed prior to a meeting when that meeting is considered to be an enforcement conference. Such conferences are informal mechanisms for candid discussions regarding potential or alleged violations and will not normally be open to the public. In circumstances for which immediate enforcement action is necessary in the interest of worker safety and health, such action will be taken prior to the enforcement conference, which may still be held after the necessary DOE action has been taken.

VIII. Enforcement Letter

(a) In cases where DOE has decided not to conduct an investigation or inspection or issue a Preliminary Notice of Violation (PNOV), DOE may send an Enforcement Letter, signed by the Director to the contractor. The Enforcement Letter is intended to communicate the basis of the decision not to pursue enforcement action for a noncompliance. The Enforcement Letter is intended to direct contractors to the desired level of worker safety and health performance. It may be used when DOE concludes that the specific noncompliance at issue is not of the level of significance warranted to conduct an investigation or inspection or for issuance of a PNOV. Even where a noncompliance may be significant, the Enforcement Letter may recognize that the contractor's actions may have attenuated the need for enforcement action. The Enforcement Letter will typically recognize how the contractor handled the circumstances surrounding the noncompliance, address additional areas requiring the contractor's attention, and address DOE's expectations for corrective action.

(b) In general, Enforcement Letters communicate DOE's expectations with respect to any aspect of the requirements of this part, including identification and reporting of issues, corrective actions, and implementation of the contractor's safety and health program. DOE might, for example, wish to recognize some action of the contractor that is of particular benefit to worker safety and health that is a candidate for emulation by other contractors. On the other hand, DOE may wish to bring a program shortcoming to the attention of the contractor that, but for the lack of worker safety and health significance of the immediate issue, might have resulted in the issuance of a PNOV. An Enforcement Letter is not an enforcement action.

(c) With respect to many noncompliances, an Enforcement Letter may not be required. When DOE decides that a contractor has appropriately corrected a noncompliance or that the significance of the noncompliance is sufficiently low, it may close out its review simply through an annotation in the DOE Noncompliance Tracking System (NTS). A closeout of a noncompliance with or without an Enforcement Letter may only take place after DOE has confirmed that corrective actions have been completed.

IX. Enforcement Actions

(a) This section describes the enforcement sanctions available to DOE and specifies the conditions under which each may be used. The basic sanctions are Notices of Violation and civil penalties.

(b) The nature and extent of the enforcement action is intended to reflect the seriousness of the violation. For the vast majority of violations for which DOE assigns severity levels as described previously, a Notice of Violation will be issued, requiring a formal response from the recipient describing the nature of and schedule for corrective actions it intends to take regarding the violation.

1. Notice of Violation

(a) A Notice of Violation (either a Preliminary or Final Notice) is a document setting forth the conclusion of DOE and the basis to support the conclusion, that one or more violations of the worker safety and health requirements have occurred. Such a notice normally requires the recipient to provide a written response which may take one of several positions described in section V of this policy statement. In the event that the recipient concedes the occurrence of the violation, it is required to describe corrective steps which have been taken and the results achieved; remedial actions which will be taken to prevent recurrence; and the date by which full compliance will be achieved.

(b) DOE will use the Notice of Violation as the standard method for formalizing the existence of a violation and, in appropriate cases as described in this section, the Notice of Violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in this section, DOE may refrain from the issuance of an otherwise appropriate Notice of Violation. However, a Notice of Violation will virtually always be issued for willful violations, or if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances.

(c) DOE contractors are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for noncompliance with the worker safety and health requirements.

(d) DOE expects its contractors to have the proper management and supervisory systems in place to assure that all activities at covered workplaces, regardless of who performs them, are carried out in compliance with all the worker safety and health requirements. Therefore, contractors are normally held responsible for the acts of their employees and subcontractor employees in the conduct of activities at covered workplaces. Accordingly, this policy should not be construed to excuse personnel errors.

(e) The limitations on remedies under section 234C will be implemented as follows:

(1) DOE may assess civil penalties of up to $70,000 per violation per day on contractors (and their subcontractors and suppliers) that are indemnified by the Price-Anderson Act, 42 U.S.C. 2210(d). *See* 10 CFR 851.5(a).

(2) DOE may seek contract fee reductions through the contract's *Conditional Payment of Fee* Clause in the Department of Energy Acquisition Regulation (DEAR). *See* 10 CFR 851.4(b); 48 CFR parts 923, 952, 970. Policies for contract fee reductions are not established by this policy statement. The Director and appropriate contracting officers will coordinate their efforts in compliance with the statute. *See* 10 CFR 851.5(b).

(3) For the same violation of a worker safety and health requirement in this part, DOE may pursue either civil penalties (for indemnified contractors and their subcontractors and suppliers) or a contract fee reduction, but not both. *See* 10 CFR 851.5(c).

(4) A ceiling applies to civil penalties assessed on certain contractors specifically listed in 170d. of the Atomic Energy Act, 42 U.S.C. 2282a(d), for activities conducted at specified facilities. For these contractors, the total amount of civil penalties and contract penalties in a fiscal year may not exceed the total amount of fees paid by DOE to that entity in that fiscal year. *See* 10 CFR 851.5(d).

2. Civil Penalty

(a) A civil penalty is a monetary penalty that may be imposed for violations of requirements of this part. *See* 10 CFR 851.5(a). Civil penalties are designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of DOE contractor self-identification, reporting, and correction of violations of the worker safety and health requirements in this part.

(b) Absent mitigating circumstances as described below, or circumstances otherwise warranting the exercise of enforcement discretion by DOE as described in this section, civil penalties will be proposed for Severity Level I and II violations.

(c) DOE will impose different base level penalties considering the severity level of the violation. Table A–1 shows the daily base civil penalties for the various categories of severity levels. However, as described below in section IX, paragraph b.3, the imposition of civil penalties will also take into account the gravity, circumstances, and extent of the violation or violations and, with respect to the violator, any history of prior similar violations and the degree of culpability and knowledge.

(d) Enforcement personnel will use risk-based criteria to assist the Director in determining appropriate civil penalties for violations found during investigations and inspections.

(e) Regarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty be such that it puts a DOE contractor out of business. Contract termination, rather than civil penalties, is used when the intent is to terminate these activities. The deterrent effect of civil penalties is best served when the amount of such penalties takes this factor into account. However, DOE will evaluate the relationship of affiliated entities to the contractor (such as parent corporations) when the contractor asserts that it cannot pay the proposed penalty.

(f) DOE will review each case on its own merits and adjust the base civil penalty values upward or downward. As indicated below, Table A–1 identifies the daily base civil penalty values for different severity levels. After considering all relevant circumstances, civil penalties may be adjusted up or down based on the mitigating or aggravating factors described later in this section. In no instance will a civil penalty for any one violation exceed the statutory limit of $70,000 per day. In cases where the DOE contractor had knowledge of a violation and has not reported it to DOE and taken corrective action despite an opportunity to do so, DOE will consider utilizing its per day civil penalty authority. Further, as described in this section, the duration of a violation will be taken into account in adjusting the base civil penalty.

TABLE A–1.—SEVERITY LEVEL BASE CIVIL PENALTIES

Severity level	Base civil penalty amount (Percentage of maximum per violation per day)
I	100
II	50

3. Adjustment Factors

(a) DOE may reduce a penalty based on mitigating circumstances or increase a penalty based on aggravating circumstances. DOE's enforcement program is not an end in itself, but a means to achieve compliance with the worker safety and health requirements in this part. Civil penalties are intended to emphasize the importance of

compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of violations of the worker safety and health requirements in this part by the DOE contractors themselves rather than by DOE, and the prompt correction of any violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance with the worker safety and health requirements in this part. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting, and prompt correction of conditions that may constitute, or lead to, violations of the worker safety and health requirements in this part, before, rather than after, DOE has identified such violations. Thus, DOE contractors should almost always be aware of worker safety and health noncompliances before they are discovered by DOE. Obviously, worker safety and health is enhanced if noncompliances are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a noncompliance until later, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of worker safety and health-related noncompliances by DOE contractors has the added benefit of allowing information that could prevent such noncompliances at other facilities in the DOE complex to be shared with other appropriate DOE contractors.

(b) Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting, and prompt correction of conditions which constitute, or could lead to, violations of the worker safety and health requirements. Thus, the civil penalty may be reduced for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

(c) On the other hand, ineffective programs for problem identification and correction are aggravating circumstances and may increase the penalty amount. Thus, for example, where a contractor fails to disclose and promptly correct violations of which it was aware or should have been aware, substantial civil penalties are warranted and may be sought, including the assessment of civil penalties for continuing violations on a per day basis.

(d) Further, in cases involving factors of willfulness, repeated violations, death, serious injury, patterns of systemic violations, DOE-identified flagrant violations, repeated poor performance in an area of concern, or serious breakdown in management controls, DOE intends to apply its full statutory enforcement authority where such action is warranted.

(e) Additionally, adjustment to the amount of civil penalty will be dependent, in part, on the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent violations will be viewed differently from those in which there is gross negligence, deception, or willfulness. In addition to the severity of the underlying violation and level of culpability involved, DOE will also consider the position, training and experience of those involved in the violation. Thus, for example, a violation may be deemed to be more significant if a senior manager of an organization is involved rather than a foreman or non-supervisory employee.

(f) Other factors that will be considered in determining the civil penalty amount are the duration of the violation (how long the condition has presented a potential exposure to workers), the extent of the condition (number of instances of the violation), the frequency of the exposure (how often workers are exposed), the proximity of the workers to the exposure, and the past history of similar violations.

(g) DOE expects contractors to provide full, complete, timely, and accurate information and reports. Accordingly, the penalty amount for a violation involving either a failure to make a required report or notification to the DOE or an untimely report or notification, will be based upon the circumstances surrounding the matter that should have been reported. A contractor will not normally be cited for a failure to report a condition or event unless the contractor was aware or should have been aware of the condition or event that it failed to report.

4. Identification and Reporting

Reduction of up to 50% of the base civil penalty shown in Table A–1 may be given when a DOE contractor identifies the violation and promptly reports the violation to the DOE. Consideration will be given to, among other things, the opportunity available to discover the violation, the ease of discovery and the promptness and completeness of any required report. No consideration will be given to a reduction in penalty if the DOE contractor does not take prompt action to report the problem to DOE upon discovery, or if the immediate actions necessary to restore compliance with the worker safety and health requirements are not taken.

5. Self-Identification and Tracking Systems

(a) DOE strongly encourages contractors to self-identify noncompliances with the worker safety and health requirements before the noncompliances lead to a string of similar and potentially more significant events or consequences. When a contractor identifies a noncompliance, DOE will normally allow a reduction in the amount of civil penalties, unless prior opportunities existed for contractors to identify the noncompliance. DOE will normally not allow a reduction in civil penalties for self-identification if significant DOE intervention was required to induce the contractor to report a noncompliance.

(b) Self-identification of a noncompliance is possibly the single most important factor in considering a reduction in the civil penalty amount. Consideration of self-identification is linked to, among other things, whether prior opportunities existed to discover the violation, and if so, the age and number of such opportunities; the extent to which proper contractor controls should have identified or prevented the violation; whether discovery of the violation resulted from a contractor's self-monitoring activity; the extent of DOE involvement in discovering the violation or in prompting the contractor to identify the violation; and the promptness and completeness of any required report. Self-identification is also considered by DOE in deciding whether to pursue an investigation.

(c) DOE will use the voluntary Noncompliance Tracking System (NTS) which allows contractors to elect to report noncompliances. In the guidance document supporting the NTS, DOE will establish reporting thresholds for reporting noncompliances of potentially greater worker safety and health significance into the NTS. Contractors are expected, however, to use their own self-tracking systems to track noncompliances below the reporting threshold. This self-tracking is considered to be acceptable self-reporting as long as DOE has access to the contractor's system and the contractor's system notes the item as a noncompliance with a DOE safety and health requirement. For noncompliances that are below the NTS reportability thresholds, DOE will credit contractor self-tracking as representing self-reporting. If an item is not reported in NTS but only tracked in the contractor's system and DOE subsequently determines that the noncompliance was significantly mischaracterized, DOE will not credit the internal tracking as representing appropriate self-reporting.

6. Self-Disclosing Events

(a) DOE expects contractors to demonstrate acceptance of responsibility for worker safety and health by proactively identifying noncompliances. When the occurrence of an event discloses noncompliances that the contractor could have or should have identified before the event, DOE will not generally reduce civil penalties for self-identification, even if the underlying noncompliances were reported to DOE. In deciding whether to reduce any civil penalty proposed for violations revealed by the occurrence of a self-disclosing event, DOE will consider the ease with which a contractor could have discovered the noncompliance and the prior opportunities that existed to discover the noncompliance. If a contractor simply reacts to events that disclose potentially significant consequences or downplays noncompliances which did not result in significant consequences to worker safety and health, such contractor actions do not constitute the type of proactive behavior necessary to prevent significant events from occurring and thereby to improve worker safety and health.

(b) The key test is whether the contractor reasonably could have detected any of the underlying noncompliances that contributed to the event. Examples of events that provide opportunities to identify noncompliances include, but are not limited to:

(1) Prior notifications of potential problems such as those from DOE operational experience publications or vendor equipment deficiency reports;

(2) Normal surveillance, quality assurance performance assessments, and post-maintenance testing;

(3) Readily observable parameter trends; and

(4) Contractor employee or DOE observations of potential worker safety and health problems.

(c) Failure to utilize these types of events and activities to address noncompliances may result in higher civil penalty assessments or a DOE decision not to reduce civil penalty amounts.

(d) Alternatively, if, following a self-disclosing event, DOE finds that the contractor's processes and procedures were adequate and the contractor's personnel generally behaved in a manner consistent with the contractor's processes and procedures, DOE could conclude that the contractor could not have been reasonably expected to find the single noncompliance that led to the event and thus, might allow a reduction in civil penalties.

7. Corrective Action To Prevent Recurrence

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to identify root cause and prevent recurrence, may result in an increase or decrease in the base civil penalty shown in Table A–1. For example, appropriate corrective action may result in DOE's reducing the proposed civil penalty up to 50% from the base value shown in Table A–1. On the other hand, the civil penalty may be increased if initiation of corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor, consideration will be given to, among other things, the appropriateness, timeliness and degree of initiative associated with the corrective action. The comprehensiveness of the corrective action will also be considered, taking into account factors such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

8. DOE's Contribution to a Violation

There may be circumstances in which a violation of a DOE worker safety and health requirement results, in part or entirely, from a direction given by DOE personnel to a DOE contractor to either take or forbear from taking an action at a DOE facility. In such cases, DOE may refrain from issuing an NOV, or may mitigate, either partially or entirely, any proposed civil penalty, provided that the direction upon which the DOE contractor relied is documented in writing, contemporaneously with the direction. It should be emphasized, however, that pursuant to 10 CFR 851.7, interpretative ruling of a requirement of this part must be issued in accordance with the provisions of 851.7 to be binding. Further, as discussed above in this policy statement, lack of funding by itself will not be considered as a mitigating factor in enforcement actions.

9. Exercise of Discretion

Because DOE wants to encourage and support DOE contractor initiative for prompt self-identification, reporting and correction of noncompliances, DOE may exercise discretion as follows:

(a) In accordance with the previous discussion, DOE may refrain from issuing a civil penalty for a violation that meets all of the following criteria:

(1) The violation is promptly identified and reported to DOE before DOE learns of it or the violation is identified by a DOE independent assessment, inspection or other formal program effort.

(2) The violation is not willful or is not a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

(3) The DOE contractor, upon discovery of the violation, has taken or begun to take prompt and appropriate action to correct the violation.

(4) The DOE contractor has taken, or has agreed to take, remedial action satisfactory to DOE to preclude recurrence of the violation and the underlying conditions that caused it.

(b) DOE will not issue a Notice of Violation for cases in which the violation discovered by the DOE contractor cannot reasonably be linked to the conduct of that contractor in the design, construction or operation of the DOE facility involved, provided that prompt and appropriate action is taken by the DOE contractor upon identification of the past violation to report to DOE and remedy the problem.

(c) In situations where corrective actions have been completed before termination of an inspection or assessment, a formal response from the contractor is not required and the inspection report serves to document the violation and the corrective action. However, in all instances, the contractor is required to report the noncompliance through established reporting mechanisms so the noncompliance and any corrective actions can be properly tracked and monitored.

(d) If DOE initiates an enforcement action for a violation, and as part of the corrective action for that violation, the DOE contractor identifies other examples of the violation with the same root cause, DOE may refrain from initiating an additional enforcement action. In determining whether to exercise this discretion, DOE will consider whether the DOE contractor acted reasonably and in a timely manner appropriate to the severity of the initial violation, the comprehensiveness of the corrective action, whether the matter was reported, and whether the additional violation(s) substantially change the significance or character of the concern arising out of the initial violation.

(e) The preceding paragraphs are examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or Notice of Violation issued when, in DOE's judgment, such action is warranted.

X. Inaccurate and Incomplete Information

(a) A violation of the worker safety and health requirements to provide complete and accurate information to DOE, 10 CFR 851.40, can result in the full range of enforcement sanctions, depending upon the circumstances of the particular case and consideration of the factors discussed in this section. Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a DOE contractor normally will be categorized based on the guidance in section IX, "Enforcement Actions."

(b) DOE recognizes that oral information may in some situations be inherently less reliable than written submittals because of the absence of an opportunity for reflection and management review. However, DOE must be able to rely on oral communications from officials of DOE contractors concerning significant information. In determining whether to take enforcement action for an oral statement, consideration will be given to such factors as:

(1) The degree of knowledge that the communicator should have had regarding the matter in view of his or her position, training, and experience;

(2) The opportunity and time available prior to the communication to assure the accuracy or completeness of the information;

(3) The degree of intent or negligence, if any, involved;

(4) The formality of the communication;

(5) The reasonableness of DOE reliance on the information;

(6) The importance of the information that was wrong or not provided; and

(7) The reasonableness of the explanation for not providing complete and accurate information.

(c) Absent gross negligence or willfulness, an incomplete or inaccurate oral statement normally will not be subject to enforcement action unless it involves significant information provided by an official of a DOE contractor. However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to DOE by an official of a DOE contractor or others on behalf of the DOE contractor, if a record was made of the oral information and provided to the DOE contractor thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the DOE contractor and was not subsequently corrected in a timely manner.

(d) When a DOE contractor has corrected inaccurate or incomplete information, the decision to issue a citation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether DOE or the DOE contractor identified the problem with the communication, and whether DOE relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the DOE contractor prior to reliance by DOE, or before DOE raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after DOE relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected.

(e) If the initial submission was accurate when made but later turns out to be

erroneous because of newly discovered information or advances in technology, a citation normally would not be appropriate if, when the new information became available, the initial submission was promptly corrected.

(f) The failure to correct inaccurate or incomplete information that the DOE contractor does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, an unintentionally inaccurate or incomplete submission may be treated as a more severe matter if a DOE contractor later determines that the initial submission was in error and does not promptly correct it or if there were clear opportunities to identify the error.

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Part III

Department of Housing and Urban Development

24 CFR Parts 91 and 570
Consolidated Plan Revisions and Updates; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 91 and 570

[Docket No. FR–4923–F–02]

RIN 2501–AD07

Consolidated Plan Revisions and Updates

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule.

SUMMARY: This rule makes streamlining and clarifying changes to the consolidated plan regulations of state and local governments so that the plans are more results-oriented and useful to communities in assessing their own progress toward addressing the problems of low-income areas. The rule also eliminates obsolete and redundant provisions and makes other changes that conform these regulations to HUD's public housing regulations that govern the Public Housing Agency (PHA) Plan. A consolidated plan is a document that jurisdictions submit to HUD if they receive funding under any of HUD's Community Planning and Development formula grant programs. The consolidated plan also serves as the jurisdiction's planning document for the use of the funds received under these programs.

DATES: *Effective Date:* March 13, 2006.

FOR FURTHER INFORMATION CONTACT: Salvatore Sclafani, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7240, Washington, DC 20410–7000. Telephone: (202) 708–1817. (This is not a toll-free number.) Individuals with hearing and speech impairments may contact this telephone number through the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On December 30, 2004, HUD published the proposed rule to update and streamline the consolidated plan (69 FR 78830). The rule built on the existing framework that established the consolidated plan as a collaborative process whereby a community establishes a unified plan of housing and community development actions. That framework gave states and local governments the flexibility to use existing plans and strategies to help citizens understand the jurisdiction's priority needs, and assess the jurisdiction's progress toward meeting identified goals and objectives through measurable indicators.

The proposed rule resulted from an extensive consultation process that involved stakeholders representing the interests of state and local governments and low-income persons. In Fiscal Year (FY) 2002, the President's Management Agenda directed HUD to work with local stakeholders to streamline the consolidated plan by making it more results-oriented and useful to communities in assessing their own progress toward addressing the problems of low-income areas. To launch this activity, several HUD Office of Community Planning and Development (CPD) field offices held focus group sessions with grantees and other stakeholders in February 2002 to discuss ways to streamline the consolidated plan and improve performance measurement. On March 14, 2002, CPD convened a national planning meeting to introduce the concept of the Consolidated Plan Improvement Initiative. In attendance were public interest groups, grantees, other stakeholders, along with staff from HUD Headquarters and field offices, and from the Office of Management and Budget (OMB).

At a meeting of these stakeholders, participants agreed that addressing the issues of streamlining and performance measurement would be best served by small working groups that represent the full range of people involved in and affected by the consolidated plan, including grantee practitioners, public interest groups, HUD staff, and other stakeholders. Six working groups were created to assess alternative planning requirements, examine and suggest performance measures, and identify communities that would be willing to test pilots of alternative planning procedures. The Department carefully considered ideas generated by the working groups concerning alternative planning requirements and suggestions for improving the consolidated plan. Representatives from the following national groups participated in the working groups: Council of State Community Development Agencies, National Community Development Association, National Association for County, Community and Economic Development, National Association of Housing and Redevelopment Officials, and National Low Income Housing Coalition.

Alternative planning procedures were tested by representatives of state and local governments that participated in eight pilots. One pilot looked at streamlining the consolidated plan by referencing existing documents to avoid requiring redundant information. Another pilot evaluated alternative means of satisfying non-housing community development plan requirements. A third pilot addressed alternative formats for submission of consolidated plans, action plans, and performance reporting. A fourth pilot explored ways to enhance the citizen participation process. A fifth pilot involved development and use of templates. The sixth pilot involved coordination of consolidated plan and PHA plan. A seventh pilot explored the development and review of tools to submit consolidated plans, track results, and report performance. An eighth pilot documented useful practices for streamlining and performance measurement. An analysis of these pilots helped HUD determine how the consolidated planning process and regulatory requirements might be streamlined, made more results-oriented, and ultimately made more useful to communities in addressing the needs of their low-income residents and areas.

This rule also conformed the consolidated plan regulations to sections 568 and 583 of the Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105–276, 112 Stat. 2461, approved October 21, 1998, codified at 42 U.S.C. 12705). Those sections required state and local consolidated plans to describe the manner in which the jurisdiction will help address the needs of public housing, and also mandated that a consolidated plan from a state or unit of general local government in which any troubled PHA is located must include a description of the manner in which the state or local government will provide financial or other assistance to remove the PHA's troubled designation. Those sections of the rule also made certain other conforming amendments and clarification changes.

II. This Final Rule

This final rule takes into consideration the public comments received on the December 30, 2004, proposed rule. After reviewing the public comments, the significant changes described below have been incorporated into the final rule.

A. Executive Summary

The Department believes an executive summary is useful and has included references to this requirement at §§ 91.200, 91.220, 91.300, and 91.320. The final rule does not specify the precise content or format. However, the executive summary must include a summary of objectives and outcomes

identified in the consolidated plan, and an evaluation of past performance.

B. Chronic Homelessness

The references to including any persons that are chronically homeless in the inventory of facilities and services at § 91.210 and § 91.310 have been modified to make it clear that a separate inventory identifying chronic homeless facilities and services is not required. Rather, the inventory should include an estimate of the percentage or number of beds and supportive services programs that are serving people that are chronically homeless, to the extent that information is available to the jurisdiction.

C. Relative Allocation Priorities

The Department has decided to eliminate the requirement regarding relative allocation priorities and to allow jurisdictions to designate one. The regulation has also been revised to make it clear that the jurisdiction must describe the relationship between the allocation priorities and the extent of need given to each category of priority needs, particularly among extremely low-income, low-income, and moderate-income households. The plan should be explicit about what the jurisdiction plans to do with formula grant funds in the context of their larger strategy.

D. Objectives and Outcomes

The consolidated plan's strategy requirements are modified to take into account the proposed performance measurement framework that was developed by a working group that included representatives from national groups, including the Council of State Community Development Agencies; the National Association for County, Community and Economic Development; and the National Community Development Association. Changes have been made to § 91.215 and § 91.315 indicating that these requirements will be provided in accordance with guidance issued by HUD.

E. Abandoned Buildings

Data regarding the number of vacant or abandoned buildings should be included in the Housing Market Analysis section of the consolidated plan rather than in the section dealing with the non-housing community development plan. The estimate of the number of vacant or abandoned buildings and whether units are available that are suitable for rehabilitation should be provided to the extent information is available.

F. Resources

The Department agreed that local jurisdictions should include Low-Income Housing Tax Credits (LIHTCs) among the federal resources discussed in the consolidated plan, even though HUD does not administer them. The importance of the LIHTC program to jurisdictions cannot be overstated as a means of accomplishing the goals of a jurisdiction to provide housing for extremely low-income and low-income households.

III. Summary of Public Comments

The comment period for the proposed rule closed on January 31, 2005. HUD received 53 comments, including 20 from local governments or groups representing their interests, 22 from states or groups representing their interests, five from groups representing the interests of homeless or low-income persons, one from an organization representing a coalition of organizations advocating for the interests of persons with disabilities, two from trade associations representing home builders and manufactured housing, and three from individuals. Low-income advocates, cities, and states often expressed opposing views on the rule.

For example, one of the groups representing low-income persons welcomed improvements in the rule that increased the emphasis on accountability and results, but indicated that many consolidated plans fail to demonstrate how funds allocated by the plan address the needs of extremely low-income persons. That group indicated that federal funds should be used to solve the most pressing problems and that failure to link spending decisions to priority needs should be a factor that HUD can use to disapprove a plan. On the other hand, one of the groups representing local governments thought some of the proposed changes to the rule went beyond the current statute and were too prescriptive, particularly in the area of assigning quantifiers to priority needs and requiring grantees to estimate the amount of funding in target areas. That group expressed concern that HUD might use these reports to penalize communities for not reaching their goals. Another group representing local governments said that requiring jurisdictions to address the chronically homeless in the strategic plan and to include specific action steps to end chronic homelessness in the action plan diminished the consolidated plan's ability to be a "concise" and "streamlined" document. This new requirement would ask CPD formula programs to be accountable for yet another objective, making it less targeted and less streamlined. One state suggested that HUD, by focusing on trying to influence grantees to use their resources on assisting the homeless, especially the chronic homeless, was violating both the intent of the consolidated plan as well as Congress's directions to HUD that prevents HUD from conveying federal housing priorities to local governments.

IV. Summary of Public Comments From Local Governments and Interest Groups

A. Concise Action-Oriented Management Tool

Groups representing local governments expressed support for making the consolidated plan a concise, action-oriented management tool. One group representing local governments was pleased that some concerns were addressed in the proposed rule but was disappointed that the "revisions and updates" appeared to have usurped the "streamlining effort" in favor of additional requirements, particularly in the area of assigning quantifiers to priority needs and requiring grantees to estimate the amount of funding they will use in target areas. Another group representing local governments expressed support for the Consolidated Plan Management Process (CPMP) Tool as part of the streamlining effort, but felt the Tool did not produce a consumer-friendly document that allowed community residents to understand the goals and achievements of their jurisdictions' federal grant programs. The group urged HUD to amend the CPMP Tool so that it generates a document that more simply communicates program goals. One county cited the addition or expansion of required narratives on homelessness and public housing as prime examples that made the process more burdensome and questioned why it was necessary to repeat information contained in other HUD documents in consolidated plans. It suggested that it would be far simpler to cross-reference the pages of the relevant document where the information could be found. One large city suggested that HUD permit localities with PHAs the option of cross-referencing materials contained in their approved PHA Plan or other similar documents. Two other cities also indicated that it was redundant to require jurisdictions to include needs identified in the PHA Plan.

HUD response: The final rule provides more flexibility while also asking for more accountability in terms of the ability to track results. With

respect to the CPMP Tool, the Department plans to revise the tool so that it generates a document that more simply communicates program goals. The Department will also allow jurisdictions the option to cross-reference pages of relevant documents like the PHA Plan and Continuum of Care Plan in order to streamline the consolidated plan and make the process less burdensome. The Department will issue supplemental guidance on how local jurisdictions can implement some of these requirements.

B. Citizen Participation

Representatives of county officials and local governments supported the language at § 91.1 and § 91.105 to include a broader list of stakeholders in the consolidated planning process and encouraging jurisdictions to explore alternative public involvement techniques such as focus groups and use of the Internet. A national group representing homebuilders also expressed support for widening the participation of stakeholders, which it suggested would help foster more public-private partnerships and leverage more community resources. Several cities and counties indicated to HUD that they had already undertaken efforts to broaden stakeholder involvement. One city, however, commented that broadening the scope of the required section would be a time-consuming administrative burden and should be deleted.

HUD response: The Department has determined that including a broader list of stakeholders in the process and encouraging alternative public involvement techniques would not significantly increase the administrative burden.

Executive Summary. The preamble of the proposed rule invited comment on whether an executive summary would be a useful tool for both citizens and jurisdictions. The preamble also indicated that HUD was particularly interested in comments on what specific information should be included in an executive summary and whether the benefit of an executive summary would outweigh the burden. Eleven local governments and one of the groups representing their interests expressed support for an executive summary, thought it might be useful, and indicated that many communities currently use one. Another group representing local governments, however, did not support an executive summary as a way of simplifying the information for the general public. Instead, it suggested that HUD reduce the scope and administrative burden of the consolidated plan itself, to what would essentially be an executive summary and argued an executive summary would add more work. Some commenters that support an executive summary indicated that the summary would be a powerful and meaningful document only if jurisdictions were allowed to present it in a format that was most consistent with local citizen participation and program management processes. Most local governments felt that because each jurisdiction knew the most effective way to provide that information to citizens and governing bodies, HUD should not be mandating the format. A group representing low-income housing advocates also thought a well-written executive summary would be a useful device for citizen participation and expressed support for maintaining citizen participation requirements and continuing to seek input on how to make citizen participation as effective and meaningful as possible. One local government indicated that it made extended use of an executive summary not only in its five-year plan and annual action plan but also in its Consolidated Annual Performance and Evaluation Report. The city suggested that the executive summary include not only short-term and long-term performance goals and the major activities and projects a city plans to fund, but also provide a strong evaluation of the previous year's results, information on targeting of consolidated plan funds, and information on how these funds directly affected neighborhoods. Three cities expressed reservations about an executive summary. One maintained that the strategic plan should be well organized so that it functions as an executive summary. Another indicated that an executive summary would become a burden to both citizens and jurisdictions unless other changes were made that condense or consolidate the changes. A third said it should be left to the option of grantees because, in trying an executive summary format in the past, the city found it raised more questions from readers than if one had not been written.

HUD response: The Department believes an executive summary is useful and has included references to this requirement at §§ 91.200, 91.220, 91.300, and 91.320. The final rule does not specify the precise content or format. However, the executive summary must include a summary of objectives and outcomes identified in the consolidated plan, and an evaluation of past performance.

C. Clarification of Chronic Homelessness

While representatives of county officials and local governments supported the goal of ending chronic homelessness, they cited the difficulty of identifying and tracking transient individuals and families. In addition, they cited the difficulty of asking CPD formula programs to be accountable for yet another objective, thereby making the plans less targeted and streamlined. One group expressed a concern that the definition of chronic homelessness was too broad and difficult to determine in most cases, and impossible in many. Several communities suggested expanding the definition to include families, while others indicated that funds were too limited. Others cited the expansion in the number of narratives dealing with chronic homelessness as burdensome and the need for a more explicit linkage with the Continuum of Care process. One city stated that a separate inventory identifying chronic homeless facilities was not needed, and that instead, it was the programs and priorities that should be identified.

HUD response: The Department recognizes that jurisdictions may find it difficult to maintain documentation for a chronically homeless person and has developed technical assistance guides that describe methods for identifying and counting the homeless. These are available at: *http://www.hud.gov/offices/cpd/homeless/hmis/assistance/index.cfm#materials.* The Department believes there should be a more explicit linkage with the Continuum of Care process, and the definition of chronic homelessness is identical with the definition that is used in that process. The 2006 consolidated plan update for the city of Seattle, which is available at: *http://www.cityofseattle.net/humanservices/director/consolidatedplan/default.htm,* provides an example of the linkage between the Continuum of Care process, the King County/Seattle Ten Year Plan to End Homelessness, and the Consolidated Plan. In addition, the reference to including any persons that are chronically homeless in the inventory of facilities and services at § 91.210 has been modified to make it clear that a separate inventory identifying chronic homeless facilities and services is not required. Rather, the inventory should include an estimate of the percentage or number of beds and supportive services programs that are serving people that are chronically homeless, to the extent that information on those subjects is available to the jurisdiction. With regard to the term "disabling condition," the

term applies specifically to the sections of the consolidated plan that relate exclusively to chronically homeless people.

D. Removal of Barriers to Affordable Housing

One representative of the local governments agreed with the constructiveness of working to remove barriers to affordable housing development. However, the representative did not think the HUD–27300 Form would be useful in collecting information on regulatory barriers, since it did not ask specific-enough questions about regulatory barriers so that the results could be aggregated nationally. Two cities commented that the additional language contained in § 91.220(j), which specified annual actions to address affordable housing barriers, was too restrictive and should be eliminated. While recognizing the importance of the topic, two other local jurisdictions opposed adding additional requirements and cited the complexity of the issue.

HUD response: The Department believes that the removal of barriers to affordable housing is an important issue and has decided to include the additional clarifying language with the understanding that it is not imposing a new requirement.

E. Clarification of Strategic Plan Provisions

Priorities and Priority Needs. Representatives of county officials, local governments, and most commenters did not find the current method of assigning "relative" allocation priorities of "high," "medium," and "low" particularly useful. Some large cities suggested making it optional or assigning a federal, federal/local, local, or no-priority designation to more clearly communicate how a community intends to fund a need and with what resources (which could tie into the proposed measurement framework). One city argued that the designation should be linked not to the funding, but to whether the need is high, medium, or low. Another city indicated that only those needs that will be funded should be included in the consolidated plan, and that an amendment could be made with the new priorities if priorities changed later.

HUD response: The Department has decided to eliminate the requirement regarding relative allocation priorities but to allow jurisdictions to designate one. The regulation has also been revised to make it clear that the jurisdiction must describe the relationship between the allocation priorities and the extent of need given to each category of priority needs, particularly among extremely low-income, low-income, and moderate-income households. The consolidated plan should be explicit about what the jurisdiction intends to do with formula grant funds in the context of their larger strategy. For example, jurisdictions may wish to indicate that they intend to allocate formula grant funds for gap financing, while using tenant-based rental assistance or vouchers for low-income households that require a deeper subsidy. The rationale for establishing the allocation priorities should flow logically from the analysis. As part of the analysis, the jurisdiction must also identify any obstacles to addressing underserved needs.

Summary of objectives. A number of commenters indicated that the consolidated plan's strategy requirements should be influenced by a proposed performance measurement framework that has been developed by a working group that included representatives from the Council of State Community Development Agencies; the National Association for County, Community and Economic Development; and the National Community Development Association. HUD has been working with the working group to develop workable outcome measures that will be acceptable to the Department and its grantees.

HUD response: Changes are being made to § 91.215(a)(4) indicating that these requirements would be provided in accordance with guidance issued by HUD.

Non-homeless special needs. One national group representing persons with disabilities was concerned that the reference to persons with disabilities in the priority housing needs table is only to those persons who may require housing with supportive services. The group recommended the reference to persons with disabilities in the priority housing needs table not be limited to persons that may require housing with supportive services but to all people with disabilities, since many people with disabilities do not need supportive housing but do need decent, safe, and affordable housing. The group was also concerned that the proposed rule did not refer to the President's New Freedom Initiative, a nationwide effort that encourages both the removal of barriers to community living for people with disabilities, and the integration of persons with disabilities into local communities. Another group expressed a concern that the proposed rule did not promote integration between the consolidated plan and the Analysis of Impediments (AI) to Affirmatively Furthering Fair Housing (AFFH).

HUD response: The Department agrees that the reference to persons with disabilities in the priority needs table should not be limited to persons that require supportive services, and will make the appropriate changes to the consolidated plan guidelines and instructions. With regard to the President's New Freedom Initiative, the consolidated plan rule requires communities to conduct an analysis to identify impediments to fair housing choice and take appropriate actions to overcome the effects of any impediments. In addition, the Department issued a notice (CPD Notice 05–03) addressing the President's New Freedom Initiative. This notice, which is available on HUD's Web site *http://www.hud.gov/offices/cpd/lawsregs/notices/2005/index.cfm,* encourages communities to develop "comprehensive, effective working plans" aimed at providing services to individuals with disabilities in the most integrated settings possible.

With regard to the second comment, this final rule focuses on streamlining the consolidated plan and making it more results-oriented in accordance with the President's Management Agenda. The final rule does not address the topic of affirmatively furthering fair housing that the Department believes merits separate consideration and consultation with stakeholders. The Department is considering a proposed rule that would invite comments on better ways to integrate the Consolidated Plan and the Analysis of Impediments to AFFH. The Department is also considering issuing guidance dealing with AFFH and other fair housing issues.

Dollars to address. Almost all commenters agreed with the proposal to eliminate the requirement to quantify "dollars to address" in the non-housing community development plan. One large city, however, argued for retention of the requirement to quantify "dollars to address" non-housing community development needs. It argued that the estimated "dollars to address" has a practical utility for understanding the scope of unmet needs.

HUD response: The Department has decided to eliminate the requirement to quantify "dollars to address" in the non-housing community development plan, but to allow jurisdictions to provide an estimate of "dollars to address" unmet needs or to identify estimated dollars that will be targeted to address the need.

Abandoned Buildings. Most commenters said they did not

understand the intention behind mandating jurisdictions to estimate the number of abandoned buildings and that there appeared to be many logistical problems with this requirement, including definitional and data collection issues. One commenter indicated that the requirement to estimate the number of abandoned buildings in the non-housing community development plan would be redundant because the Housing Market Analysis of the plan includes data on the number of abandoned buildings as part of its calculation of the housing vacancy rate, and because the description of the condition of housing includes the number of abandoned (residential) buildings. Others indicated that collecting this information would be burdensome, unless there were specific plans for a site.

HUD response: The Department agrees with the comment that this provision would be redundant because the Housing Market Analysis section of the consolidated plan should include both an estimate of the number of vacant or abandoned buildings as part of its calculation of the housing vacancy rate and the description of the condition of housing. Therefore, the Department has determined that data regarding the number of vacant or abandoned buildings should be included in the Housing Market Analysis section of the consolidated plan instead of the section dealing with the non-housing community development plan. The estimate of the number of vacant or abandoned buildings and whether units in the building are suitable for rehabilitation should be provided to the extent information is available.

For jurisdictions that wish to use it, HUD will make data available from the U.S. Postal Service on the number of vacant addresses at the census tract level, and plans to provide updated data on the number of vacant addresses annually. The U.S. Postal Service collects data on addresses that are vacant 90 days or longer. The Department finds vacant and abandoned buildings depress property values, reduce tax revenues, attract crime, and serve as a good measure of neighborhood blight. Vacant properties also degrade the quality of life for remaining residents. A large number of vacant buildings in a neighborhood increases the likelihood that property values will continue to decline and that further abandonment will persist.

Lead-based Paint Hazards. A national organization advocating solutions to childhood lead poisoning commented that jurisdictions should describe how their plan for the reduction of lead-based hazards will increase access to housing without such health hazards. In addition, one commenter on HUD regulations that address barriers to the production and rehabilitation of affordable housing stated that HUD should clarify that the consolidated plan should describe the relationship between plans for reducing lead hazards and the extent of lead poisoning and lead hazards.

HUD response: The Department agrees and has modified § 91.215(i) accordingly. In addition, the description of the consultation process described in § 91.200 is being modified to include a reference to consultations with state or local health and child welfare agencies regarding lead-based paint hazards conducted in accordance with § 91.100(a)(3).

F. Action Plan

Federal resources. With regard to describing resources, one city expressed concern that the clarified term "federal resources" included Section 8 resources made available to the jurisdictions and competitive McKinney-Vento Homeless Assistance Act funds. The city maintained that by including these funds as resources in the action plan, it might be inferred that these funds are available for allocation through the consolidated plan process, which is not the case. Another city argued that an estimate of Section 8 funding should be contained in the PHA's annual plan and that the best a jurisdiction could do for a tabulation of competitive McKinney-Vento resources would be an estimate. Another city indicated that only those jurisdictions that administer Section 8 vouchers and public housing programs should be required to report on the vast breadth of the public housing requirements listed in the consolidated plan. Therefore, jurisdictions should be mandated to report on public housing requirements on a more limited, scaled-down basis in the consolidated plan. This would help jurisdictions that might choose to fund an occasional public housing project without duplicating the reporting requirements that already exist in the Public Housing Agency Plan.

HUD response: The Department recognizes that Section 8 funds and McKinney-Vento Homeless Assistance funds may be administered by other entities. The regulation only requires the jurisdiction to identify these programs as sources of funding.

A national group representing homebuilders and one representing low-income housing advocates said it would also be useful to include expected allocations of LIHTC in its discussion of expected federal resources, even though HUD does not administer the LIHTC program. They pointed out that the importance of the LIHTC program to jurisdictions cannot be overstated and that jurisdictions should consider linking Section 8 rental assistance to LIHTC projects as a means of accomplishing their goals to provide housing for extremely low-income and low-income households.

HUD response: The Department agrees that LIHTCs should be listed among the federal resources.

Summary of annual objectives. One representative of the local governments expressed support for the provision requiring jurisdictions to submit a summary of annual objectives and also indicated that most of its members already meet this requirement. One city also asked for clarification as to whether the annual objectives identified in the action plan were a subset of the specific objectives identified in the strategic plan. Another city thought it was unclear whether this provision would actually enhance the quality, utility, and clarity of the action plan since objectives tend to be broad. Still another city thought the provision was unnecessary since it was addressed by other parts of the plan.

HUD response: The Department believes a summary of annual specific objectives is a useful feature of the action plan since it identifies the subset of specific objectives that jurisdictions expect to achieve during the forthcoming program year.

Activities to be undertaken. One group representing low-income housing advocates recommended that the consolidated plan include a stronger linkage between the priority needs identified in the plan and the action plan. It said jurisdictions should spend federal funds to solve the most pressing problems and that the failure of plans to link spending decisions to priority needs should be one of the factors that HUD considers when it approves a consolidated plan.

HUD response: The Department agrees the consolidated plan must describe the linkage between priority needs identified in the plan and activities that are funded. Section 105(b)(8) of the Cranston-Gonzalez National Affordable Housing Act requires that the plan of the jurisdiction describe how the plan will address housing and homeless needs, describe the reasons for allocation priorities, and identify any obstacles to addressing underserved needs. Since the allocation of resources is described in the action plan, the Department has revised the section of the regulation dealing with

the description of activities to be undertaken by requesting grantees to describe the reasons for their allocation priorities and to identify any obstacles to addressing their underserved needs.

Outcomes. Groups representing local governments expressed support for measuring outcomes and accomplishments in the consolidated plan so that the positive impact of CPD formula programs may be compellingly communicated at the national level. However, one group pointed out that it does not support reporting on outcomes if doing so becomes a means by which HUD uses these reports to penalize communities for not reaching their goals. Planning is not an exact science, and funding levels, lack of viable projects, along with many other factors can determine if goals will be met.

Nine local governments commented on this provision. One large city recommended that HUD modify the provision by permitting localities to demonstrate that they currently provide appropriate housing and community development performance measures through other documents and by enabling these jurisdictions to meet the federal requirement by cross-referencing (*e.g.*, providing the Internet site address for) materials published by the locality. The large city pointed out that requiring detailed outcome measures to somehow be reconfigured to fit the specific parameters of the consolidated plan would lead to additional burdensome accounting without necessarily improving the public's sense of the situation.

Another city agreed that outcome measures should be included. However, the commenter argued that the use of outcome measures to measure the result of each activity was misguided and would result in redundant and duplicative entries. The commenter indicated that outcome measures measure long-term results, such as assessed valuation, crime rates, poverty rates, etc. It was that city's experience that it takes more than one activity to result in a significant change in an outcome measure. The city added that outcome measures should be associated with the achievement of a larger goal such as neighborhood revitalization, homeownership, and employment rates. For example, in its plan. the city could claim that up to ten different activities could be linked to a single outcome such as homeownership rate. The jurisdiction suggested that outcome measures be required to measure stated larger goals, rather than small activities, and then associate activities with each goal. This would eliminate a great deal of confusion and needless paperwork.

Others supported outcome measures, but only if they were implemented in a meaningful way and did not place an undue burden on jurisdictions. Some jurisdictions felt that maximum flexibility must be provided to grantees in determining outcomes based on local program experience and knowledge of current housing and community development needs, and supported development of such outcome indicators from a broad spectrum, with input from residents, city departments, related city agencies, counties, states, other grantees, and non-profit and for-profit organizations. They did not think it necessary that either the Department, or the Office of Management and Budget needed to define national outcome measures. One large city thought that until outcome measures were further developed by the Department and published, it was premature to add this requirement to the rule. Another said it was not able to take a position since HUD had not released its guidance regarding specific outcome measures: It requested that HUD publish a proposed rule on the specific outcome measures rather than issuing guidance in order to allow an opportunity to review and submit comments on an area that would greatly impact the way jurisdictions do business. However, it strongly opposed the insertion of, as burdensome and of no practical or analytical use, a provision at § 91.520 requiring that the performance report "must explain variances between proposed and actual outcomes."

HUD response: The Department has decided to require outcomes in the consolidated plan rule in accordance with guidance to be issued by HUD. Accordingly, it has modified the provision at § 91.520 by requiring that the performance report explain why progress was not made toward meeting goals and objectives. HUD published a notice outlining the framework for a draft performance measurement system for comment in the **Federal Register** on June 10, 2005 (70 FR 34004).

Percentage of funds to target areas. Groups representing local governments expressed concern about this provision and did not understand the relevance of requiring a jurisdiction to estimate the percentage of funds the jurisdiction plans to dedicate to target areas, since at least 70 percent of the distribution of CDBG funds is mandated to be spent on projects that benefit low- and moderate-income persons. While expressing support for funding activities in target areas, one group opposing this requirement indicated that it suggests that HUD is pushing jurisdictions to spend funds in target areas, which also creates the impression that if grantees do not spend funds in target areas, they may be sanctioned or penalized in some manner. The group indicated that using a target area approach in funding activities is a locally determined decision and one that should remain as such.

Eight local governments also commented on this provision. One city suggested that it would be better to require a listing, in the action plan, of any target areas as well as funds and projects dedicated to those target areas. Another indicated that there already is a requirement to provide a description of the geographic distribution of funds and that additional details required in federal regulations usually translate into extra research, documentation, recordkeeping, and reports. Some jurisdictions said they do not have target areas and jurisdictions and should have the flexibility to serve low- and moderate-income clients throughout the jurisdiction. Others urged HUD to make the designation of target areas (and specific objectives for those areas) optional, rather than having the federal government mandate the kind of system to be employed.

HUD response: The Department believes that identification of the percentage of funds a jurisdiction plans to dedicate to target areas will be useful in determining the degree to which activities are being carried out in a concentrated manner.

One-year housing goals. A representative of local governments argued that it is too narrow a requirement if jurisdictions must specify a goal for the number of homeless, non-homeless and special needs families to be assisted by three different categories of housing assistance. When a double breakdown of data like this is required, the numbers become artificial estimates and are confusing to the public. However, the group indicated that setting separate goals for the number of homeless, non-homeless and special needs families to be assisted is useful and would inform the public of the community's priorities. Similarly setting separate goals for the number of households to be served by rent assistance, new construction units, rehab, or acquisition is also good and would inform the public of the community's priorities. Several other cities thought this requirement might be redundant or duplicative of the goals required in the strategic plan.

HUD response: The Department agrees with the point made by the group representing local governments and is clarifying the regulation to require two sets of annual housing goals. One set of

annual goals is for the number of households to be served by rent assistance, new construction units, rehabilitation, or acquisition during the year with funds made available by HUD to the jurisdiction. A second set of annual goals is for the number of homeless, non-homeless, and special needs families to be assisted during the program year with funds made available by HUD to the jurisdiction. The program funds providing the benefits (i.e., CDBG, HOME, HOPWA, ESG) may be from any funding year or combined funding years.

Estimate amount of CDBG funds to benefit low/mod persons. One of the groups representing local governments expressed support for including an estimate of the amount of CDBG funds that would be used for activities benefiting low- and moderate-income persons. Two cities, however, commented that requiring an estimate of the amount of CDBG funds used for activities benefiting low- and moderate-income persons was redundant because the program already requires that at least 70 percent of a jurisdiction's CDBG funding benefit this income group. A group representing low-income advocates, however, indicated that the consolidated plan requires an assessment of the number of extremely low-income, low-income, and moderate-income people who need affordable housing and to whom the jurisdiction will provide affordable housing. It thought it would be incongruous if jurisdictions were not expected to demonstrate how low-income people are actually aided by CDBG funds.

HUD response: The Department believes this provision should be required by the regulation, since Section 104(a)(2) of the Housing and Community Development Act of 1974 requires the jurisdiction's statement of community development and housing activities include the estimated amount of funds proposed to be used for activities that will benefit persons of low- and moderate-income.

G. Submission Requirements

Needs, Market Analysis, and Strategic Plan. One of the groups representing local governments and one local government strongly supported giving jurisdictions the flexibility to submit and update plans in a manner that facilitates orderly program management. A local government indicated that allowing for this flexibility will greatly improve the ability of urban counties to synchronize the consolidated planning process with the 3-year cooperation agreement cycle and other local planning and data collection cycles.

Consolidated Plan Submission. Clarifying changes are made to § 91.15 and § 91.200 identifying both the submissions that make up the component parts of the consolidated plan submission and the sections of the rule that contain the comprehensive housing affordability strategy for local jurisdictions.

H. Public and Assisted Housing

Financial and other assistance for troubled housing. One group representing local governments commented that requirements related to public housing would seem to encumber the consolidated planning process rather than streamline it. Requiring a jurisdiction to "describe the manner in which the jurisdiction will address the needs of public housing and the financial or other assistance the jurisdiction will provide to improve the operations of a public housing agency if that agency is designated as "troubled" is beyond the scope of CPD's formula grant programs and becomes a logistical nightmare for urban counties that have many PHAs within their jurisdictions. Three local jurisdictions also commented on these provisions. One jurisdiction said providing financial or other assistance for troubled PHAs constituted an unfunded mandate, especially to an agency that may not even be an agency of the grant recipient. Two jurisdictions thought it was appropriate to address the needs of public housing. Two jurisdictions also objected to giving HUD the ability to disapprove a plan or risk future funding if a jurisdiction either did not offer assistance or provide information on how it would help a PHA to remove a troubled designation.

HUD response: As indicated in the preamble of the proposed rule, these amendments were made pursuant to the requirements of sections 568 and 583 of the Quality Housing and Work Responsibility Act of 1998 (42 U.S.C. 12705). The statute requires that the consolidated plan of a jurisdiction describe the manner in which the jurisdiction will address the needs of public housing and the financial or other assistance it will provide to improve the operations of a PHA designated as "troubled," in order to remove such designation. The statute also considers the failure to include a description of the manner in which a jurisdiction will provide financial or other assistance to remove a PHA's troubled designation as cause for HUD to disapprove a consolidated plan or determine that one is substantially incomplete. Also, HUD is clarifying that the provision at § 91.500 applies to states as well as units of general local government. Such assistance need not be financial assistance but can include other assistance such as technical assistance provided by the jurisdiction.

V. Summary of Public Comments From State Governments and Interest Groups

A. Concise Action-Oriented Management Tool

A group representing state community development agencies expressed support for HUD's efforts to streamline the consolidated plans and action plans and reduce the administrative burdens on states. However, they argued that several provisions would not streamline the preparation of plans or were inconsistent with the state role as a grantor agency. Among the issues raised were provisions that would require reporting on activities and outcomes that cannot be funded or achieved primarily with the formula grant programs covered by the consolidated plan. For example, state grantees would be required to describe their strategy for "helping homeless persons (especially any persons that are chronically homeless) make the transition to permanent housing and independent living." Several states contended that requiring additional information regarding chronic homelessness, public housing, and outcome measurement would entail considerable additional work for which HUD has committed no additional administrative or planning funds. Several states also indicated that the proposed rule failed to take into account the unique nature of the small cities CDBG program as administered by the states. One state said it would make more sense to include some of the requirements in applications submitted by applicants instead of in the plan submitted to HUD. Some states indicated some of the requirements involving public housing would be redundant since some of this information was already included in local PHA plans. Many states expressed that putting outcome measures in the final rule was premature since more work was needed before this change was implemented.

HUD response: HUD recognizes that the states as grantor agencies have less control over fulfillment of sections of the regulations dealing with annual goals and performance than do local jurisdictions. However, states are expected to provide the information to the extent that they are able to do so. HUD recognizes that states generally do not originate specific projects or activities, but offer programs through which local communities apply to

accomplish specific objectives. These local applications are submitted after the consolidated plan is submitted to HUD and approved. With regard to the provisions dealing with chronic homelessness, this section has been revised to require estimation "to the extent practicable." The information about public housing has been included because it is a comprehensive housing affordability strategy (CHAS) statutory requirement. However, the Department will also allow states the option to cross-reference pages of relevant documents like the PHA plan and Continuum of Care Plan in order to streamline the consolidated plan and make the process less burdensome. Also, the Department may issue supplemental guidance on how states can implement some of these requirements.

B. Citizen Participation

Representatives of state governments recommended that HUD continue to pursue ways that state grantees can use electronic and other forms of input, particularly to help states reach rural populations. In addition, representatives of state governments recommended that HUD allow input from local governments to meet citizen participation requirements, since they are representatives of citizens and are more likely to provide input to states than individual citizens. Several states were in agreement with provisions to include citizens, organizations, businesses, and other stakeholders among those that should be involved in the citizen participation process and exploring alternative public involvement techniques. However, one state objected to adding quantitative ways to measure efforts that encourage citizen participation. One state suggested the section be modified to state that "the citizen participation process should encourage participation of citizens of the jurisdiction, and agencies, organizations, and private for-profit businesses and private non-profit entities that are involved with, or affected by, the programs or activities covered by the consolidated plan." Another state indicated that an analysis and evaluation of performance should be referenced and made available to citizens during the citizen participation process for the annual plan so that citizens and others could view the progress the grantee is making on addressing the identified needs in the strategy.

Executive Summary. The preamble of the proposed rule invited comment on whether an executive summary would be a useful tool for citizens as well as jurisdictions. It also indicated that HUD was particularly interested in comments on what specific information should be included in an executive summary and whether the benefit of an executive summary would outweigh the burden. While some states considered the concept of an executive summary as having some benefit, they said it would be more useful to entitlement communities. Some thought that HUD's intent was to make local citizens aware of programs and activities, but argued that requiring that proposed projects and activities be stated would amount to restating the content of the consolidated plan and thus would hardly be a "summary." Several states suggested that condensing state plans would not be worth the effort and a table of contents would be much more effective and could accomplish the same goal.

HUD response: The Department has determined that including a broader list of stakeholders in the process and encouraging alternative public involvement techniques would not significantly increase the administrative burden. Accordingly, it has modified the section to make it clear that it refers to entities that are involved with or affected by programs covered by the consolidated plan. The Department also believes an executive summary is useful and has included references to this requirement at §§ 91.300 and 91.320. To meet the concerns raised by the commenters, HUD will allow states to determine the format but that the executive summary must include a summary of objectives and outcomes identified in the consolidated plan and an evaluation of past performance.

C. Clarification of Chronic Homelessness

A group representing state community development organizations indicated there were several problems associated with implementing the proposed changes involving chronic homelessness. Its first concern was that the definition of a "chronically homeless person" was far too restrictive and ignored the existence of chronically homeless families, including couples without children and disabled parents with children. Moreover, it expressed concern about the ability of grantees to document either such disabling conditions or the length of time that each individual has been homeless. Such documentation would require, at a minimum, a year's worth of high quality data in the grantee's Homeless Management Information System (HMIS). Also, the proposed addition to include an inventory of all facilities meeting the needs of the chronically homeless is unnecessary from the perspective of factors that may influence the state's method of distribution for the Emergency Shelter Grant program and is impractical at the state level, particularly since the provision does not limit the inventory of facilities to those that have received CDBG funding. One state claimed there was no basis in the statute for the definition of chronic homelessness and that while such priorities are reasonable for making competitive funding decisions, such requirements should not be imposed on the consolidated plan. Another state indicated that the resources for chronically homeless are not expected to be much different than they are for other homeless persons. Several states indicated that the proposed changes regarding the chronic homelessness provide tracking challenges. One state that was in the early stages of building its HMIS indicated that it eventually would be able to extract chronic homeless data from HMIS, but could not do so at present. Further, the chronic homeless definition includes persons who have been homeless at least three times in a year, and most states are not going to have data in their systems to determine whether a household meets that part of the homeless definition. Homeless shelters in small communities have small, usually volunteer staff and don't have time to spend an hour with each homeless person to determine if that person has a disabling condition, nor can they document how often the person has been homeless. The state pointed out that the federal, ten-year Census could not adequately document this and small organizations will have a difficult time providing this information, and the requirement could affect the amount they are funded. On the other hand, another state expressed a concern that the regulations did not include a discussion on "coordinated discharge policy" and asked for more guidance on this issue.

HUD response: In response to these comments, the Department recognizes that states and local governments may find it difficult to maintain documentation for chronically homeless persons. The Department wishes to point out that the CHAS statute requires states and local jurisdictions to describe their strategy on addressing the emergency shelter and transitional housing needs of homeless persons (including a brief inventory of facilities and services that meet such needs). The statute does not limit the description to the projected use of Emergency Shelter Grant funds. However, the Department is modifying the reference to including

any persons that are chronically homeless in the inventory of facilities and services at § 91.310, to make it clear that a separate inventory identifying chronic homeless facilities and services is not required. Rather, the inventory should include an estimate of the percentage or number of beds and supportive services programs that are serving people that are chronically homeless, to the extent that information is available to the state. States are encouraged to use information from their Continuum of Care applications to satisfy this requirement. The existing regulations at 24 CFR 91.310(c) currently require states to describe programs for ensuring that persons returning from mental and physical health institutions receive appropriate supportive housing. The regulations at §§ 91.225 and 91.325 now require states and local jurisdictions to include a certification that they have developed a coordinated discharge policy. Such a policy should include policies and protocols for the discharge of persons from publicly funded institutions or systems of care (such as health care facilities, foster care, or other youth facilities, or correction programs and institutions) in order to prevent such discharge from immediately resulting in homelessness for such persons. HUD will issue supplemental guidance on what elements should be included in such a policy.

D. Removal of Barriers to Affordable Housing

A group representing state community development agencies stated that it was difficult for states to meet goals for affordable housing barrier removal because states have very minimal control over the major barriers identified by HUD (zoning, local fees, etc). Zoning and land use decision-making are an inherently local process, subject to a range of influences including market forces and citizen input. One state indicated that it had already addressed those areas over which the state has regulatory control and that the existing regulatory relief barrier requirement on HUD's Notice of Funding Availability process is sufficient to reward those HUD applicants that have made efforts to reduce constraints on affordable housing. Another suggested that these issues could be addressed in the applicant's application, but they could not require a local jurisdiction to change its policies. Still another indicated it was not clear exactly what kinds of barriers HUD believes still exist and what specific information it has on such barriers in local communities. It suggested that HUD share this information with grantees so that they could better respond to these issues.

HUD response: The Department recognizes that states have less control over barrier removal than do entitlement jurisdictions. The Department believes the removal of barriers to affordable housing is important and has decided to include the additional clarifying language with the understanding that it is not imposing a new requirement. The Department has also established a regulatory barrier clearinghouse at *http://www.huduser.org/rbc/* that provides examples of how communities can identify and remove barriers to affordable housing.

E. Clarification of Strategic Plan Provisions

Priorities and Priority Needs—Relative priorities. A group representing state community development agencies recommended that HUD remove this classification system for high, medium, or low priorities in favor of the overarching goals and outcomes established by each grantee, which will be required if other sections of this rule are implemented. The group argued that these goals and outcomes should become, in effect, the priorities established by the grantee to meet the intent of the statutory provision pertaining to priorities.

Most of the states that commented welcomed the elimination of the requirement to designate relative priorities. One said the new performance and outcome measures should serve this purpose more effectively. Another indicated that a priority could be important to a state, but that it may not spend federally allocated money on that priority. Indicating where federal funds will be spent could easily be accomplished with a checkbox, or something similar and less able to be misconstrued. HUD and citizens should be able to discern the relative importance a jurisdiction has placed on funding a certain area by looking at the goals relative to unmet needs. The same state felt that general priorities and the reasons for allocation priorities are better described in narratives where program obstacles can be identified. Also, many programs are not designed to serve extremely low-income households, for instance, without supplementary operating subsidy. One state suggested local communities be able to assign their own priorities depending on local needs and suggested making "high" priority mean the needs are widespread or urgent, "medium" mean moderate in terms of extent and urgency, and "low" mean the activity may be funded at a very low level if funds are available. Another state suggested including only high priorities because it would be confusing and misleading if medium and low priorities were included that could not be addressed through the available funding allocation.

HUD response: The Department has decided to eliminate the requirement regarding setting a relative allocation priority but to allow states to set one. The regulation has also been revised to make it clear that the state must describe the relationship between the allocation priorities and the extent of need given to each category of priority need, particularly among extremely low-income, low-income, and moderate-income households. The consolidated plan should be explicit about what the state intends to do with formula grant funds in the context of their larger strategy. For example, states may wish to indicate that they intend to allocate formula grant funds for projects that involve gap financing, while allocating low-income tax credits to projects for low-income households that require a deeper subsidy. The rationale for establishing the allocation priorities should flow logically from the analysis. Also as part of the analysis, the state must also identify any obstacles to addressing underserved needs.

Several states objected to the provision at § 91.315(b)(1) requiring states to identify how local market conditions led to the use of HOME funds for tenant-based assistance.

HUD response: This provision is required by section 212(a)(3) of the Cranston-Gonzalez National Affordable Housing Act that requires states to specify the local market conditions that led to the choice of tenant-based rental assistance.

Summary of Specific Objectives. A number of commenters indicated that the consolidated plan's strategy requirements should be influenced by a proposed performance measurement framework that has been developed by the working group that included representatives from the Council of State Community Development Agencies; the National Association for County, Community and Economic Development; and the National Community Development Association. HUD has been working with that group to develop workable outcome measures that will be acceptable to the Department and its grantees. One state pointed out that the purpose of a strategic plan is to identify categories and types and areas of need, and to develop strategies for addressing those needs. Annually, the performance report

should examine the needs of these population groups against the actual activities to determine how well their needs are being met. The state argued that if the strategy is created correctly, the types and magnitude of needs, goals, objectives, and priorities will become apparent and there would be no need to try to force communities to develop specific statements such as "the grantee will install 983 linear feet of sidewalks on Elm Street." The fact that the need for sidewalks has been identified as a need is sufficient. Therefore, the annual action plan would merely need to be evaluated and demonstrate that it makes progress toward addressing that need through specific activities.

HUD response: The Department agrees that the consolidated plan's strategy requirements should be influenced by the proposed performance measurement framework that has been developed. Accordingly, changes have been made to § 91.315 to indicate that these requirements would be provided in accordance with guidance issued by HUD.

Antipoverty strategy. A group representing state community development agencies and several states suggested that the regulation involving the antipoverty strategy be revised to indicate that states can meet this requirement by referring to their statewide plans related to poverty.

HUD response: The Department agrees that states can satisfy this requirement by referring to statewide plans related to poverty by allowing states the option to cross-reference pages of relevant documents like the Temporary Assistance for Needy Families (TANF) Plan in order to streamline the plan and make the process less burdensome. The Department will issue supplemental guidance on how states can implement some of these requirements.

F. Action Plan

Summary of annual objectives. One state and group representing state community development agencies asked for clarification as to whether the summary of annual objectives was the same as the outcome measures a grantee would submit. Meanwhile, several states expressed support for the provision requiring jurisdictions to submit a summary of annual objectives. One state agreed that long-term objectives should be stated in the strategy and that short-term objectives should be covered in the action plan.

HUD response: The Department believes that a summary of annual specific objectives is a useful feature of the plan since it identifies the subset of specific objectives (identified in the strategic plan) that will be addressed in the action plan.

Outcomes. Although some states supported outcome measurement and indicated it was a good idea, many states felt that putting outcome measures in the final rule was premature since more work was needed before this change could be implemented. One state indicated that HUD's guidance for these measures should be flexible enough to recognize that many entitlement jurisdictions and states are charged with developing allocation and rating systems to be responsive to the needs of many different local communities. Any direction from HUD should preserve the flexibility of state and local jurisdictions to develop outcome measures that are consistent with the jurisdiction's approved allocation method and application rating system, but which do not narrow or preclude varying choices among eligible activities among grantees throughout the state. One state felt that measurements for outcomes/performance measurements would be more appropriately addressed within the content requirements of the Performance Evaluation Report and the Integrated Disbursement and Information System. Based on the nature of their programs as grantor agencies, several other states said they could only make estimates based on historical funding and past experience.

HUD response: The Department has decided to require outcomes in the consolidated plan in accordance with guidance to be issued by HUD and has modified the provision at § 91.520 to explain why progress was not made toward meeting goals and objectives. HUD recognizes that some of these estimates may be based on historical funding and past experience of states.

Percentage of funds to target areas. While several states were unclear how this provision could be applied to their state, one, in expressing support for estimating the amount of funds spent in target areas, indicated that it would help show impact.

HUD response: The Department believes that identification of the percentage of funds a state plans to dedicate to target areas, where appropriate, would be useful in determining the degree to which activities are being carried out in a concentrated manner.

One-year housing goals. The preamble to the proposed rule added a new section requiring jurisdictions to specify one-year goals for the number of homeless, non-homeless, and special-needs households to be provided with affordable housing through activities that provide rental assistance, production of new units, rehabilitation of existing units, or acquisition of existing units with funds made available to the jurisdiction. One state asked HUD to clarify how these numbers should be counted.

HUD response: The Department is clarifying the regulation to require two sets of annual housing goals. One set of annual goals is for the number of households to be served by rent assistance, new construction units, rehabilitation, or acquisition during the program year with funds made available to the jurisdiction. A second set of annual goals is for the number of homeless, non-homeless, and special-needs households to be assisted during the program year. The program funds providing the benefits (i.e., CDBG, HOME, HOPWA, ESG) may be from any funding year or combined funding years.

One state opposed the requirement for the number of homeless, non-homeless, and special-needs households because the requirement implies that the federal government desires that federal funds be used for these categories of households. States may have non-federal funds that they use for addressing these categories of households. Consequently, states should not be judged negatively for not having goals for using federal funds for households that are as aggressive as HUD may wish, or for not allocating funds from programs that are not specifically required to be used for these populations. Another state indicated that it would be impossible to carry out this requirement to specify one-year goals for the number of homeless, non-homeless, and special-needs families to be provided affordable housing with any level of accuracy. The states indicated that they can set priorities and forecast results after projects are chosen, and can later report on accomplishments. It would also be impossible to know who the tenants of an affordable housing project might be or the detailed characteristics of households that might receive down payment assistance before those events occur.

HUD response: The Department recognizes that the states as grantor agencies have less control over fulfillment of sections of the regulations dealing with annual goals and performance that do local jurisdictions. However, states are expected to provide the information to the extent that they are able to do so.

G. Submission Requirements

Needs, Market, and Strategic Plan. One state commented that it agreed with

the proposed rule that allows the submission of the housing and homeless needs assessment, housing market analysis, and strategic plan sections every five years, or at such time agreed upon by HUD and the state in order to facilitate orderly, program management, and to coordinate consolidated plans with time periods used for cooperation agreements, other plans, or the availability of data. The state encouraged adoption of this rule as a reasonable approach to using the most currently available data.

Consolidated Plan Submission. A clarifying amendment has been made to § 91.300 identifying the sections of the rule concerning a state's comprehensive housing affordability strategy.

H. Public and Assisted Housing

Financial and other assistance for troubled housing. A group representing state community development agencies acknowledged that this requirement comes from the Quality Housing and Work Responsibility Act, but indicated the funds covered by the consolidated plan would likely not be used to assist troubled PHAs. It recommended use of a more appropriate document, other than the consolidated plan, for states to report this type of information. Several states also acknowledged the statutory requirement but some argued that states should not be held responsible for assisting a PHA with removing the "troubled" designation. Several states indicated that they have provisions in various programs that allow PHAs to participate and that they will continue to work with those PHAs to ensure that their programs are available to them. However, they maintain that PHAs are essentially an arm of local governments and that the state should not be held responsible for assisting a PHA with removing the "troubled" designation. Rather, assisting "troubled" PHAs should be a local government issue and a HUD issue. Two states and a group representing state community development agencies asked that HUD provide each state with a list of troubled PHAs in their state.

HUD response: As indicated in the preamble of the proposed rule, these amendments were made pursuant to the requirements of sections 568 and 583 of the Quality Housing and Work Responsibility Act of 1998 (42 U.S.C. 12705). The statute requires that the plan of a state describe the manner in which the jurisdiction will address the needs of public housing and the financial or other assistance the jurisdiction will provide to improve the operations of a PHA designated as "troubled" in order to remove such designation. The regulation excludes PHAs that are entirely within the boundaries of a unit of general local government that must submit a consolidated plan to HUD. The statute also considers the failure to include a description of the manner in which a jurisdiction will provide financial or other assistance to remove a PHA's troubled designation as cause for HUD to disapprove a plan or determine that it is substantially incomplete. Also, the final rule clarifies that the provision at § 91.500 applies to states as well as units of general local government. Such assistance need not be financial assistance but can include other assistance such as technical assistance provided by the jurisdiction. The Department will also provide each state with a list of troubled PHAs in their state in order to facilitate state grantee compliance with this requirement.

I. State Method of Distribution

Most commenters agreed that the method of distribution should include all of the state's selection criteria used to select applications for funding. One state thought it added nothing and argued that it attempts to remove all program flexibility. The state also found the language insulting and inappropriate to reference perceived notions that senior management overturns staff decisions in the program and argued that it promotes a guilty-until-proven innocent mentality. Another state indicated that the section went well beyond reasonableness in requiring that any decisions made by senior management be included in the criteria description of the method of distribution. In addition, a group representing state community development agencies and six states objected to the provision that approval of the plan shall not be deemed to indicate that the method of distribution was in compliance with CDBG program requirements. The group argued that each state needs to have a point at the beginning of its program year when its method of distribution is officially approved by HUD. Most of the states that commented on this point argued that such a decision should be made in tandem with the approval of the consolidated plan. One state asked how states become aware in advance if their method of distribution will meet HUD's acceptability criteria when scrutinized by HUD during a future monitoring visit, what the penalty would be, and would all funds awarded become disallowed costs.

HUD response: HUD acknowledges the desire among states to know that their method of distribution has been determined to be in compliance with program requirements before the state implements its method of distribution. However, HUD has long recognized that it is not practical to expect a state's annual action plan to contain every detail about a state's distribution process—otherwise a state would have to incorporate the contents of its application manuals into the action plan. To further streamline the consolidated plan, the proposed rule provided that a state's method of distribution could contain a summary of the state's selection criteria, so long as the details are contained in other readily available state documents. HUD has retained that provision in the final rule and has modified the final language to indicate that HUD may monitor the method of distribution as part of its audit and review responsibilities in order to determine compliance with program requirements.

This final rule also makes several technical changes to the proposed rule. Duplicative language regarding the content of the method of distribution and provisions regarding records a state must keep to document its funding decisions, proposed at § 91.320(j)(1), has been moved to § 570.490(a), which is the section of the state CDBG regulations governing recordkeeping requirements.

VI. Findings and Certifications

Information Collections

The information collection requirements contained in this final rule are currently approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2506–0117. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

Regulatory Planning and Review

The Office of Management and Budget (OMB) has reviewed this rule in accordance with Executive Order 12866, (captioned "Regulatory Planning and Review"). OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes to the rule resulting from this review are available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk.

Regulatory Flexibility Act

The undersigned, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule makes only clarifying and conforming changes to a regulation to make it more internally consistent and consistent with recent statutory changes.

Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction, or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and the private sector. This final rule does not impose any federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of the UMRA.

Catalog of Federal Domestic Assistance

The applicable Catalog of Federal Domestic Assistance (CFDA) program number is 14.218.

List of Subjects

24 CFR Part 91

Aged, Grant programs—housing and community development, Homeless, Individuals with disabilities, Low- and moderate-income housing, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Loan programs—housing and community development, Low- and moderate-income housing, Northern Mariana Islands, Pacific Islands Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

■ Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR parts 91 and 570 as follows:

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

■ 2. In § 91.1, revise paragraph (b) to read as follows:

§ 91.1 Purpose.

* * * * *

(b) *Functions of plan.* The consolidated plan serves the following functions:

(1) A planning document for the jurisdiction, which builds on a participatory process among citizens, organizations, businesses, and other stakeholders;

(2) A submission for federal funds under HUD's formula grant programs for jurisdictions;

(3) A strategy to be followed in carrying out HUD programs; and

(4) A management tool for assessing performance and tracking results.

■ 3. Add § 91.2(d) to read as follows:

§ 91.2 Applicability.

* * * * *

(d) The Public Housing Agency Plan submission (PHA Plan) (see 24 CFR part 903) includes a certification by the appropriate state or local official that the PHA Plan is consistent with the applicable consolidated plan for the jurisdiction in which the public housing agency is located and must describe the manner in which the applicable contents of the PHA Plan are consistent with the consolidated plan.

■ 4. Amend § 91.5 by adding alphabetically definitions for "chronically homeless person" and "disabling condition" and revising the definition of "consolidated plan" to read as follows:

§ 91.5 Definitions.

* * * * *

Chronically homeless person. An unaccompanied homeless individual with a disabling condition who has been continuously homeless for a year or more, or has had at least four episodes of homelessness in the past three years. To be considered chronically homeless, a person must have been sleeping in a place not meant for human habitation (e.g., living on the streets) and/or in an emergency shelter during that time.

Consolidated plan or ("the plan"). The document that is submitted to HUD that serves as the comprehensive housing affordability strategy, community development plan, and submissions for funding under any of the Community Planning and Development formula grant programs (e.g., CDBG, ESG, HOME, and HOPWA), that is prepared in accordance with the process described in this part.

* * * * *

Disabling condition. For the purposes of chronic homelessness, a disabling condition is a diagnosable substance use disorder, serious mental illness, developmental disability, or chronic physical illness or disability, including the co-occurrence of two or more of these conditions. A disabling condition limits an individual's ability to work or perform one or more activities of daily living.

* * * * *

■ 5. Revise § 91.15 to read as follows:

§ 91.15 Submission date.

(a) *General.* (1) In order to facilitate continuity in its program and to provide accountability to citizens, each jurisdiction should submit its consolidated plan to HUD at least 45 days before the start of its program year. (But see § 92.104 of this subtitle with respect to newly eligible jurisdictions under the HOME program.) With the exception of the August 16 date noted in paragraph (a)(2) of this section, HUD may grant a jurisdiction an extension of the submission deadline for good cause.

(2) In no event will HUD accept a submission earlier than November 15 or later than August 16 of the federal fiscal year for which the grant funds are appropriated. Failure to receive the plan

by August 16 will automatically result in a loss of the CDBG funds to which the jurisdiction would otherwise be entitled.

(3) A jurisdiction may have a program year that coincides with the federal fiscal year (e.g., October 1, 2005 through September 30, 2006, for federal fiscal year 2006 funds). However, the consolidated plan may not be submitted earlier than November 15 of the federal fiscal year and HUD has the period specified in § 91.500 to review the consolidated plan.

(4) See § 91.20 for HUD field office authorization to grant exceptions to these provisions.

(b) *Frequency of submission.* (1) The summary of the citizen participation and consultation process, the action plan, and the certifications must be submitted on an annual basis.

(2) The housing, and homeless needs assessment, market analysis, and strategic plan must be submitted at least once every five years, or as such time agreed upon by HUD and the jurisdiction in order to facilitate orderly program management, coordinate consolidated plans with time periods used for cooperation agreements, other plans, or the availability of data.

(3) A jurisdiction may make amendments that extend the time period covered by their plan if agreed upon by HUD.

■ 6. Revise § 91.20 to read as follows:

§ 91.20 Exceptions.

The HUD Field Office may grant a jurisdiction an exception from the submission deadline for plans and reports and from a requirement in the implementation guidelines for good cause, as determined by the field office and reported in writing to HUD Headquarters, unless the requirement is required by statute or regulation.

■ 7. In § 91.100, revise paragraphs (a) and (c) to read as follows:

§ 91.100 Consultation: local governments.

(a) *General.* (1) When preparing the consolidated plan, the jurisdiction shall consult with other public and private agencies that provide assisted housing, health services, and social and fair housing services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, homeless persons) during preparation of the consolidated plan.

(2) When preparing the portion of the consolidated plan describing the jurisdiction's homeless strategy, the jurisdiction shall consult with public and private agencies that provide assisted housing, health services, and social services to determine what resources are available to address the needs of any persons that are chronically homeless.

(3) When preparing the portion of its consolidated plan concerning lead-based paint hazards, the jurisdiction shall consult with state or local health and child welfare agencies and examine existing data related to lead-based paint hazards and poisonings, including health department data on the addresses of housing units in which children have been identified as lead poisoned.

(4) When preparing the description of priority nonhousing community development needs, a unit of general local government must notify adjacent units of general local government, to the extent practicable. The nonhousing community development plan must be submitted to the state, and, if the jurisdiction is a CDBG entitlement grantee other than an urban county, to the county.

(5) The jurisdiction also should consult with adjacent units of general local government, including local government agencies with metropolitan-wide planning responsibilities, particularly for problems and solutions that go beyond a single jurisdiction.

* * * * *

(c) *Public housing.* The jurisdiction shall consult with the local public housing agency (PHA) concerning consideration of public housing needs and planned programs and activities. This consultation will help provide a better basis for the certification by the authorized official that the PHA Plan is consistent with the consolidated plan and the local government's description of the manner in which it will address the needs of public housing and, where necessary, the manner in which it will provide financial or other assistance to a troubled PHA to improve its operations and remove such designation. It will also help ensure that activities with regard to local drug elimination, neighborhood improvement programs, and resident programs and services, funded under a PHA's program and those funded under a program covered by the consolidated plan, are fully coordinated to achieve comprehensive community development goals. If a PHA is required to implement remedies under a Section 504 Voluntary Compliance Agreement to provide accessible units for persons with disabilities, the local jurisdiction should consult with the PHA and identify actions it may take, if any, to assist the PHA in implementing the required remedies. A local jurisdiction may use CDBG funds for eligible activities or other funds to implement remedies required under a Section 504 Voluntary Compliance Agreement.

■ 8. In § 91.105, paragraphs (a)(2)(ii) and (iii) are revised to read as follows:

§ 91.105 Citizen participation plan; local governments.

(a) * * *

(2) * * *

(ii) These requirements are designed especially to encourage participation by low- and moderate-income persons, particularly those living in slum and blighted areas and in areas where CDBG funds are proposed to be used, and by residents of predominantly low- and moderate-income neighborhoods, as defined by the jurisdiction. A jurisdiction also is expected to take whatever actions are appropriate to encourage the participation of all its citizens, including minorities and non-English speaking persons, as well as persons with disabilities. The jurisdiction shall encourage the participation of local and regional institutions and other organizations (including businesses, developers, and community and faith-based organizations) in the process of developing and implementing the consolidated plan. The jurisdiction should also explore alternative public involvement techniques and quantitative ways to measure efforts that encourage citizen participation in a shared vision for change in communities and neighborhoods, and the review of program performance, e.g., use of focus groups, and use of the Internet.

(iii) The jurisdiction shall encourage, in conjunction with consultation with public housing agencies, the participation of residents of public and assisted housing developments, in the process of developing and implementing the consolidated plan, along with other low-income residents of targeted revitalization areas in which the developments are located. The jurisdiction shall make an effort to provide information to the public housing agency about consolidated plan activities related to its developments and surrounding communities so that the public housing agency can make this information available at the annual public hearing required for the PHA Plan.

* * * * *

■ 9. Revise § 91.110 to read as follows:

§ 91.110 Consultation; states.

When preparing the consolidated plan, the state shall consult with other public and private agencies that provide assisted housing (including any state

housing agency administering public housing), health services, and social and fair housing services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, and homeless persons) during preparation of the consolidated plan. When preparing the portion of the consolidated plan describing the state's homeless strategy, the state shall consult with public and private agencies that provide assisted housing, health services, and social services to determine what resources are available to address the needs of any persons that are chronically homeless. When preparing the portion of its consolidated plan concerning lead-based paint hazards, the state shall consult with state or local health and child welfare agencies and examine existing data related to lead-based paint hazards and poisonings, including health department data on the addresses of housing units in which children have been identified as lead poisoned. When preparing its method of distribution of assistance under the CDBG program, a state must consult with local governments in nonentitlement areas of the state.

■ 10. Revise § 91.115(a)(2) to read as follows:

§ 91.115 Citizen participation plan; states.

(a) * * *

(2) Encouragement of citizen participation. The citizen participation plan must provide for and encourage citizens to participate in the development of the consolidated plan, any substantial amendments to the consolidated plan, and the performance report. These requirements are designed especially to encourage participation by low- and moderate-income persons, particularly those living in slum and blighted areas and in areas where CDBG funds are proposed to be used and by residents of predominantly low- and moderate-income neighborhoods. A state also is expected to take whatever actions are appropriate to encourage the participation of all its citizens, including minorities and non-English speaking persons, as well as persons with disabilities. The state shall encourage the participation of statewide and regional institutions and other organizations (including businesses, developers, and community and faith-based organizations) that are involved with or affected by the programs or activities covered by the consolidated plan in the process of developing and implementing the consolidated plan. The state should also explore alternative public involvement techniques that encourage a shared vision of change for the community and the review of program performance, e.g., use of focus groups, and use of Internet.

* * * * *

■ 11. Revise § 91.200 to read as follows:

§ 91.200 General.

(a) A complete consolidated plan consists of the information required in § 91.200 through § 91.230, submitted in accordance with instructions prescribed by HUD (including tables and narratives), or in such other format as jointly agreed upon by HUD and the jurisdiction. A comprehensive housing affordability strategy consists of the information required in § 91.200 through § 91.215(e), § 91.215(h) through § 91.215(l), § 91.220(c), § 91.220(g), § 91.225 and § 91.230.

(b) The jurisdiction shall describe the lead agency or entity responsible for overseeing the development of the plan and the significant aspects of the process by which the consolidated plan was developed, the identity of the agencies, groups, organizations, and others who participated in the process, and a description of the jurisdiction's consultations with social service, health, and child service agencies and other entities.

(c) In order to facilitate citizen review and comment each year, the plan shall contain a concise executive summary that includes the objectives and outcomes identified in the plan as well as an evaluation of past performance. The plan shall also include a concise summary of the citizen participation process, public comments, and efforts made to broaden public participation in the development of the consolidated plan.

■ 12. Revise § 91.205 (a), (b), and (c) to read as follows:

§ 91.205 Housing and homeless needs assessment.

(a) *General.* The consolidated plan must provide a concise summary of the jurisdiction's estimated housing needs projected for the ensuing five-year period. Housing data included in this portion of the plan shall be based on U.S. Census data, as provided by HUD, as updated by any properly conducted local study, or any other reliable source that the jurisdiction clearly identifies, and should reflect the consultation with social service agencies and other entities conducted in accordance with § 91.100 and the citizen participation process conducted in accordance with § 91.105. For a jurisdiction seeking funding on behalf of an eligible metropolitan statistical area under the HOPWA program, the needs described for housing and supportive services must address the unmet needs of low-income persons with HIV/AIDS and their families throughout the eligible metropolitan statistical area.

(b) *Categories of persons affected.* (1) The plan shall estimate the number and type of families in need of housing assistance for extremely low-income, low-income, moderate-income, and middle-income families, for renters and owners, for elderly persons, for single persons, for large families, for public housing residents, for families on the public housing and section 8 tenant-based waiting list, for persons with HIV/AIDS and their families, and for persons with disabilities. The description of housing needs shall include a concise summary of the cost burden and severe cost burden, overcrowding (especially for large families), and substandard housing conditions being experienced by extremely low-income, low-income, moderate-income, and middle-income renters and owners compared to the jurisdiction as a whole. (The jurisdiction must define in its consolidated plan the terms "standard condition" and "substandard condition but suitable for rehabilitation.")

(2) For any of the income categories enumerated in paragraph (b)(1) of this section, to the extent that any racial or ethnic group has disproportionately greater need in comparison to the needs of that category as a whole, assessment of that specific need shall be included. For this purpose, disproportionately greater need exists when the percentage of persons in a category of need who are members of a particular racial or ethnic group in a category of need is at least 10 percentage points higher than the percentage of persons in the category as a whole.

(c) *Homeless needs.* The plan must provide a concise summary of the nature and extent of homelessness (including rural homelessness and chronically homeless persons), addressing separately the need for facilities and services for homeless individuals and homeless families with children, both sheltered and unsheltered, and homeless subpopulations, in accordance with a table prescribed by HUD. This description must include the characteristics and needs of low-income individuals and families with children (especially extremely low-income) who are currently housed but threatened with homelessness. The plan also must contain a brief narrative description of the nature and extent of homelessness

by racial and ethnic group, to the extent information is available.

* * * * *

■ 13. In § 91.210, revise paragraphs (a), (b)(1), (b)(2), and (c) to read as follows:

§ 91.210 Housing market analysis.

(a) *General characteristics.* Based on information available to the jurisdiction, the plan must describe the significant characteristics of the jurisdiction's housing market, including the supply, demand, and condition and cost of housing and the housing stock available to serve persons with disabilities, and to serve other low-income persons with special needs, including persons with HIV/AIDS and their families. Data on the housing market should include, to the extent information is available, an estimate of the number of vacant or abandoned buildings and whether units in these buildings are suitable for rehabilitation. The jurisdiction must also identify and describe any areas within the jurisdiction with concentrations of racial/ethnic minorities and/or low-income families, stating how it defines the terms "area of low-income concentration" and "area of minority concentration" for this purpose. The locations and degree of these concentrations must be identified, either in a narrative or on one or more maps.

(b) *Public and assisted housing.* (1) The plan must describe and identify the public housing developments and the number of public housing units in the jurisdiction, the physical condition of such units, the restoration and revitalization needs, results from the Section 504 needs assessment (i.e., assessment of needs of tenants and applicants on waiting list for accessible units, as required by 24 CFR 8.25), and the public housing agency's strategy for improving the management and operation of such public housing and for improving the living environment of low- and moderate-income families residing in public housing. The consolidated plan must identify the public housing developments in the jurisdictions that are participating in an approved PHA Plan.

(2) The jurisdiction shall include a description of the number and targeting (income level and type of family served) of units currently assisted by local, state, or federally funded programs, and an assessment of whether any such units are expected to be lost from the assisted housing inventory for any reason, such as expiration of Section 8 contracts.

(c) *Homeless facilities.* The plan must include a brief inventory of facilities and services that meet the emergency shelter, transitional housing, permanent supportive housing, and permanent housing needs of homeless persons within the jurisdiction, including any persons that are chronically homeless. The inventory should also include (to the extent the information is available to the jurisdiction) an estimate of the percentage or number of beds and supportive services programs that are serving people that are chronically homeless.

* * * * *

■ 14. Revise § 91.215 to read as follows:

§ 91.215 Strategic plan.

(a) *General.* For the categories described in paragraphs (b), (c), (d), (e), and (f) of this section, the consolidated plan must do the following:

(1) Indicate the general priorities for allocating investment geographically within the jurisdiction (or within the EMSA for the HOPWA program) and among different activities and needs, as identified in tables prescribed by HUD.

(2) Describe the rationale for establishing the allocation priorities given to each category of priority needs, particularly among extremely low-income, low-income, and moderate-income households;

(3) Identify any obstacles to meeting underserved needs;

(4) Summarize the priorities and specific objectives the jurisdiction intends to initiate and/or complete during the time period covered by the strategic plan and how funds that are reasonably expected to be available will be used to address identified needs. For each specific objective statement, identify proposed accomplishments and outcomes the jurisdiction hopes to achieve in quantitative terms over a specified time period (e.g., one, two, three or more years), or in other measurable terms as identified and defined by the jurisdiction. This information is to be provided in accordance with guidance to be issued by HUD.

(b) *Affordable housing.* With respect to affordable housing, the consolidated plan must include the priority housing needs table prescribed by HUD and must do the following:

(1) The affordable housing section shall describe how the characteristics of the housing market and the severity of housing problems and needs of extremely low-income, low-income, and moderate-income renters and owners identified in accordance with § 91.205 provided the rationale for establishing allocation priorities and use of funds made available for rental assistance, production of new units, rehabilitation of existing units, or acquisition of existing units (including preserving affordable housing units that may be lost from the assisted housing inventory for any reason). Household and income types may be grouped together for discussion where the analysis would apply to more than one of them. If the jurisdiction intends to use HOME funds for tenant-based assistance, it must specify local market conditions that led to the choice of that option.

(2) The affordable housing section shall include specific objectives that describe proposed accomplishments the jurisdiction hopes to achieve and must specify the number of extremely low-income, low-income, and moderate-income families to whom the jurisdiction will provide affordable housing as defined in 24 CFR 92.252 for rental housing and 24 CFR 92.254 for homeownership over a specific time period.

(c) *Public housing.* The consolidated plan must describe the manner in which the plan of the jurisdiction will address the needs of public housing, including the need to increase the number of accessible units where required by a Section 504 Voluntarily Compliance Agreement. The consolidated plan must also describe the jurisdiction's activities to encourage public housing residents to become more involved in management and participate in homeownership. If the public housing agency is designated as "troubled" by HUD under 24 CFR part 902, the jurisdiction must describe the manner in which it will provide financial or other assistance to improve its operations and remove the "troubled" designation.

(d) *Homelessness.* With respect to homelessness, the consolidated plan must include the priority homeless needs table prescribed by HUD and must describe the jurisdiction's strategy for the following:

(1) Helping low-income families avoid becoming homeless;

(2) Reaching out to homeless persons and assessing their individual needs;

(3) Addressing the emergency shelter and transitional housing needs of homeless persons; and

(4) Helping homeless persons (especially any persons that are chronically homeless) make the transition to permanent housing and independent living.

(e) *Other special needs.* With respect to special needs of the non-homeless, the consolidated plan must provide a concise summary of the priority housing and supportive service needs of persons who are not homeless but who may or may not require supportive housing

(i.e., elderly, frail elderly, persons with disabilities (mental, physical, developmental), persons with alcohol or other drug addiction, persons with HIV/AIDS and their families, and public housing residents). If the jurisdiction intends to use HOME funds for tenant-based assistance to assist one or more of these subpopulations, it must specify local market conditions that led to the choice of this option.

(f) *Nonhousing community development plan.* If the jurisdiction seeks assistance under the Community Development Block Grant (CDBG) program, the consolidated plan must provide a concise summary of the jurisdiction's priority non-housing community development needs eligible for assistance under HUD's community development programs by CDBG eligibility category, in accordance with a table prescribed by HUD. This community development component of the plan must state the jurisdiction's specific long-term and short-term community development objectives (including economic development activities that create jobs), which must be developed in accordance with the primary objective of the CDBG program to develop viable urban communities by providing decent housing and a suitable living environment and expanding economic opportunities, principally for low-income and moderate-income persons.

(g) *Neighborhood Revitalization.* Jurisdictions are encouraged to identify locally designated areas where geographically targeted revitalization efforts are carried out through multiple activities in a concentrated and coordinated manner. In addition, a jurisdiction may elect to carry out a HUD-approved neighborhood revitalization strategy that includes the economic empowerment of low-income residents with respect to one or more of its areas. If HUD approves such a strategy, the jurisdiction can obtain greater flexibility in the use of the CDBG funds in the revitalization area(s) as described in 24 CFR part 570, subpart C. This strategy must identify long-term and short-term objectives (e.g., physical improvements, social initiatives and economic empowerment), expressing them in terms of measures of outputs and outcomes the jurisdiction expects to achieve in the neighborhood through the use of HUD programs.

(h) *Barriers to affordable housing.* The consolidated plan must describe the jurisdiction's strategy to remove or ameliorate negative effects of public policies that serve as barriers to affordable housing, as identified in accordance with § 91.210(e), except that, if a State requires a unit of general local government to submit a regulatory barrier assessment that is substantially equivalent to the information required under this paragraph (h), as determined by HUD, the unit of general local government may submit its assessment submitted to the State to HUD and shall be considered to have complied with this requirement.

(i) *Lead-based paint hazards.* The consolidated plan must outline actions proposed or being taken to evaluate and reduce lead-based paint hazards and increase access to housing without such health hazards, how the plan for the reduction of lead-based hazards is related to the extent of lead poisoning and hazards, and how the plan for the reduction of lead-based hazards will be integrated into housing policies and programs.

(j) *Anti-poverty strategy.* The consolidated plan must provide a concise summary of the jurisdiction's goals, programs, and policies for reducing the number of poverty-level families and how the jurisdiction's goals, programs, and policies for producing and preserving affordable housing, set forth in the housing component of the consolidated plan, will be coordinated with other programs and services for which the jurisdiction is responsible and the extent to which they will reduce (or assist in reducing) the number of poverty-level families, taking into consideration factors over which the jurisdiction has control. These policies may include the jurisdiction's policies for providing employment and training opportunities to section 3 residents pursuant to 24 CFR part 135.

(k) *Institutional structure.* (1) The consolidated plan must provide a concise summary of the institutional structure, including private industry, nonprofit organizations, community and faith-based organizations, and public institutions, through which the jurisdiction will carry out its housing, homeless, and community development plan, and which assesses the strengths and gaps in that delivery system.

(2) The plan must provide a concise summary of what the jurisdiction will do to overcome gaps in the institutional structure for carrying out its strategy for addressing its priority needs.

(l) *Coordination.* The consolidated plan must provide a concise summary of the jurisdiction's activities to enhance coordination between public and assisted housing providers and private and governmental health, mental health, and service agencies. With respect to the preparation of its homeless strategy, the jurisdiction must describe efforts in addressing the needs of persons that are chronically homeless. With respect to the public entities involved, the plan must describe the means of cooperation and coordination among the state and any units of general local government in the metropolitan area in the implementation of its consolidated plan. With respect to economic development, the jurisdiction should describe efforts to enhance coordination with private industry, businesses, developers, and social service agencies.

■ 15. Revise § 91.220 to read as follows:

§ 91.220 Action plan.

The action plan must include the following:

(a) Standard Form 424;

(b) A concise executive summary that includes the objectives and outcomes identified in the plan as well as an evaluation of past performance, a summary of the citizen participation and consultation process (including efforts to broaden public participation) (24 CFR 91.200 (b)), a summary of comments or views, and a summary of comments or views not accepted and the reasons therefore (24 CFR 91.105 (b)(5)).

(c) *Resources and objectives.* (1) *Federal resources.* The consolidated plan must provide a concise summary of the federal resources (including grant funds and program income) expected to be made available. Federal resources should include Section 8 funds made available to jurisdictions, Low-Income Housing Tax Credits, and competitive McKinney-Vento Homeless Assistance Act funds, expected to be available to address priority needs and specific objectives identified in the strategic plan.

(2) *Other resources.* The consolidated plan must indicate resources from private and state and local sources that are reasonably expected to be made available to address the needs identified in the plan. The plan must explain how federal funds will leverage those additional resources, including a description of how matching requirements of the HUD programs will be satisfied. Where the jurisdiction deems it appropriate, the jurisdiction may indicate publicly owned land or property located within the jurisdiction that may be used to address the needs identified in the plan;

(3) *Annual objectives.* The consolidated plan must contain a summary of the annual objectives the jurisdiction expects to achieve during the forthcoming program year.

(d) *Activities to be undertaken.* The action plan must provide a description of the activities the jurisdiction will

undertake during the next year to address priority needs and objectives. This description of activities shall estimate the number and type of families that will benefit from the proposed activities, the specific local objectives and priority needs (identified in accordance with § 91.215) that will be addressed by the activities using formula grant funds and program income the jurisdiction expects to receive during the program year, proposed accomplishments, and a target date for completion of the activity. This information is to be presented in the form of a table prescribed by HUD. The plan must also describe the reasons for the allocation priorities and identify any obstacles to addressing underserved needs;

(e) *Outcome measures.* Each jurisdiction must provide outcome measures for activities included in its action plan in accordance with guidance to be issued by HUD.

(f) *Geographic distribution.* A description of the geographic areas of the jurisdiction (including areas of low-income and minority concentration) in which it will direct assistance during the ensuing program year, giving the rationale for the priorities for allocating investment geographically. When appropriate, jurisdictions should estimate the percentage of funds they plan to dedicate to target areas.

(g) *Affordable housing.* The jurisdiction must specify one-year goals for the number of homeless, non-homeless, and special-needs households to be provided affordable housing using funds made available to the jurisdiction and one-year goals for the number of households to be provided affordable housing through activities that provide rental assistance, production of new units, rehabilitation of existing units, or acquisition of existing units using funds made available to the jurisdiction. The term affordable housing shall be as defined in 24 CFR 92.252 for rental housing and 24 CFR 92.254 for homeownership.

(h) *Public housing.* Actions it plans to take during the next year to address the needs of public housing and actions to encourage public housing residents to become more involved in management and participate in homeownership. If the public housing agency is designated as "troubled" by HUD under part 902 of this title, the jurisdiction must describe the manner in which it will provide financial or other assistance to improve its operations and remove the "troubled" designation.

(i) *Homeless and other special needs activities.* Activities it plans to undertake during the next year to address emergency shelter and transitional housing needs of homeless individuals and families (including subpopulations), to prevent low-income individuals and families with children (especially those with incomes below 30 percent of median) from becoming homeless, to help homeless persons make the transition to permanent housing and independent living, specific action steps to end chronic homelessness, and to address the special needs of persons who are not homeless identified in accordance with § 91.215(e);

(j) *Barriers to Affordable Housing.* Actions it plans to take during the next year to remove or ameliorate the negative effects of public policies that serve as barriers to affordable housing. Such policies, procedures and processes include, but are not limited to, land use controls, tax policies affecting land, zoning ordinances, building codes, fees and charges, growth limitations, and policies affecting the return on residential investment.

(k) *Other actions.* Actions it plans to take during the next year to address obstacles to meeting underserved needs, foster and maintain affordable housing, evaluate and reduce lead-based paint hazards, reduce the number of poverty-level families, develop institutional structure, and enhance coordination between public and private housing and social service agencies (see § 91.215 (a), (b), (i), (j), (k), and (l)).

(l) *Program-specific requirements*—(1) *CDBG.* (i) A jurisdiction must describe activities planned with respect to all CDBG funds expected to be available during the program year (including program income that will have been received before the start of the next program year), except that an amount generally not to exceed ten percent of such total available CDBG funds may be excluded from the funds for which eligible activities are described if it has been identified for the contingency of cost overruns.

(ii) CDBG funds expected to be available during the program year includes the following:

(A) Any program income that will have been received before the start of the next program year and that has not yet been programmed;

(B) Proceeds from Section 108 loan guarantees that will be used during the year to address the priority needs and specific objectives identified in its strategic plan;

(C) Surplus from urban renewal settlements;

(D) Grant funds returned to the line of credit for which the planned use has not been included in a prior statement or plan; and

(E) Income from float-funded activities. The full amount of income expected to be generated by a float-funded activity must be shown, whether or not some or all of the income is expected to be received in a future program year. To assure that citizens understand the risks inherent in undertaking float-funded activities, the recipient must specify the total amount of program income expected to be received and the month(s) and year(s) that it expects the float-funded activity to generate such program income.

(iii) An "urgent needs" activity (one that is expected to qualify under § 570.208(c) of this title) may be included only if the jurisdiction identifies the activity in the action plan and certifies that the activity is designed to meet other community development needs having a particular urgency because existing conditions pose a serious and immediate threat to the health or welfare of the community and because other financial resources are not available.

(iv) The plan shall identify the estimated amount of CDBG funds that will be used for activities that benefit persons of low- and moderate-income. The information about activities shall be in sufficient detail, including location; to allow citizens to determine the degree to which they are affected.

(2) *HOME.* (i) For HOME funds, a participating jurisdiction shall describe other forms of investment that are not described in § 92.205(b).

(ii) If the participating jurisdiction intends to use HOME funds for homebuyers, it must state the guidelines for resale or recapture, as required in § 92.254.

(iii) If the participating jurisdiction intends to use HOME funds to refinance existing debt secured by multifamily housing that is being rehabilitated with HOME funds, it must state its refinancing guidelines required under 24 CFR 92.206(b). The guidelines shall describe the conditions under which the participating jurisdictions will refinance existing debt. At minimum, the guidelines must:

(A) Demonstrate that rehabilitation is the primary eligible activity and ensure that this requirement is met by establishing a minimum level of rehabilitation per unit or a required ratio between rehabilitation and refinancing.

(B) Require a review of management practices to demonstrate that disinvestment in the property has not occurred; that the long-term needs of the project can be met; and that the

feasibility of serving the targeted population over an extended affordability period can be demonstrated.

(C) State whether the new investment is being made to maintain current affordable units, create additional affordable units, or both.

(D) Specify the required period of affordability, whether it is the minimum 15 years or longer.

(E) Specify whether the investment of HOME funds may be jurisdiction-wide or limited to a specific geographic area, such as a neighborhood identified in a neighborhood revitalization strategy under 24 CFR 91.215(g) or a federally designated Empowerment Zone or Enterprise Community.

(F) State that HOME funds cannot be used to refinance multifamily loans made or insured by any federal program, including CDBG.

(iv) If the participating jurisdiction will receive funding under the American Dream Downpayment Initiative (ADDI) (see 24 CFR part 92; subpart M), it must include:

(A) A description of the planned use of the ADDI funds;

(B) A plan for conducting targeted outreach to residents and tenants of public and manufactured housing and to other families assisted by public housing agencies, for the purposes of ensuring that the ADDI funds are used to provide downpayment assistance for such residents, tenants, and families; and

(C) A description of the actions to be taken to ensure the suitability of families receiving ADDI funds to undertake and maintain homeownership.

(3) *HOPWA.* For HOPWA funds, the jurisdiction must specify one-year goals for the number of households to be provided housing through the use of HOPWA activities for: short-term rent, mortgage, and utility assistance payments to prevent homelessness of the individual or family; tenant-based rental assistance; and units provided in housing facilities that are being developed, leased, or operated with HOPWA funds and shall identify the method of selecting project sponsors (including providing full access to grassroots faith-based and other community organizations).

■ 16. Amend § 91.225 by adding paragraph (c)(10) to read as follows:

§ 91.225 Certifications.

* * * * *

(c) * * *

(10) A certification that the jurisdiction has established a policy for the discharge of persons from publicly funded institutions or systems of care (such as health care facilities, foster care or other youth facilities, or correction programs and institutions) in order to prevent such discharge from immediately resulting in homelessness for such persons.

* * * * *

■ 17. Revise § 91.300 to read as follows:

§ 91.300 General.

(a) A complete consolidated plan consists of the information required in § 91.300 through § 91.330, submitted in accordance with instructions prescribed by HUD (including tables and narratives), or in such other format as jointly agreed upon by HUD and the state. A comprehensive housing affordability strategy consists of the information required in § 91.300 through § 91.315(e), § 91.315(h) through § 91.315(m), § 91.320(c), § 91.320 (g), § 91.225 and § 91.330.

(b) The state shall describe the lead agency or entity responsible for overseeing the development of the plan and the significant aspects of the process by which the consolidated plan was developed; the identity of the agencies, groups, organizations, and others who participated in the process; and a description of the state's consultations with social service, health, and child service agencies and other entities.

(c) The plan shall contain a concise executive summary that includes the objectives and outcomes identified in the plan as well as an evaluation of past performance. The plan shall also contain a concise summary of the citizen participation process, public comments, and efforts made to broaden public participation in the development of the consolidated plan.

■ 18. In § 91.305, revise paragraphs (a), (b), and (c) to read as follows:

§ 91.305 Housing and homeless needs assessment.

(a) *General.* The consolidated plan must provide a concise summary of the state's estimated housing needs projected for the ensuing five-year period. Housing data included in this portion of the plan shall be based on U.S. Census data, as provided by HUD, as updated by any properly conducted local study, or any other reliable source that the state clearly identifies and should reflect the consultation with social service agencies and other entities conducted in accordance with § 91.110 and the citizen participation process conducted in accordance with § 91.115. For a state seeking funding under the HOPWA program, the needs described for housing and supportive services must address the unmet needs of low-income persons with HIV/AIDS and their families in areas outside of eligible metropolitan statistical areas.

(b) *Categories of persons affected.* (1) The plan shall estimate the number and type of families in need of housing assistance for extremely low-income, low-income, moderate-income, and middle-income families, for renters and owners, for elderly persons, for single persons, for large families, for persons with HIV/AIDS and their families, and for persons with disabilities. The description of housing needs shall include a concise summary of the cost burden and severe cost burden, overcrowding (especially for large families), and substandard housing conditions being experienced by extremely low-income, low-income, moderate-income, and middle-income renters and owners compared to the state as a whole. (The state must define in its consolidated plan the terms "standard condition" and "substandard condition but suitable for rehabilitation.")

(2) For any of the income categories enumerated in paragraph (b)(1) of this section, to the extent that any racial or ethnic group has disproportionately greater need in comparison to the needs of that category as a whole, assessment of that specific need shall be included. For this purpose, disproportionately greater need exists when the percentage of persons in a category of need who are members of a particular racial or ethnic group in a category of need is at least 10 percentage points higher than the percentage of persons in the category as a whole.

(c) *Homeless needs.* The plan must provide a concise summary of the nature and extent of homelessness (including rural homelessness and chronically homeless persons) within the state, addressing separately the need for facilities and services for homeless individuals and homeless families with children, both sheltered and unsheltered, and homeless subpopulations, in accordance with a table prescribed by HUD. This description must include the characteristics and needs of low-income individuals and families with children (especially extremely low-income) who are currently housed but threatened with homelessness. The plan also must contain a brief narrative description of the nature and extent of homelessness by racial and ethnic group, to the extent information is available.

* * * * *

■ 19. Revise § 91.310(b) to read as follows:

§ 91.310 Housing market analysis.

* * * * *

(b) *Homeless facilities.* The plan must include a brief inventory of facilities and services that meet the emergency shelter, transitional housing, permanent supportive housing, and permanent housing needs of homeless persons within the state. The inventory should also include (to the extent the information is available to the state) an estimate of the percentage or number of beds and supportive services programs that are serving people that are chronically homeless.

* * * * *

■ 20. Revise § 91.315 to read as follows:

§ 91.315 Strategic plan.

(a) *General.* For the categories described in paragraphs (b), (c), (d), (e), and (f) of this section, the consolidated plan must do the following:

(1) Indicate the general priorities for allocating investment geographically within the state and among different activities and needs.

(2) Describe the rationale for establishing the allocation priorities given to each category of priority needs, particularly among extremely low-income, low-income, and moderate-income households.

(3) Identify any obstacles to meeting underserved needs.

(4) Summarize the priorities and specific objectives the state intends to initiate and/or complete during the time period covered by the strategic plan describing how the proposed distribution of funds will address identified needs. For each specific objective statement, identify proposed accomplishments and outcomes the state hopes to achieve in quantitative terms over a specified time period (e.g., one, two, three or more years), or in other measurable terms as identified and defined by the state. This information shall be provided in accordance with guidance to be issued by HUD.

(b) *Affordable housing.* With respect to affordable housing, the consolidated plan must include the priority housing needs table prescribed by HUD and must do the following:

(1) The affordable housing section shall describe how the characteristics of the housing market and the severity of housing problems and needs of extremely low-income, low-income, and moderate-income renters and owners identified in accordance with § 91.305 provided the rationale for establishing allocation priorities and use of funds made available for rental assistance, production of new units, rehabilitation of existing units, or acquisition of existing units (including preserving affordable housing units that may be lost from the assisted housing inventory for any reason). Household and income types may be grouped together for discussion where the analysis would apply to more than one of them. If the state intends to use HOME funds for tenant-based assistance, it must specify local market conditions that led to the choice of that option.

(2) The affordable housing section shall include specific objectives that describe proposed accomplishments the state hopes to achieve and must specify the number of extremely low-income, low-income, and moderate-income families to whom the state will provide affordable housing as defined in 24 CFR 92.252 for rental housing and 24 CFR 92.254 for homeownership over a specific time period.

(c) *Public housing.* With respect to public housing, the consolidated plan must do the following:

(1) *Resident initiatives.* For a state that has a state housing agency administering public housing funds, the consolidated plan must describe the state's activities to encourage public housing residents to become more involved in management and participate in homeownership;

(2) *Public housing needs.* The consolidated plan must describe the manner in which the plan of the state will address the needs of public housing; and

(3) *Troubled public housing agencies.* If a public housing agency located within a state is designated as "troubled" by HUD under part 902 of this title, the strategy for the state or unit of local government in which any troubled public housing agency is located must describe the manner in which the state or unit of general local government will provide financial or other assistance to improve the public housing agency's operations and remove the "troubled" designation. A state is not required to describe the manner in which financial or other assistance is provided if the troubled public housing agency is located entirely within the boundaries of a unit of general local government that must submit a consolidated plan to HUD.

(d) *Homelessness.* With respect to homelessness, the consolidated plan must include the priority homeless needs table prescribed by HUD and must describe the state's strategy for the following:

(1) Helping low-income families avoid becoming homeless;

(2) Reaching out to homeless persons and assessing their individual needs;

(3) Addressing the emergency shelter and transitional housing needs of homeless persons; and

(4) Helping homeless persons (especially any persons that are chronically homeless) make the transition to permanent housing and independent living.

(e) *Other special needs.* With respect to supportive needs of the non-homeless, the consolidated plan must provide a concise summary of the priority housing and supportive service needs of persons who are not homeless but require supportive housing, i.e., elderly, frail elderly, persons with disabilities (mental, physical, developmental), persons with alcohol or other drug addiction, persons with HIV/AIDS and their families, and public housing residents. If the state intends to use HOME funds for tenant-based assistance to assist one or more of these subpopulations, it must specify local market conditions that led to the choice of this option.

(f) *Nonhousing community development plan.* If the state seeks assistance under the CDBG program, the consolidated plan must concisely describe the state's priority nonhousing community development needs that affect more than one unit of general local government. These priority needs must be described by CDBG eligibility category, reflecting the needs of persons or families for each type of activity. This community development component of the plan must identify the state's specific long-term and short-term community development objectives (including economic development activities that create jobs), which must be developed in accordance with the primary objective of the CDBG program to develop viable urban communities by providing decent housing and a suitable living environment and expanding economic opportunities, principally for low-income and moderate-income persons.

(g) *Community Revitalization.* States are encouraged to identify areas where geographically targeted revitalization efforts are carried out through multiple activities in a concentrated and coordinated manner. In addition, a state may elect to allow units of general local government to carry out a community revitalization strategy that includes the economic empowerment of low-income residents, in order to obtain the additional flexibility available as provided in 24 CFR part 570, subpart I. A state must approve a local government's revitalization strategy before it may be implemented. If a state elects to allow revitalization strategies in its program, the method of

distribution contained in a state's action plan pursuant to § 91.320(k)(1) must reflect the state's process and criteria for approving local government's revitalization strategies. The strategy must identify the long-term and short-term objectives (e.g., physical improvements, social initiatives, and economic empowerment), expressing them in terms of measures of outputs and outcomes that are expected through the use of HUD programs. The state's process and criteria are subject to HUD approval.

(h) *Barriers to affordable housing.* The consolidated plan must describe the state's strategy to remove or ameliorate negative effects of its policies that serve as barriers to affordable housing, as identified in accordance with § 91.310.

(i) *Lead based paint.* The consolidated plan must outline the actions proposed or being taken to evaluate and reduce lead-based paint hazards, and describe how the lead-based paint hazard reduction will be integrated into housing policies and programs.

(j) *Anti-poverty strategy.* The consolidated plan must provide a concise summary of the state's goals, programs, and policies for reducing the number of poverty-level families and how the state's goals, programs, and policies for producing and preserving affordable housing, set forth in the housing component of the consolidated plan, will be coordinated with other programs such as Temporary Assistance for Needy Families as well as employment and training programs and services for which the state is responsible and the extent to which they will reduce (or assist in reducing) the number of poverty-level families, taking into consideration factors over which the state has control.

(k) *Institutional structure.* (1) The consolidated plan must provide a concise summary of the institutional structure, including private industry, nonprofit organizations, and public institutions, through which the state will carry out its housing, homeless, and community development plan, assessing the strengths and gaps in that delivery system.

(2) The plan must provide a concise summary of what the state will do to overcome gaps in the institutional structure for carrying out its strategy for addressing its priority needs.

(l) *Coordination.* The consolidated plan must provide a concise summary of the state's activities to enhance coordination between public and assisted housing providers and private and governmental health, mental health, and service agencies. With respect to the preparation of its homeless strategy, the state must describe efforts in addressing the needs of persons that are chronically homeless. With respect to the public entities involved, the plan must describe the means of cooperation and coordination among the state and any units of general local government in the implementation of its consolidated plan. With respect to economic development, the state should describe efforts to enhance coordination with private industry, businesses, developers, and social service agencies.

(m) *Low-income housing tax credit.* The consolidated plan must describe the strategy to coordinate the Low-Income Housing Tax Credit with the development of housing that is affordable to low-income and moderate-income families.

■ 21. Revise § 91.320 to read as follows:

§ 91.320 Action plan.

The action plan must include the following:

(a) Standard Form 424;

(b) A concise executive summary that includes the objectives and outcomes identified in the plan as well as an evaluation of past performance, a summary of the citizen participation and consultation process (including efforts to broaden public participation) (24 CFR 91.300 (b)), a summary of comments or views, and a summary of comments or views not accepted and the reasons therefore (24 CFR 91.115 (b)(5)).

(c) *Resources and objectives.* (1) *Federal resources.* The consolidated plan must provide a concise summary of the federal resources expected to be made available. These resources include grant funds and program income.

(2) *Other resources.* The consolidated plan must indicate resources from private and non-federal public sources that are reasonably expected to be made available to address the needs identified in the plan. The plan must explain how federal funds will leverage those additional resources, including a description of how matching requirements of the HUD programs will be satisfied. Where the state deems it appropriate, it may indicate publicly owned land or property located within the state that may be used to carry out the purposes identified in the plan;

(3) *Annual objectives.* The consolidated plan must contain a summary of the annual objectives the state expects to achieve during the forthcoming program year.

(d) *Activities.* A description of the state's method for distributing funds to local governments and nonprofit organizations to carry out activities, or the activities to be undertaken by the state, using funds that are expected to be received under formula allocations (and related program income) and other HUD assistance during the program year, the reasons for the allocation priorities, how the proposed distribution of funds will address the priority needs and specific objectives described in the consolidated plan, and any obstacles to addressing underserved needs.

(e) *Outcome measures.* Each state must provide outcome measures for activities included in its action plan in accordance with guidance issued by HUD. For the CDBG program, this would include activities that are likely to be funded as a result of the implementation of the state's method of distribution.

(f) *Geographic distribution.* A description of the geographic areas of the State (including areas of low-income and minority concentration) in which it will direct assistance during the ensuing program year, giving the rationale for the priorities for allocating investment geographically. When appropriate, the state should estimate the percentage of funds they plan to dedicate to target area(s).

(g) *Affordable housing goals.* The state must specify one-year goals for the number of households to be provided affordable housing through activities that provide rental assistance, production of new units, rehabilitation of existing units, or acquisition of existing units using funds made available to the state, and one-year goals for the number of homeless, non-homeless, and special-needs households to be provided affordable housing using funds made available to the state. The term affordable housing shall be as defined in 24 CFR 92.252 for rental housing and 24 CFR 92.254 for homeownership.

(h) *Homeless and other special needs activities.* Activities it plans to undertake during the next year to address emergency shelter and transitional housing needs of homeless individuals and families (including subpopulations), to prevent low-income individuals and families with children (especially those with incomes below 30 percent of median) from becoming homeless, to help homeless persons make the transition to permanent housing and independent living, specific action steps to end chronic homelessness, and to address the special needs of persons who are not homeless identified in accordance with § 91.315(e);

(i) *Barriers to Affordable Housing.* Actions it plans to take during the next year to remove or ameliorate the negative effects of public policies that

serve as barriers to affordable housing. Such policies, procedures, and processes include but are not limited to: land use controls, tax policies affecting land, zoning ordinances, building codes, fees and charges, growth limitations, and policies affecting the return on residential investment.

(j) *Other actions.* Actions it plans to take during the next year to implement its strategic plan and address obstacles to meeting underserved needs, foster and maintain affordable housing (including the coordination of Low-Income Housing Tax Credits with the development of affordable housing), evaluate and reduce lead-based paint hazards, reduce the number of poverty level families, develop institutional structure, enhance coordination between public and private housing and social service agencies, address the needs of public housing (including providing financial or other assistance to troubled public housing agencies), and encourage public housing residents to become more involved in management and participate in homeownership.

(k) *Program-specific requirements.* In addition, the plan must include the following specific information:

(1) *CDBG.* The action plan must set forth the state's method of distribution.

(i) The method of distribution shall contain a description of all criteria used to select applications from local governments for funding. including the relative importance of the criteria, where applicable. The action plan must include a description of how all CDBG resources will be allocated among funding categories and the threshold factors and grant size limits that are to be applied. The method of distribution must provide sufficient information so that units of general local government will be able to understand and comment on it, understand what criteria and information their application will be judged, and be able to prepare responsive applications. The method of distribution may provide a summary of the selection criteria, provided that all criteria are summarized and the details are set forth in application manuals or other official state publications that are widely distributed to eligible applicants. HUD may monitor the method of distribution as part of its audit and review responsibilities, as provided in § 570.493(a)(1), in order to determine compliance with program requirements.

(ii) If the state intends to help nonentitlement units of general local government apply for guaranteed loan funds under 24 CFR part 570, subpart M, it must describe available guarantee amounts and how applications will be selected for assistance. If a state elects to allow units of general local government to carry out community revitalization strategies, the method of distribution shall reflect the state's process and criteria for approving local government's revitalization strategies.

(2) *HOME.* (i) The state shall describe other forms of investment that are not described in 24 CFR 92.205(b).

(ii) If the state intends to use HOME funds for homebuyers, it must state the guidelines for resale or recapture, as required in 24 CFR 92.254.

(iii) If the state intends to use HOME funds to refinance existing debt secured by multifamily housing that is being rehabilitated with HOME funds, it must state its refinancing guidelines required under 24 CFR 92.206(b). The guidelines shall describe the conditions under which the state will refinance existing debt. At minimum, the guidelines must:

(A) Demonstrate that rehabilitation is the primary eligible activity and ensure that this requirement is met by establishing a minimum level of rehabilitation per unit or a required ratio between rehabilitation and refinancing.

(B) Require a review of management practices to demonstrate that disinvestment in the property has not occurred; that the long-term needs of the project can be met; and that the feasibility of serving the targeted population over an extended affordability period can be demonstrated.

(C) State whether the new investment is being made to maintain current affordable units, create additional affordable units, or both.

(D) Specify the required period of affordability, whether it is the minimum 15 years or longer.

(E) Specify whether the investment of HOME funds may be state-wide or limited to a specific geographic area, such as a community identified in a neighborhood revitalization strategy under 24 CFR 91.315(g), or a federally designated Empowerment Zone or Enterprise Community.

(F) State that HOME funds cannot be used to refinance multifamily loans made or insured by any federal program, including the CDBG program.

(iv) If the state will receive funding under the American Dream Downpayment Initiative (ADDI) (see 24 CFR part 92, subpart M), it must include:

(A) A description of the planned use of the ADDI funds;

(B) A plan for conducting targeted outreach to residents and tenants of public and manufactured housing and to other families assisted by public housing agencies, for the purposes of ensuring that the ADDI funds are used to provide downpayment assistance for such residents, tenants, and families; and

(C) A description of the actions to be taken to ensure the suitability of families receiving ADDI funds to undertake and maintain homeownership, such as provision of housing counseling to homebuyers.

(3) ESG. The state shall identify the process for awarding grants to state recipients and a description of how the state intends to make its allocation available to units of local government and nonprofit organizations (including community and faith-based organizations).

(4) *HOPWA.* For HOPWA funds, the state must specify one-year goals for the number of households to be provided housing through the use of HOPWA activities for short-term rent; mortgage and utility assistance payments to prevent homelessness of the individual or family; tenant-based rental assistance; and units provided in housing facilities that are being developed, leased or operated with HOPWA funds, and shall identify the method of selecting project sponsors (including providing full access to grassroots faith-based and other community-based organizations).

■ 22. In § 91.325, amend paragraph (c) by adding (c)(10) to read as follows:

§ 91.325 Certifications.

* * * * *

(c) * * *

(10) A certification that the state has established a policy for the discharge of persons from publicly funded institutions or systems of care (such as health care facilities, foster care, or other youth facilities, or correction programs and institutions) in order to prevent such discharge from immediately resulting in homelessness for such persons.

* * * * *

■ 23. In § 91.500, revise paragraph (b)(3) and add paragraph (b)(4) to read as follows:

§ 91.500 HUD approval action.

* * * * *

(b) * * *

(3) A plan for which a certification is rejected by HUD as inaccurate, after HUD has inspected the evidence and provided due notice and opportunity to the jurisdiction for comment; and

(4) A plan that does not include a description of the manner in which the unit of general local government or state will provide financial or other assistance to a public housing agency if

the public housing agency is designated as "troubled" by HUD.

* * * * *

■ 24. Amend § 91.520 by adding paragraph (g) to read as follows:

§ 91.520 Performance reports.

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(g) The report will include a comparison of the proposed versus actual outcomes for each outcome measure submitted with the consolidated plan and explain, if applicable, why progress was not made toward meeting goals and objectives.

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 25. The authority citation for part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301–5320.

■ 26. Revise § 570.490(a) to read as follows:

§ 570.490 Recordkeeping requirements.

(a) *State records.* (1) The state shall establish and maintain such records as may be necessary to facilitate review and audit by HUD of the state's administration of CDBG funds under § 570.493. The content of records maintained by the state shall be as jointly agreed upon by HUD and the states and sufficient to enable HUD to make the determinations described at § 570.493. For fair housing and equal opportunity purposes, and as applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program. The records shall also permit audit of the states in accordance with 24 CFR part 85.

(2) The state shall keep records to document its funding decisions reached under the method of distribution described in 24 CFR 91.320(j)(1), including all the criteria used to select applications from local governments for funding and the relative importance of the criteria (if applicable), regardless of the organizational level at which final funding decisions are made, so that they can be reviewed by HUD, the Inspector General, the Government Accountability Office, and citizens pursuant to the requirements of § 570.490(c).

* * * * *

Dated: January 31, 2006.

Pamela H. Patenaude,

Assistant Secretary for Community Planning and Development.

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Agricultural Marketing Service
Egg, poultry, and rabbit products; inspection and grading:
Administrative requirements; update; comments due by 2-13-06; published 1-13-06 [FR E6-00258]

AGRICULTURE DEPARTMENT
Animal and Plant Health Inspection Service
Plant-related quarantine, domestic:
Karnal bunt; comments due by 2-13-06; published 12-13-05 [FR 05-23995]
Plant-related quarantine, foreign:
Nursery stock; comments due by 2-13-06; published 12-15-05 [FR 05-24031]

COMMERCE DEPARTMENT
National Oceanic and Atmospheric Administration
International fisheries regulations:
West Coast States and Western Pacific fisheries—
Pacific halibut catch sharing plan; comments due by 2-14-06; published 1-30-06 [FR E6-01113]

COMMODITY FUTURES TRADING COMMISSION
Commodity Exchange Act:
Market and large trader reporting; amendments; comments due by 2-13-06; published 12-15-05 [FR 05-23977]

DEFENSE DEPARTMENT
Sexually explicit material; sale or rental on DoD property; comments due by 2-17-06; published 12-19-05 [FR 05-24160]

ENVIRONMENTAL PROTECTION AGENCY
Air pollution control; new motor vehicles and engines:
Light-duty vehicles, light-duty trucks, and heavy-duty vehicles; emission durability procedures; comments due by 2-16-06; published 1-17-06 [FR 06-00073]
Air pollution; standards of performance for new stationary sources:
Electric generating units; emissions test; comments due by 2-17-06; published 10-20-05 [FR 05-20983]
Hearing; comments due by 2-17-06; published 11-22-05 [FR 05-23087]
Air programs:
Fine particulate matter and ozone; interstate transport control measures
Supplemental reconsideration notice; comments due by 2-16-06; published 12-29-05 [FR 05-24609]
Fuel and fuel additives—
Reformulated and conventional gasoline including butane blenders and attest engagements; standards and requirements modifications; comments due by 2-13-06; published 12-15-05 [FR 05-23806]
Reformulated and conventional gasoline including butane blenders and attest engagements; standards and requirements modifications; comments due by 2-13-06; published 12-15-05 [FR 05-23807]
Air programs; State authority delegations:
Various States; comments due by 2-16-06; published 1-17-06 [FR 06-00381]
Air quality implementation plans:
Preparation, adoption, and submittal—
Volatile organic compounds; emissions reductions in ozone nonattainment and maintenance areas; comments, data, and information request; comments due by 2-16-06; published 12-20-05 [FR 05-24260]
Air quality implementation plans; approval and promulgation; various States:
Maryland; comments due by 2-13-06; published 1-12-06 [FR E6-00221]
Wisconsin; comments due by 2-13-06; published 1-12-06 [FR E6-00227]
Pesticide, food, and feed additive petitions:
Syngenta Crop Protection, Inc.; comments due by 2-14-06; published 12-16-05 [FR 05-24097]
Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
Bifenazate; comments due by 2-14-06; published 12-16-05 [FR 05-24137]

FARM CREDIT ADMINISTRATION
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Federal Agricultural Mortgage Corporation, disclosure and reporting requirements; risk-based capital requirements; revision; comments due by 2-15-06; published 11-17-05 [FR 05-22730]

FEDERAL COMMUNICATIONS COMMISSION
Television broadcasting:
Cable Television Consumer Protection and Competition Act—
Multichannel video programming distributor marketplace; local franchising process; comments due by 2-13-06; published 12-14-05 [FR 05-24029]

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
Thrift Savings Plan:
Death benefits; comments due by 2-13-06; published 1-12-06 [FR E6-00207]

HEALTH AND HUMAN SERVICES DEPARTMENT
Food and Drug Administration
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Group A streptococcus; revocation of status; comments due by 2-15-06; published 12-2-05 [FR 05-23545]
Medical devices:
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Condom and condom with spermicidal lubricant; special control designation; comments due by 2-13-06; published 11-14-05 [FR 05-22611]

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Ports and waterways safety; regulated navigation areas, safety zones, security zones, etc.:
Port Valdez and Valdez Narrows, AK; comments due by 2-12-06; published 1-18-06 [FR 06-00449]

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Critical habitat designations—
Laguna Mountains skipper; comments due by 2-13-06; published 12-13-05 [FR 05-23691]
Perdido Key beach mouse, etc.; comments

LIST OF PUBLIC LAWS

This is the first in a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html.*

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H.R. 4659/P.L. 109–170

To amend the USA PATRIOT ACT to extend the sunset of certain provisions of such Act. (Feb. 3, 2006; 120 Stat. 3)

Last List January 13, 2006

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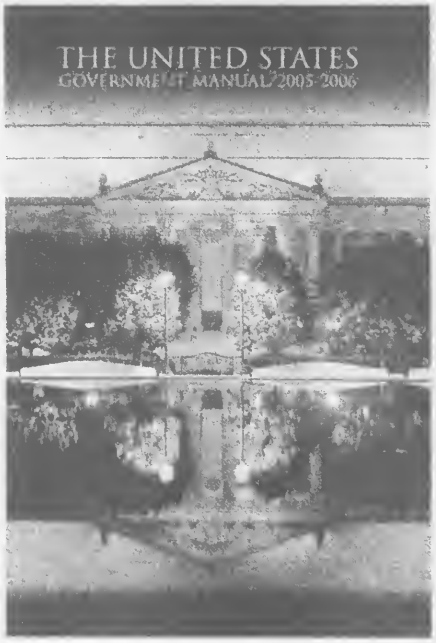

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